Spanish Real Estate Legal Update

Review

Nº 7 – May 2009

In this issue:

Amendment of the outsourcing act in the field of construction

On March 13, an amendment was introduced to Royal Decree 1109/2007 of August 24, which develops Act 32/2006 of October 18 regarding outsourcing activities in the field of construction (hereinafter the "Act").

The abovementioned Act aims to improve the working conditions in the construction industry and to ensure the occupational health and safety of construction workers. It is applicable to the outsourcing contracts signed to conduct construction work.

Besides this, Royal Decree 1109/2007 of August 24 establishes the guidelines for the development and enforcement of the Act in four fields: i) Registry of Accredited Companies, ii) Outsourcing Book, iii) rules for calculating the percentages of permanent workers established by Law and iv) simplification of documentary requirements for construction works in the legal system.

One of the major innovations introduced by Royal Decree 1109/2007 is the creation of the Registry of Accredited Companies. It is compulsory for all companies that claim to be contracted or subcontracted to carry out construction works to be registered in this Registry, said registration being valid for a three year period. Companies shall register before the start of the

subcontracting process since it is a prerequisite to take part in the contracting and subcontracting process. The registration is valid for the entire Spanish territory.

Companies shall be registered and shall renew their inscription every three years or apply for the cancellation of the registration when they no longer meet the requirements, otherwise the Labour Authorities can proceed to cancel the registration.

Failure to comply with the accreditation and registration requirements results in the joint and several liability of the subcontractor who has been contracted as well as of the contractor as regards Labour and Social Security obligations.

Less than two years after Royal Decree 1109/2007 came into force the need to use electronic signature systems to streamline administrative procedures for the registration of Companies as well as the delivery of certifications seemed more than obvious. To this end, Royal Decree 327/2009 introduces - by means of one sole article- an additional provision to Royal Decree 1109/2007 concerning automated administrative processes that allow the Labour Authority in charge of the Registry of Accredited Companies to use electronic signature systems for procedures regarding the Registry of Accredited Companies.

The administrative proceedings have been simplified with this amendment

These automated actions introduced by the Royal Decree are a result of the provisions of Act 11/2007 of June 22 regarding citizens' electronic access to public services, which recognizes citizens' right to contact government agencies electronically and regulates the conditions for the use of technology for administrative purposes.

The aim of the new Royal Decree is to speed up the administrative procedures regarding the Registry of Accredited Companies, simplify the steps and facilitate the economic flow in the construction sector.

The modifications of the bankruptcy act

This article addresses the recent modification of the Bankruptcy Act 22/2003 (Ley Concursal 22/2003) (hereinafter "LC") by Royal Decree-Law 3/2009 (hereunder "RDL 3/2009") to support debtor companies and their creditors, and to correct certain procedural and substantive matters which unreasonably hindered the implementation and fulfilment of the objectives of the LC.

It is no surprise that the LC has not achieved its main objectives, since approximately 90% of the bankruptcies end up in liquidation, i.e. just the opposite of the purposes of the LC when said act was drafted. Actually, it can be stated that this act is more an obstacle than a solution for bankrupt companies.

The reasons that can be identified to explain the failure of the LC include an excessive slowdown in procedures and the short deadlines envisaged by the LC to apply for volunteer competition, which translates into greater chances of being found guilty by the judge in case of debt, which, in turn, explains why prior agreements with creditors are normally sought.

A determining factor in the revision of the LC is the role of credit institutions, which feel clearly punished in the credit rating, especially considering the cases of refinancing –which are becoming all the more frequent- and the possibility of being relegated to the last position in the credit legalization ranking.

In this scenario, the amendments to RDL 3/2009 are mainly aimed at facilitating the refinancing of companies that are undergoing financial difficulties, so as to prevent insolvencies, as well as streamlining procedural steps, reducing processing and publication bankruptcy costs, reviewing the status of certain credits and improving the situation of bankrupt companies' employees.

