Spanish Real Estate Legal Update

Review

Nº 12 –July 2010

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Amendments to the measures to combat late payment in commercial transactions.

On 6 July 2010, Act 15/2010, of 5 July, amending Act 3/2004, of 29 December, which establishes measures to combat late payment in commercial transactions, that implemented European Parliament and Council Directive 2000/35/EC, of 29 June 2000, into Spanish law, was published in the Spanish Official Gazette. It came into force on the day following its publication.

Given the changes to the economic world in recent years, the aforementioned Act 15/2010 seeks to adapt and amend the legislation combating late payment in commercial transactions for its application in Spanish companies and the public sector.

One of the main amendments introduced by the new legislation is to remove the possibility of the parties agreeing to the payment terms of commercial transactions between companies. Specifically, the aforementioned Act 3/2004 established specific payment terms failing agreement between the parties, which enabled the payment periods to be significantly lengthened and which was generally to the detriment of the SMEs.

This new legislation coming into force removes the possibility of the parties reaching an agreement to set the payment terms and likewise established new compulsory payment terms.

Therefore, the payment terms between companies is established as a maximum of 60 days, in general, from the date of acceptance of the goods or services rendered, which the parties cannot agree to lengthen. This does not apply to fresh and perishable food products, whose payment terms shall never exceed 30 days from the date of delivery of the goods.

Nonetheless, the aforementioned 60 days shall be adjusted progressively for those companies that have already agreed longer payment terms, in accordance with the following timeframe:

i) 85 days from this legislation coming into force until 31 December 2011.

ii) 75 days between 1 January 2012 and 31 December 2012.

iii) 60 days from 1 January 2013.

The above timeframe shall not be applicable to perishable and fresh food products, where the 30 days payment term shall be effective immediately.

Furthermore, civil engineering companies with civil works contracts in progress with the different public authorities may, exceptionally and during two years from this legislation coming into force, agree with its suppliers and/or sub-contractors the following maximum payment terms, in accordance with the following timeframe. The parties may not agree any longer payment terms and dates:

i) 120 days from this legislation coming into force until 31 December 2011.

ii) 90 days from 1 January 2012 until 31 December 2012.

iii) 60 days from 1 January 2013 until 31 December 2013.

As far as the public sector is concerned, the payment terms have been reduced from 1 January 2013 to a maximum of 30 days from the date of issuing the work certificates or the documents that accredit the total or partial fulfilment of the contract. The following transition period has been established until then:

i) Payment terms of 55 days for public authorities have been established from the legislation coming into force and until 31 December 2010.

ii) The terms will be 50 days from 1 January 2011 to 31 December 2011.

iii) 40 days from 1 January 2012 and 31 December 2012.

Finally, in accordance with what is indicated in the preamble to the Act, this seeks to ensure an effective and efficient procedure to settle the debts of the public authorities and to establish transparency mechanisms regarding compliance of the payment obligations, by means of regular reports at all levels of the administration and new local authority invoice register being set up.

Alfonso López

Simplification and clarification of the credit institution provisions system.

On 13 July 2010, Bank of Spain Circular 3/2010 of 29 June, which amended Annex IX of the Circular 4/2004 of 22 December (the "Circular"), regarding financial information standards, was published in the Spanish Official Gazette (BOE).

Even though Circular 4/2004 added the international information standards adopted by the EU to the basic accounting regulations for credit institutions, the consequences of the current international financial crisis has meant that the Bank of Spain has included a set of principles to rate operations according to their risk in its accounting regulations. It has also established a method for credit institutions to calculate the amounts needed to be taken into account to estimate the credit risk impairment.

The amendment included in the Circular can be divided into three main blocks:

i) A simplified allocation schedule, speeding up the recognition of impairment loss and by applying a consistent process for real estate collateral according to its heterogeneity and its short-term access possibilities.

ii) The application of coherent treatment of property assets appropriated or received as payment for a debt, by establishing a recommended criterion to calculate their value.

iii) Different precautions are established that the financial institutions have to take into account when granting and managing credit operations.

As far as hedging bad debts is concerned, the Circular unifies the five provision schedule that existed until then and shortened the period to a maximum period of twelve months from the date of defaulting on the payment until 100% coverage is achieved. Thus, real estate assets that could be rated as doubtful due to the customer defaulting are fully hedged by the relevant provisions, after twelve months from the defaulting date, unless the loan is guaranteed by a primary mortgage guarantee. Different special criteria is established and applied according to the type of asset (finished building that is the normal place of residence of the borrower; rustic land being farmed, offices, premises and warehouses; finished houses, plots of land and other property assets), that is encumbered.

