
Spanish Real Estate Legal Update

Review

Nº 8 – September 2009

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Hammonds Spain has won the Real Estate Law Firm of the year award.

Hammonds has been awarded as "Real Estate Law Firm of the Year" in Spain by the legal publication ACQ Finance, in the second edition of its prizes "Country Law Awards".

The selection process of the winners is driven by a totally independent survey among sector experts and members of the publication that vote about the leaders firms in the different areas of expertise that have advised in deals published in the magazine during the last 12 months.

We really thank you all our clients for their rely on our Law Firm, which have contributed to make Hammonds as one of the Law Firms leaders in advising for the financing, promotion, construction, management, commercialization and acquisition and sale of all kinds of real estate assets, from commercial projects to offices, hotels and logistic parks.

Measures for the promotion of leasing and energetic efficiency of buildings.

The “Plan E” launched by the Spanish Government to stimulate the economy and employment includes a series of economic, social and tax measures aimed at providing liquidity and stability in the highly complex scenario of the world economies.

One of the latest actions adopted in the real estate sector has been a proposal adopted by the Spanish Government to promote property leasing and the energetic efficiency of buildings. Although there is currently a Draft Act pending to be approved by the Senate, it is expected that approval will be ultimately obtained in order to give a strong boost to the Spanish leasing market.

Broadly speaking, we can conclude that the First Draft Act aims to provide flexibility and efficiency to the legal proceedings of eviction and unpaid rents derived from leasing to protect lessors from abuse and unjustified delays. Likewise, the amendments will allow owner communities to adopt agreements for the execution of works and installation of equipment or systems that enhance energetic or hydric efficiency in buildings more easily.

The Draft Act will involve the amendment of three acts: the Leasing Act, the Horizontal Property Act and the Civil Proceedings Act.

In the case of the Leasing Act the circumstances in which the mandatory extension of the lease agreement is not applicable have increased. Nowadays, the owner of the property may only terminate the lease agreement in case he needs to occupy the property for his own use. The Draft Act extends this right to his relatives in the first degree of consanguinity (parents or sons) or the spouse in divorce and marriage annulment but only in case the lessor establishes this possibility in the agreement.

If three months after the termination of the agreement, the lessor or his relatives have not occupied the property, they will have to extend the lessee’s agreement for the use and enjoyment of the dwelling by an additional period of up to five years and the lessee, in turn, shall be entitled to receive as a compensation the expenses incurred in as a result of the eviction of the property until the reoccupation.

The amendment of the Horizontal Property Act will soften the majorities required in the voting processes held in the community of owners to carry out the execution of works in order to improve the energetic efficiency of buildings. With said amendment it will be possible to avoid the scenario whereby one owner’s opinion blocks that of the remaining community of owners. At present, unanimity is required to modify the rules contained in the deed or title establishing the horizontal property or in the bylaws of the community, whereas a majority of three fifths is required for those proceedings that involve the establishment of common services of general interest, and, lastly, the majority rule applies to adopt all remaining agreements.

The amendment of the Act facilitates the adoption of agreements on actions aimed at improving the energetic efficiency of buildings,

Try to provide flexibility and efficiency to the legal proceedings of eviction

The circumstances in which the mandatory extension of the lease agreement is not applicable have increased

suppressing the unanimity rule for these facilities, regardless of whether they are considered to be common services of general interest or whether they entail the modification of the incorporation title or of the bylaws. If the equipment or systems are susceptible of individual use, the favourable vote of one third of the owners will be sufficient for the approval of said agreements, in which case the cost will be assumed only by those owners who have voted in favour of the agreement and who will thus benefit from the improvement.

The amendment also facilitates rehabilitation works done in residential buildings to improve energetic efficiency and will therefore contribute to the effectiveness of the Renewal Plan (the so-called Plan Renove) for properties.

The third Act that will be modified by this Draft Act is the Civil Proceedings Act. The goal of this amendment is to speed up eviction and claim proceedings for unpaid rents, two areas in which legal proceedings are usually very slow and onerous for the parties.

The reform planned by the Government provides that claims for unpaid rents, which, until now, have been decided in ordinary trials, will be decided instead in verbal trials, which are faster and easier than the previous ones. Likewise, a series of measures are adopted in terms of callings, locations and notifications, and claims for eviction and rents will be resolved via the monitory procedure. Other important amendments aimed at speeding up the proceedings are that the condemnatory sentence of eviction will be, in itself, a title of direct execution of eviction, which means that it will not be necessary to start a new process or a later proceeding, and that the sentence condemning the payment of unpaid rents will also include the rents that have remained unpaid after the lessor filed the lawsuit (so far, if new unpaid rents were accumulated since the time the lawsuit was filed, the lessor was forced to return to court)

In addition, the term for the lessor to give notice of a summons to the lessee for unpaid rents and the filing of the lawsuit is reduced from two months to one month. The lessee can avoid the process by paying the delayed rents during this period of time.