The new law speeds up the refinancing of companies with financial problems

With regards to the refinancing of viable companies, RDL 3/2009 envisages an increase in the guarantees in favour of refinancing entities focused on the non-rescindible nature of non-fraudulent transactions resulting from the agreements between these entities and bankrupt companies and on the restriction of the legitimisation to challenge such transactions. These guarantees are subject to refinancing support of at least three fifths of the debtor's liabilities at the date of adoption of the refinancing agreement, backed by a feasibility plan that ensures the debtor's business continuity on the short and medium term and by a report issued by an independent expert appointed by the commercial registrar (from the same corporate domicile as the debtor). The abovementioned documents shall be duly documented in a public deed.

With regards to the search for incentives for the signing of early agreements with creditors to avoid liquidation of the bankrupt company, a three month deferment period of the duty to declare bankruptcy for debtors who notify this to the judge is provided. Therefore, an extended term is opened to promote an agreement with creditors so that they adhere to an early agreement proposal. The declaration of bankruptcy will have to be applied within the following month regardless of whether the minimum support required to accept the proposal is obtained or not. In this regard, and to facilitate the early agreement proposal, said proposal shall be backed by any creditors whose credits exceed one fifth of the liabilities presented by the debtor. In turn, it is stated that when the proposal is submitted with the application for voluntary bankruptcy it would suffice to obtain adhesions accounting for 10% of the liabilities.

The obligation of announcing bankruptcy is delayed three months

Furthermore, it is important to highlight that the revision establishes a more flexible majority regime for the approval of proposed agreements; it is necessary to obtain the favourable vote of at least half of the liabilities of the bankruptcy procedure. However, when the proposal involves full payment of the ordinary credits within a deadline of less than three years, or the immediate payment of ordinary expired credits with a discharge of debt lower than twenty per cent, it will be enough to obtain the positive vote of a share of the liabilities that is greater than those voting against the proposal.

With regards to the measures adopted in RDL 3/2009, a series of modifications are introduced in order to accelerate the bankruptcy procedure and reduce its costs; said changes include the restriction of the salaries of the trustees by means of a tariff that will be have to be officially approved, the creation of a system that seeks to ensure a minimum pay to directors of

companies that are undergoing bankruptcy proceedings and that have insufficient funds and of a payment system that addresses the complexity of the insolvency. Furthermore, funds for the payment of the reports issued by independent experts will be taken from the judicial directors' salaries. Moreover, the RDL envisages other changes, namely: (i) the broadening of the scope of the summary procedure for companies with liabilities under 10 million euro; (ii) the clarification of the rules of judicial challenging, the removal of the bankruptcy incident from the order that grants or denies judicial authorization -when it is required- and the suppression of the hearing as a general rule; (iii) the free publication of notices in the Spanish Official Gazette (BOE) and the creation of a public telematic registry for bankruptcy resolutions, the so-called Public Bankruptcy Registry, to speed up the knowledge thereof; (iv) and the possibility of processing the agreement in written form, without having to hold a creditors' meeting, when the number of creditors exceeds three hundred.

The majorities regimen to accept the creditors agreement has become more flexible

Moreover, provided that the company's economic situation does not show reasonable evidence of being able to avoid liquidation, an early liquidation of the company is foreseen upon request of the debtor for the payment of creditors within a period of fifteen days following the date of submission of the trustee report established under article 75 of the LC.

With regards to the revision of the status of certain credits, guarantees of public credits and of the FOGASA (Salary Guarantee Fund) will be reinforced together with the position of those creditors who were unaware of the bankruptcy proceedings, subordinating the credits derived from the reciprocal obligations whenever the breach is the result of hindering practices on behalf of the creditor and of those partners that are closely related to the bankrupt company.

Lastly, we will conclude our analysis of this RDL 3/2009 on bankruptcy issues by mentioning a series of modifications aimed at improving the situation of bankrupt companies' employees. To prevent employment termination processes and processes aimed at implementing significant changes in working conditions, employees are allowed to continue working until the insolvency procedure is declared. In addition, the extinguishment of work relations is allowed from the moment said procedure is declared in order to allow employees to benefit from unemployment benefits.

The new act related to loan & credit agreements and intermediation services executed by consumers

On April 1, the act 2/2009 of 3 March, (hereunder the "Act") ruling the contracting of mortgage loans or credits and intermediation services by consumers interested in contracting a mortgage loan or credit was published in the BOE ("Spanish Official Gazette").