For the purposes of calculating the value of the real estate assets used as surety for doubtful debts due to the customer defaulting, the lower of the following two shall be estimated: (a) the purchase price that appears on the deed of sale and (b) the appraisal value of the current state of the property. A discount that increases according to how difficult it is to access the guarantee will be applied to that amount.

With regard to the appraising of the property assets appropriated or received as payment of the debt, the lower amount will be taken of (a) the depreciated cost of the assets less the relevant impairment with a minimum of 10%, and (b) the appraisal value of the asset in its current state less the estimated selling costs, that cannot be estimated under 10% of the current appraisal value.

With regard to the acquisition of property assets as payment of the debt, the Circular establishes that at the time of acquiring the asset, a minimum impairment of 10% shall be recognised, by establishing an upper minimum impairment (of 20% or 30%) according to the length of time (over 12 or 24 months respectively) that the property assets have been on the balance sheet. For the case of property assets that remain on the balance sheet for over 24 months, the banks will have procedures in place to ensure the accuracy of the market appraisal value used under real market conditions in the zone where the assets are located.

Finally, it should be pointed out that even though the Circular was published in the BOE on 13 July, it will not come into force until 30 September 2010.

Ramón Castilla

Boosting retail trade by the Autonomous Communities.

This article sets out the main provisions agreed over recent months by the Autonomous Communities in order to enhance and boost the freedom of establishment and the free rendering of services in the retail trade sector envisaged in the DIRECTIVE 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereinafter “the Directive").

In the Autonomous Community of Andalusia, after Act 3/2010, of 21 May, amending the different legislation for the transposition of the Directive in Andalusia, which was approved and published on 8 June, and in order to comply with said Directive, obtaining a specific business licence prior to a municipal licence for large commercial establishments envisaged in Act 1/1996, 10 January, was one of the requirements that was no longer required.

In order to simplify the checking actions prior to the authorisation of large retail outlets, defined in the recent Decree Law 3/2009, of 22 December, as any retail establishment with a display and sales usable surface area of over 2,500 square metres, the municipalities shall perform those checking

actions by means of granting municipal working licenses, in accordance with land use, urban planning and environmental criteria.

Another significant new feature is that the procedure has been regulated for the first time in Andalusia by means of the Order of 7 May 2010. This grants the status of Open Shopping Centre to those retail organisation formulas of any economic stakeholders that, in the sphere of domestic retail trade, are involved in a defined urban area, with a commercial tradition in the zone and with their own on-going image and strategy.

This status of Open Shopping Centre may be preferentially assessed according to the regulations governing the incentives to be granted by the Department of Tourism, Trade and Sports of the Junta de Andalucía regional government. They may likewise be included in the promotional actions that said Department implement in this area.

In order to obtain the status of Open Shopping Centre of Andalusia, the project shall be territorially defined within the urban centre, or a zone of a notable commercial nature, have a common management unit and model in terms of operating and opening hours, and provide common services to its associates.

They shall likewise carry out joint promotion, advertising and communication activities that foster the image of the overall unit. They shall also provide easy private and public access, along with an area to park vehicles.

On the other hand, in the Autonomous Community of Cantabria, after the publication on 29 May 2010 in the Official Spanish Gazette (Boletín Oficial del Estato) of Act 2/2010, of 4 May, to amend Cantabria Retail Trade Act 1/2002, of 26 February, and other complementary legislation for its adaptation to the Directive, the requirement to obtain a specific commercial licence has been replaced by the obligation to obtain a relevant report from the Regional Minister of Trade, prior to the granting of the municipal business opening licence, in order to open and expand a Large Shopping Centre. For those purposes, Large Shopping Centres shall be considered to be those collective or individual commercial establishments that have a retail sales and display usable surface area of over 2,500 square metres.

This report shall be based on criteria of general interest, such as protecting the environment, urban setting, land use, preserving the artistic and historical heritage, protecting the workers, the consumers and the cultural, recreational, sports and social interest objectives.

Likewise with the new draft Retail Trade Act in the Autonomous Community of Valencia, retail outlets under 2,500 square metres will be able to open and begin trading without a business opening licence, which will simplify the procedure and will shorten the time required for an entrepreneur to get its business up and running.

The Autonomous Community of Valencia has also sought to regulate and set the requirements that the stores will have to met if they want to sell out-of-season products or which are due to surplus production and which

are known as “outlets”, and preventing them from selling products with faults.