This Act regulates for the first time the credit services offered by non-financial entities, which are now required to comply with a number of obligations previously observed only by financial institutions.

The scope of this Act is limited to companies other than credit companies, and to the granting of credits or mortgage loans as well as to financial intermediation service provisions.

Furthermore, and with the aim of ensuring a high level of protection for consumers and users, the Act establishes a framework of transparency and information guarantees to be followed by entities engaged in mortgage loans granting or in intermediation and advisory services with the aim of ensuring loan and credit contracts hired.

In order to achieve the abovementioned transparency and fair competition, these companies will have to be registered at a public registry (in the Autonomous Communities where their registered office is located and, in the case of companies registered abroad but operating in Spain, in the State Registry to be created in the National Consumer Institute). Likewise, these companies must have a civil liability insurance or bank guarantee covering possible liabilities arising from their relationship with consumers. In addition, they shall make the general contracting conditions used available to consumers, publishing them on their website.

Credit Services of the non-financial entities are now regulated

Regarding fees, there is freedom to establish rates and commissions. However, general application limitations result in companies not being able to set amounts exceeding those derived from the corresponding rates. Likewise, commissions must be in line with the services provided and expenses caused.

Rates shall be included in a brochure to be submitted to the registry where the company is registered. Companies with offices opened to the public must also have a notice board containing the information needed to inform consumers.

The Act requires companies the burden of proof on compliance with applicable obligations and provides access to systems of extra-judicial dispute settlement, particularly through the Consumer Arbitration System.

In relation to loan and mortgage credit hiring, and if the amount is referred to, companies are requested to mention the Annual Percentage Rate with a representative example in their advertising, commercial communications, announcements and special offers. Likewise, companies must provide consumers applying for a loan or mortgage credit with a free informative brochure.

The Act also establishes the pre-contractual information that companies must provide to consumers, as well as certain norms regarding good charges.

Once the calculation of the immovable property has been completed, companies have to notify the consumer that loan application has been rejected, or if accepted, they have make a binding credit or loan offer to the consumer in written.

Regarding loan or mortgage contracts, companies must satisfy the obligations already complied with by credit entities.

Lastly, the Act foresees a specific legal system to which companies engaged in intermediation transactions must adhere, especially focusing on commercial

communications and advertisement, pre-contract information, intermediation contracts and obligations complementing the intermediation activity.

Novelties on the Spanish companies regulation related to mergers, splits, transformations, & international transfers of corporate domicile.

On April 3 2009, an important act (Act 3/2009 of 3 April) (hereunder "the Act"), was enacted that introduces significant changes in our legal system, namely with regards to corporate law. As indicated in this article's title, this Act concerns a series of structural modifications that affect, as provided under Article 2 of the Act, "all the companies classified as mercantile companies due to the nature of their object or to the way they were incorporated".

In this scope, it is important to stress the impact that these structural modifications will have on all the agents working in the real estate market in Spain, that, due to their mercantile condition, shall not lose sight of the novelties, modifications and suppressions introduced by this Act. Likewise, and as we will see below when we analyze the content of the Act, special attention has been paid to everything related to transformations, mergers, splits and global asset and debt assignments. Given the current situation of the Spanish economy, these are transactions that will acquire greater relevance in the future, as restructuring needs increase across all sectors, and, most significantly, in the real estate sector.

This Act is an attempt to ensure the effectiveness of the European Union internal market. Thus, it introduces the content of Directive 2005/56 regarding the international mergers of corporate companies into the Spanish legal system, as well as Directive 2007/63, which modifies Directive 78/855/CEE and 82/891/CEE and refers to the requirement of the independent expert report in the event of mergers and splits of limited companies.

With regards to international mergers, we shall begin by stressing that the Act does not limit this kind of transactions to the European Community scope; it explicitly envisages mergers between Spanish companies and non-Community companies, which will be governed by the personal law of the parties. Likewise, it is the first time that the Spanish legal system regulates the transfer of the registered address/office of Spanish companies abroad as well as the transfer to Spanish territory of the registered address of companies incorporated in accordance with other countries' laws, which clearly reflects the legislator's willingness to simplify corporate mobility and foster the act's international scope.