The figure of the urban shopping centre is likewise recognised, in areas of cities where there is a significant grouping of retail companies that are run by an entity with its own legal status. These urban shopping centres shall be developed in the traditional shopping areas of the cities.

Sandra Paoletti

Real Estate Aspects Contained in the Sustainable Economy Bill.

The recently approved Sustainable Economy Bill (hereinafter the “Bill) seeks to introduce into the Spanish legislation the necessary structural reforms to create conditions that foster environmental, social and economic development in a competitive and productive economy.

In the framework of using natural resources and improving economic activity, the key new aspects of the Bill deal with housing and its tax system, by introducing measures in four fundamental aspects:

a) Boosting renewal and refurbishing of urban areas.

   The Bill seeks to highlight the need to refurbish housing, given that figures show that there is a total of 25 million dwellings in Spain, half of which are over 30 years old and nearly six million are over 50 years old. These dwellings are often seriously lacking in terms of acoustic and thermal insulation, energy efficiency and in terms of their accessibility and habitability. There is therefore significant room for action when it comes to residential refurbishing, particularly given that refurbishing only accounts for 25% of the total production in Spain in the construction sector.

b) Extending the deadline for changes to the land valuation rules.

   The Bill includes a final provision that would amend Royal Decree 2/2008 of 20 June, which approved the redrafted text of the Land Act (the “Land Act”).

   The Third Transitory Provision (“*valuations*”) of the aforementioned Land Act established that, after it came into force, developers had 3 years to begin to build on buildable land included in a urban development plan and thus become urban land. Any land where building work had not begun after that deadline (which ended on 29 May 2010) would have to be reassessed. In many cases, said land would no longer be zoned as "buildable”, but would be re-classified as "rural". This would inevitably affect the guarantees offered for the mortgages that financial institutions had granted prior to the Land Act coming into force.

However, on the other hand, this deadline was not at all clear given that, on the one hand, the Government had passed Royal Decree Act 6/2010, of 9 April, introducing measures to boost the economic recovery and employment, which had eliminated the aforementioned three-year period and had expressly established a new deadline of 31 December 2011. On the other hand, the final provision of the Bill establishes that the revaluing of the land could be carried out until June 2013. The matter is therefore complex and we will have to wait for the Sustainable Economy Act to be passed into law to see what is worked out regarding these timeframes.

c) Deduction for purchasing the main place of residence.

From the tax point of view, the deduction for purchasing one's main place of residence has been changed and will be limited to income under 24,107.20 euros from January 2011. When the tax base is under 17,707.20 euros, the current status remains in force, which envisages a 15 per cent deduction of the amounts paid in one year, up to a limit of 9,040 euros a year. A gradual linear reduction will be applied to taxable income between 17,707.20 and 24,107.20 euros.

Tax payers who purchase their main place of residence before 31 December 2010 will be able to apply the deductions of the current system.

d) Fiscal equalization of renting and purchasing housing.

The fiscal equalization of the deduction for renting compared to the deduction for purchasing a dwelling is another of the measures included in the Bill.

In the same way as the deduction for purchasing one's main place of residence, the Bill envisages increasing the amounts of the tax bases entitled to deductions for renting. Thus, the tenant can currently deduct 10.5% of the rent paid up to a maximum of 9,040 euros a year if his income is under 12,000 euros. From 1 January 2011, this limit of 12,000 euros increases to 17,707.20 euros. The deduction base will be gradually reduced between 17,707.20 and 24,107.20 euros and the tax payers with tax bases over 24,107.20 euros will not be able to apply this deduction.

On the other hand, in order to encourage renting, the fiscal treatment of income obtained by the landlords will be enhanced and the reduction percentage in the tax return will increase from 50% to 60% from 2011 onwards. The age of the tenant is also reduced from 35 to 30 years for the purpose of 100% exemption of rental income.

Alejandra Fernández de la Cigoña

Resolutions of the Directorate-General of Registries and Notaries

Supreme Court, First Section (Civil), Decision of 20 November 2009. Appeal Number 2363/2004.

In the decision analysed below, regarding the direct action taken by the sub-contractor against the lead contractor for the amount that the latter owed to the contractor, the Supreme Court upheld the appeal decision by dismissing the appeal in cassation brought by two companies which, as the members of the Joint Venture (UTE) acting as the lead contractor, had lost the previous appeal.