In terms of structural modifications, we shall first mention that the importance of the Act is shown in the unification and broadening of the juridical regime of the so-called "structural modifications", structural modifications being those changes to the company that go beyond simple modifications in by-laws and that affect the company's patrimonial or personal structure.

The aforementioned unification refers to the broad definition of the transformations regime contained in the Limited Liability Companies Act

2/1995 (“Ley de Sociedades Anónimas”), a definition that has prevailed over the highly restrictive provision contained in the Public Limited Companies Act, thereby broadening the scope of potential transformations in view of the needs detected. For example, the Act establishes that a company that transfers all of its equity to one or more companies by universal succession in exchange of a consideration cannot receive said consideration in the form of assignee shares or contributions.

Treasury stock and financial asístanse regimens have become more flexible

With regards to mergers, the following provisions shall be highlighted: the provision that governs the absorption of a fully participated company and of companies with a ninety per cent shareholding, as well as the provision that defines the transaction whereby a company disappears by transferring its entire equity to the company that holds all the shares or contributions. Concerning splits, the most relevant novelty introduced in the act is the incorporation of the segregation concept -jointly with other types of splits that are already regulated, i.e. partial and total splits- to corporate substantive law.

In terms of the Spanish legal system, it can be concluded that this Act represents a transitory solution while all the different acts governing our corporate law are being revised and harmonized. This is the reason why the legislator has opted for a new Act instead of including the new material in the Commercial Code or in the Public Limited Companies Act, while it waits for the appropriate time to codify or, at least, compile Spanish corporate law in a unitary legal body that repeals the Corporate Companies’ title of the old Commercial Code of 1885.

Lastly, before looking into the act’s novelties with further detail, the Spanish legislator has introduced a series of specific provisions, such as the principle of equal treatment, which was considered to be until now an implicit principle, as well as the greater flexibility of the treasury stock and financial assistance regimes.

The Act is divided into five Titles which cover the following subjects: Title I: Transformations; Title II: Mergers; Title III: Splits; Title IV: Global Asset and Debt Assignment; and Title V: International transfer of the registered address. It also includes an Abolition Clause, which removes several articles of the Public Limited Companies Act, the Limited Liability Companies Act and Act 21/1991 on Economic Interest Associations from the Spanish legal system. The Act also introduces several changes to the Public Limited Companies Act in its First Final Provision, and to the Limited Liability Companies Act, in its Second Final Provision. Finally, it dedicates the Third Final Disposition to modify other articles of Act 31/2006 regarding the role of employees in public limited companies and European cooperatives.

Starting from Title I, which refers to Transformations, the most significant novelties are as follows. Firstly, article 4 of the Act includes a list of “Potential Transformation Events”, which aims to cover the whole range of potential transformation events under Spanish Law, the innovation being, precisely, the list itself. In addition, the number of notices/announcements that shall be necessarily published is reduced to two (one in press and one in BORME, the Official Bulletin of the Trade Registry), a change that also applies to mergers. Finally, it is important to highlight the provision regarding the “Industrial Partner” in the event of a transformation from a civil company to a corporate company, if the civil company indeed has this kind of partners.

As for Title II on mergers, possibly one of the Titles that introduces the greatest amount of novelties to the Act, we must mention that the legislator

has aimed to simplify this kind of transactions significantly, although he has left a door open to interpretation in everything regarding financial assistance and unanimous merger agreements between limited liability companies. Firstly, in an attempt to liberalize those transactions in which there is a merger after an acquisition of a company with indebtedness of the purchaser (typical financial assistance scenario), the Act establishes a series of requirements: among them, a directors' report and a report by an independent expert determining whether or not there is financial assistance. If there is financial assistance, then the transaction will be prohibited.

With regards to those mergers in which the participating or resulting companies are neither public limited companies nor partnership companies limited by shares and the agreement has been unanimously approved by the Board of Directors, the procedure has been simplified to such an extent that it states that "the general provisions on merger project and balance will not apply to Sections Two and Three of the Chapter of the new Act that regulates mergers". In short, there is a formal freedom that is much broader than that envisaged under the current legislation but the door is open to interpretation and there is no doubt that discrepancies will soon arise regarding the interpretation of this clause.

Another remarkable novelty is the introduction of three new types of mergers defined as special mergers. Firstly, the merger by absorption of fully owned companies, in which the acquiring company is the direct or indirect holder of the shares. In this case, a number of requirements are removed, like the independent expert's report and the directors' report, unless we are talking about an intra-EU merger.

Mergers designated as special are now regulated

Secondly, the Act defines the merger by absorption of a company with ninety per cent shareholding or more, but not fully held. In such cases it will not be necessary to submit directors' and independent expert's reports on the merger project, provided that in the project the acquisition of shares is offered by the acquiring company to the shareholders of the acquired companies at a reasonable value and within a defined deadline that may not exceed a month starting from the date of registration of the merger in the Commercial Registry.

Finally, the Act establishes that any transaction which entails the extinguishment of a company by full assignment of its equity to another company that holds the totality of its shares and quotas shall be considered similar to a merger.

With regard to splits, which are defined under Title III, the main novelty is that asides from the existing total and partial splits, a new form of split is envisaged in the Act: the so-called segregations. Segregations are defined as the full transfer via universal succession of one or more parts of a company's equity, each of which shall constitute an economic unit, to one or several companies. In exchange, the segregated company will receive shares and quotas from the beneficiary companies.

Furthermore, Title IV regulates the global assignment of assets and liabilities, allowing a registered company to transfer its entire equity via universal succession to one or more partners or third parties in exchange of a consideration that may no consist of shares or quotas of the assignee. Moreover, as in the merger, a company in liquidation may assign the totality of its assets and liabilities provided that the distribution of its equity among partners has not started.

Finally, Title V introduces one of the major novelties of this Act: the transfer of a Spanish company's registered address abroad and of a foreign company's registered address to Spain. Thus, both transfers will be governed by the provisions of the International Treaties or Conventions in force in Spain and of this Title, without prejudice to the provisions governing European Trade Companies.

Relocating the registered office of a company registered under Spanish law abroad, can only be made if the country where the company intends to move allows the company to keep its legal status. Companies in liquidation are not allowed to move their registered office. Companies incorporated under the law of another Member State of the European Economic Area (EEA) that plan on moving to Spain, will not have to change their legal status. As for companies registered in a country outside the EEA that want to change their registered office, the Spanish law requires them to present an independent expert report proving their equity covers their share capital. Once again, this comes to prove the role undertaken by the expert within the framework of this Act.

The transfer of the domicile of a Spanish company abroad and the other way around is now regulated

As for the law abolished as a result of the new Act, the following parts of the Public Limited Companies Act have been repealed: section two, article 149, related to change of registered office; chapter 8 (Articles 223 to 259) on transformation, merger and split; number 6, paragraph one, article 260, dealing with causes for dissolution; and last; paragraph two, first additional provision, presenting the limits for acquiring shares from the very business or the dominant company.

As for the Limited Liability Companies Act, the following parts are abolished: chapter 8 (Articles 87 to 94) on transformation, merger and split; paragraph two, article 111, related to payments to new clearing members; article 117, on global asset and liability transfer; as well as article 143 on New Company corporate transformation ("Sociedad Nueva Empresa").

Act 12/1991 of EIG ("Agrupaciones de Interés Económico") is the last regulation subject to modifications, with the abolishment of Articles 19 and 20 relating to the specific transformation and merger processes of EIGs.

This Act shall be in force next July 4, with the exception of the provisions on intra-EU mergers included in Chapter II, Title II, which came into force last April 5.

Many articles have been modified in the Public Limited Companies Act, in the Limited Liability Companies Act, in Act 31/2006 on employee involvement in Public Limited Companies and European cooperatives, as well as in Act 13/1989 on Credit Cooperatives. All the abovementioned changes are a consequence of the development of this new Act, which clearly has the following objectives: support business dinamization and mobility, as well as to unify criteria applicable to transformations, mergers and splits, both at a EU and national level. Time will tell if these measures are effective to make corporate laws more dynamic, opening the door to comprehensive criteria unification in the upcoming codification of this law.