The fundamental legal issue is whether the direct action envisaged in Article 1597 of the Civil Code, performed in this case not against the owner of the work but rather against the contractor (defendant) by the second sub-contractor (claimant), by means of handing over non-transferable promissory notes, whose legitimate holder at the time of filing the claim was a bank, must prosper given the circumstance that the aforementioned promissory notes had not matured at the time of the defendant being summoned.

Pursuant to the above, the decision of the High Court regarding this appeal was based on the following considerations:

Even though the handing over of the promissory notes by the lead contractor to the contractor was equivalent to the payment and discharged the obligation, such an agreement did not lessen the direct action of the sub-contractor against the members of the UTE as the sub-contractor was not a party and therefore the legal system of Article 1170 CC is applicable to the sub-contractor. The Article establishes that the effects of the handing over of the promissory notes occur when the payment is made.

On the other hand, as the direct action exclusively dealt with the amount that the lead contractor owed the contractor when the sub-contractor lodged its claim, everything that was not "owed" in any way was excluded, as was the case with the promissory notes that the lead contractor would have made effective on maturity to the contractor or to the bank that received them from the contractor prior to the claim by the sub-contractor (claimant).

Well, it is doubtful whether or not the amount represented by the aforementioned non-transferable promissory notes and which were in turn handed over to the bank in exchange for an advance of their amount and not mature at the time of the claim filed by the subcontractor, is owed by the lead contractor to the contractor. If that is the case, the direct action of the sub-contractor against the lead contractor should prosper. If not, the action will lack one of the suppositions for its viability and should be dismissed.

With regard to the above, it must considered whether the amount owed by the lead contractor to the contractor also includes, in addition to the

amount represented by the non-matured promissory notes, the amount represented by those that the latter had handed over to the credit institution, but there is a clear possibility of their being returned to the contractor for the latter to claim payment of the amount from the lead contractor. In short, it will the nature of the contract between contractor and the credit institutions which determines the applicable solution for each case.

In this respect, it is the criteria referred to in the above paragraph which enables the exceptional protection of the sub-contractors to be combined with the legal system regarding loan assignments, therefore in any case of the lead contractor paying the contractor by means of commercial drafts or promissory notes, and the amount being subsequently advanced by the bank to the contractor, the lead contractor shall be deemed not to owe anything to the contractor but rather to the aforementioned bank that has received the bills. The protection of the sub-contractor would be deceptive in the majority of the cases and what is more serious, the sub-contractor would be subject to the outcome of a contract to which the sub-contractor is not a party, that is to say, the one entered into between the contractor and the bank.

Therefore, it is clear that the credit policy to negotiate mercantile loans and documents entered into between the contractor and the credit institution did in no way discharge the lead contractor in any way, as there was still a clear possibility that the notes that were not settled by the lead contractor on maturity would be returned to the contractor, which had received an advance from the bank against the promissory notes, where the contract between both being similar to collection management.

Ignacio Domínguez de Luna

Madrid High Court of Justice, Contentious-Administrative Chamber, Section Two. Decision of 8 April 2010. Appeal Number 1748/2009

This article analyses the contesting of the resolutions adopted at the Municipal Plenary Session of Madrid City Council by a series of homeowners' association in relation to the construction of the shopping centre known as the "Palacio del Hielo", located in Madrid.

The Court of First Instance ruling stated that the agreements of the Municipal Plenary Sessions on 27 June 1996, 21 December 2000 and 19 December 2002 did not comply with the law. The ruling annulled the resolution granting municipal planning permission for the work to build the "Palacio del Hielo" and also stated that the aforementioned works should be demolished.

We will begin by saying that the appellant alleged, among other grounds, abuse of procedure, as both the action and the appealed ruling dealt with the municipal planning permission for the "Palacio del Hielo" (Madrid) granted in accordance with the resolutions adopted by the Municipal Plenary Sessions on 27 June 1996, 21 December 2000 and 19 December 2002, even though the appeal had only been lodged against the Agreement of 19 December 2002.

With respect to the above, it should be recalled that there were two different documents where the claim was delimited. One the one hand, there is the document lodging the appeal, which has to indicate the act or provision against which the appeal is being made, and on the other hand, there is the petition, which has to set out the relevant claims being made. In the present case, the appeal only contested the “Resolution of the Plenary Session of Madrid City Council of 19 December 2002”. Therefore, only that ruling can be appealed in the Court of First Instance and can in turn be analysed in the subsequent appeal.