Resolutions of the Directorate-General of Registries and Notaries Public and recent case law.

Resolution of the Directorate-General of Registries and Notaries Public of November 26, 2008.

The resolution that is hereby analysed rules an appeal brought before the General Office of Notaries and Registries (Dirección General de los Registros y del Notariado, hereinafter DGRN) regarding the refusal of the Land Registry of Archena to register a purchase option right.

The facts that originated the appeal begin with the submission of a public deed before the Land Registry in which a company recognises the existence of a 97,000 euro debt with another company as a result of commercial activities undertaken between both companies. The parties reached an agreement to satisfy the debt, stating that if the debtor failed to repay the debt within a specific deadline, the debtor would grant the creditor a purchase option right over a plot of land belonging to the debtor for the amount owed. Therefore, if the creditor exercised said right, the debt would be considered to be settled. Otherwise, the debtor would provide guarantees over said plot of land.

The Land Register, based on said facts, decided not to proceed to the registration because it considered that the content of the public deed infringed the banning of the binding agreement on guarantee rights which is in force in the Spanish legal system. This banning of the binding agreement is ruled by Spanish Civil Code articles 1.859 and 1.884. Article 1.859 states that “the creditor cannot appropriate nor use assets given as a pledge or mortgage. On the other hand, article 1.884 establishes that “the creditor does not acquire the ownership of an asset in case of non-payment of a debt within the agreed deadline. Any agreement to the contrary shall be considered null and void. Notwithstanding the above, the creditor will be entitled to claim for the payment of the debt or the sale of the asset in accordance with Civil Trial Act.”

The aforementioned articles of the Spanish Civil Code suffice, in themselves, to justify the Register’s refusal to perform the inscription. However, article 6.3 of the Spanish Civil Code, which governs the efficacy of legal provisions, shall also be considered. Said article explicitly forbids and describes as fully null and void all acts against imperative and prohibitive provisions, as occurs in this case, given that articles 1.859 and 1.884 have been violated.

In addition, the DGRN’s doctrine –consolidated in the resolutions delivered on May 5 1992, September 22 1992, and September 30 1998, among others- forbids the registration of a right of option that may be unilaterally transmitted and exercised by the owner of the right if the party who grants said right fails to satisfy the mortgage obligations issued by the grantor, having fixed a price that amounts to the sum of said mortgage obligations, to which the amount corresponding to the unpaid obligations shall be deducted.

The DGRN considers that the right of option granted as a guarantee violates the traditional banning of the binding agreement which, as mentioned earlier, is in force in the Spanish legal system.

Once the resolution of the Land Register was delivered, the appellant contested said resolution. The Land Register confirmed its ruling and sent the file to the DGRN, which dismissed the appeal and backed the ruling of the Land Registry of Archena. This decision was based on the direct connection between the option right and the debt, which clearly violated the binding agreement and, therefore, the imperative provisions of the Spanish Civil Code.

Resolution of the Directorate-General of Registries and Notaries Public of October 7, 2008.

This decision settles an appeal to the negative judgment delivered by Land Registry nº 7 of the city of San Sebastián regarding ownership proceedings concerning the registration of two storage rooms in a building subject to joint ownership.

According to the Registrar, ownership proceedings shall not be applied in the existing situation given that there is no possibility of registration because the building was registered as a whole; the spaces assigned to be storage rooms are deemed to be private elements, while remaining spaces are considered to be common elements.

The appellant disagrees with the Registrar's negative judgment because he believes that since the storage rooms are subject to horizontal ownership they can be considered to be registered, and horizontal ownership events are not an exception to registration through an ownership proceedings. Furthermore, he considers that all interested parties agreed on this point since all the owners created a Universal Board in the past to recognize and approve the right to decide on these issues, although it was finally rejected due to other reasons.

The file was then submitted to the General Office of Notaries and Registries, which dismissed the appeal and confirmed the Registrar's ruling on the following grounds: section 199 of the Mortgage Act allows the initial registration of buildings through ownership proceedings. Notwithstanding the above, when the building is subject to joint ownership, it cannot be stated that some parts of said building are not registered because the entire building shall be considered as a whole (i.e. on an individual basis) and may belong to different owners. Thus we are talking about private elements that belong to different owners in accordance with their corresponding quotas, which means that the different parts of the building may not be considered to be "not registered".

For this reason, it can be concluded that ownership proceedings cannot be applied in the current situation given that the legal instrument for the creation of a joint ownership, which may consider a building's constitutive elements on an individual basis, is the Public Deed of Horizontal Division and, exceptionally, an arbitrator´s ruling or a legal action that rectifies the registration in accordance with Section 40, letter d), of the Mortgage Act.

Sentence of the Supreme's Court Third Chamber for Contentious-Administrative proceedings of January 28, 2009.

The sentence that is hereby analysed settles an appeal before the Supreme Court in the interest of law that was submitted by the City Hall of Málaga against a ruling delivered by the Chamber of the Superior Court of Justice of Andalusia ("Sala del Tribunal Superior de Justicia de Andalucía", hereinafter TSJA). The appealed sentence concerns the possibility to obtain an urban development license through positive administrative silence, even if said licence is contrary to regional or urban planning provisions and if the silence is positive.

Everything started with the submission of an urban development license application on March 4 2002. This application was dismissed on December 11 2002, i.e. nine months after it was submitted.

TSJA´s sentence establishes that said license can be granted provided that article 43.2 of Act 30/1992 regarding the Legal Regime of Public Administrations and Common Administrative Procedure ("Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y Procedimiento Administrativo Común") and the amendments introduced by Act 4/1999 ("Stakeholders may consider their applications approved by administrative silence in all cases unless a provision of law or European Community ruling provides to the contrary") are complied with. In addition, article 42.1 of the same act states that the deadline to solve these issues shall be no longer than six months since the date of application. Once this deadline expires, as is clearly the case in this specific scenario, it shall be understood that the silence is positive.

In addition, article 43.4 establishes that only the Administration is allowed to confirm a positive administrative silence and that in those cases in which deadlines are exceeded and the administrated party has obtained an authorization or any other right, then the Administration, if it is aware of its mistake, shall follow the review procedures provided in the Law without having the possibility to deliver an explicit resolution that is contrary to the administrative silence.

The problem arises because the general provision of Article 43 of Act 30/1992 comes into conflict with article 242.6 of the previous Land Act ("Ley del Suelo") (applicable in this specific case) since both articles state that it shall in no case be understood that the powers against law provisions or urban planning provisions are obtained via administrative silence. They also conclude that the applications that are not resolved by the City Halls within the legal deadlines shall be considered to be accepted unless their content clearly violates urban planning provisions, in which case the applications will be rejected.

Subsequently, on September 10 2007 an appeal in the interest of law was submitted before the Third Chamber of the Supreme Court, This appeal was based on the fact that it is not possible to obtain licences contrary to urban planning provisions via positive silence if these licences, as is the case in the current scenario, violate the provisions of article 242.6 of the Revised Land and Urban Development 1/1992 Act, and the consolidated jurisprudence that interprets said act.

The Supreme Court admitted the appeal, because although it is true that the Chamber's doctrine has established that licences against urban planning provisions cannot be acquired via administrative silence, it is nevertheless true that the criterion of the Chamber of the Supreme Court of Andalusia is based on amendments to article 43.2 of Act 30/1992. Thus, it believes that said jurisprudence should be ignored because it is based on regulatory provisions that have disappeared as a result of the amendment.

The Supreme Court finally ruled in favour of the City Hall of Malaga, thereby suspending the appealed sentence. Its decision was based, primarily, on the fact that the new Land Act 8/2007 fully incorporated the content of article 242.6 of the previous act in article 8.1 b) of the new act. Thus, the law clearly establishes that licences that are contrary to legislation or urban planning provisions shall in no case be understood as granted via administrative silence.

FOR FURTHER INFORMATION

Ramón Castilla
Partner
Hammonds LLP
T: +34 91 426 48 40
Email: ramon.castilla@hammonds.com