Having therefore analysed the only grounds alleged by the appellants and allowed by the High Court of Justice, we will now examine the in-depth issues of this appeal, without forgetting that purpose of the first instance appeal, as we have already discussed, only consists of the Resolution adopted by the Plenary Sessions of Madrid City Council on 19 December 2002, which allowed the amendment of the final design submitted for planning permission of the “Palacio del Hielo”.

We should point out the fact that no mention was made regarding the Urban Development Regulations infringed by the aforementioned amendments either in the written claim regarding the appeal or in the relevant technical report. And what is more relevant regarding the findings of the Court, that the appellants accused their appeal and evidence, throughout the instance proceedings, to accredit the legality of a series of works that were never the subject of the contested ruling.

In relation to the above, no evidence was submitted regarding the technical modifications approved by the Resolution of 19 December 2002 considered in this appeal. In fact, the reports submitted both by the concessionary company and by Madrid City Council and which are limited to recognising that the aforementioned modifications were "basically operational or to the construction system that did not affect the surface area, occupancy or use", were never invalidated in the proceedings by the appellants, as they only alleged infringements supposedly contained in administrative documents that were ever contested. It is therefore juridically non viable for the High Court to rule on this aspect.

Finally and to conclude, the fact should be noted that instead of studying the irregularities that the project might contain, the Madrid High Court basically only considered procedural issues raised by the City Council and the concessionary company. This is even more so as it is a ruling that is final and cannot be appealed, which prevents future legal actions in this respect and finds for the appeal, by conclusively declaring the amendments to the final design submitted for planning permission of the “Palacio del Hielo” to be legal.

Ignacio Domínguez de Luna

Zaragoza Number 15 Court of the First Instance. Ruling of 13 May 2010. Ordinary Proceedings 1026/2009.

In the following article, we analyse the action brought by a management company of large retail outlets targeting the automobile sector against a

developer of large shopping centres, and how the examining magistrate considered each of the causes that led both parties not to comply with part of their contractual obligations, stressing the always litigious exceptio non adimpleti contractus, which enables each of the parties, when there is breach by the other party in its fulfilment, to fail, reciprocally, to comply with its own obligations.

The defendant as the lessor and the petitioner as the lessee signed a lease by means of which the former made available commercial premises to the latter, with the premises being within a larger commercial area, which was going to be used as a shopping centre.

The fact should here be stressed that according to the lessee, the premises being leased had to make up a unit with the other premises that made up the overall retail outlet, something which did not occur once the work to build the shopping centre had been completed, as it was separate from the aforementioned retail outlet. Therefore, in order to achieve that proximity required by the lessee, the lessor took different steps in order to facilitate the flow of customers to the premises in question, even though during its installation, the building work hindered the access of the customers to the leased premises.

Consequently, the sub-lessees that made up the whole of the centre involved in this action, began to complain about the lack of customers coming to the premises, which the defendant argued was due to the current economic situation. The lessor therefore proposed to the lessee prior to the action being filed, to reduce the income as a means to mitigate the drawbacks suffered by the latter.

On this point and prior to the lodging of the petition, the defaulting on the rent by the lessee to the lessor, on the one hand, was clear and, on the other hand, that the project carried out by lessor included a series of changes with respect to what was agreed in the lease agreement, changes that led to the lessee suing the lessor for breach of contract.

It should also be considered whether the grounds for the petition, as alleged by the defendant, lie in the lessee being able to pay the rent, due to the special economic situation of the service sector at that time, a sector in which the lessee operated.

When analysing the issue of the case, the examining magistrate established defining the bilateral obligations as the basis for issuing his ruling, which, in the case of the lessee, consisted in paying the agreed rent, and in the case of the lessor, in delivering the agreed item, that is, the commercial premises in accordance to the agreed parameters in the lease.

In relation to the above, it is necessary to state that fulfilment of bilateral obligations arises from its very nature, therefore both services are dependent on the other's cause and if one is in breach, the other lacks cause. In relation with the present case, the examining magistrate continued in the line of well-established authorised doctrine and majority jurisprudence, establishing that the lessor and defendant built the agreed commercial premises and handed them over to the lessee, who ran said

premises by sub-leasing them to third parties. The lessee collected rent for sub-leases in accordance with the agreements reached with the sub-lessees, but without fulfilling the essential obligation assumed with the lessor, which is to pay the rent.

Therefore, the Judge concluded that the breach alleged by the lessee had not prevent the latter from running its business and cannot justify the unilateral action by the lessee not to pay the rents, with the consequence in this case, which sought for compliance by the other party, to proceed to find for the defence and dismiss the petition.

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