This new draft, together with the expected future modification of the mortgage market tittles regime, will hopefully increase the stock of properties in leasing regime and reinforce the legal safeguards for the parties in lease agreements.

Alejandra Fernández de la Cigoña

Royal Decree Law 9/2009, June 26, on bank restructuring and strengthening of credit entities' resources.

Now that almost two years have passed by since we started to suffer the effects of the international financial and economic crisis, Spain is undergoing a period of recession and lack of confidence, which result in tighter market financing conditions, which have led, in turn, to a restriction in access to market financing and liquidity, in addition to a deterioration in real estate assets.

Actions aimed at
improving the energetic
efficiency of buildings,
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rule for these facilities

In order to strengthen the solvency and operation of those credit institutions that could be undergoing difficulties, the Spanish Government approved Royal Decree 9 / 2009 (hereinafter, "RDL") on June 26 2009, on bank restructuring and strengthening of credit institutions whose main purpose is to increase the strength and solvency of the Spanish banking system.

The bank restructuring model is based on the Deposit Guarantee Funds of Credit Institutions and the establishment of a new fund: "Banking Ordinance Restructuring Fund" (hereinafter, "FROB").

Three approaches can be distinguished in the restructuring of credit institutions: in the first one, credit institutions look for their own private solutions, in a process not regulated in the RDL. The second approach would be applied if a solution is not found in the first approach, taking steps to solve weaknesses that may affect the viability of credit entities with the participation of sectoral Deposit Guarantee Funds. This type of solution is also private, but is orderly and regulated.

More specifically, this case is actually designed for situations when the economic and financial weakness of an entity could jeopardize its viability and determine the advisability of undertaking a restructuring process. In this event, a viability plan must be submitted to overcome the situation, at the initiative of the entity or automatically by the Bank of Spain, and within a one month period. The Plan may be aimed at one of three actions: to facilitate a merger or takeover by another entity, help the transfer of all or part of the business or other units to other credit entities or strengthen the equity and solvency of the entity. This plan can be supported financially by the Guarantee Fund and Credit Institutions and by the FROB.

The third and final phase of restructuring will focus on the intervention of the FROB, provided that this position of weakness does not disappear and that a number of actual cases occur, for example, the fact that an entity is not able to comply with the viability plan, that it does not submit said plan, that the Bank of Spain renders the plan not viable, or, lastly, that it is not accepted by the Deposit Guarantee Fund called for its intervention.

At this point, managers of the affected bank would be replaced, the FROB thus being appointed administrator. As such, FROB must prepare a status report and submit a restructuring plan aimed at the merger of the entity or the full or partial transfer of business through global or partial assignment of assets and liabilities through a procedure that allows competition to the Bank of Spain for approval.

In turn, the viability plan may include measures of financial support, such as the granting of guarantees and loans in favourable conditions and management measures aimed at improving the entity's organization and internal control.

Meanwhile, when the FROB buys shares or participatory quotes, it will require an agreement on the abolition of the pre-emptive rights of existing shareholders or participatory quotes. Likewise, when the FROB acquires participatory quotes from a savings bank, it will enjoy a right of proportional representation in the General Assembly equivalent to the percentage that those quotes represent in the net equity of the issuing savings bank.

Try to strengthen the solvency of the Spanish Credit Institutions

The restructuring process of the crédito institutions will be organized in three phases

Regarding the second major objective of the measures taken, i.e., the strengthening by the FROB of credit institution equity, FROB is expected to support integration processes between credit entities aimed at improving their mid-term efficiency. Such processes may include, among others, the so-called "*institutional protection systems*", the objectives of which are similar to those generated in a merger process in terms of how they operate, how policies and strategies of participating entities are developed and implemented, as well as how internal controls and risk management are established and exercised.

Likewise, to this end, it is expected that the FROB may acquire preferential shares convertible into shares, participatory quotes or contributions to the share capital issued by resident credit institutions in Spain, and involved in an integration process. For this purpose, the credit institutions concerned would prepare an integration plan that sets integration processes in order to improve efficiency, management, and possible resizing.

In turn, issuing entities have to commit to repurchase those titles as quickly as possible in the terms included in the integration plan. Five years after disbursement and if no preferential shares have been repurchased by the entity, the FROB could request conversion into shares, participatory quotes or contributions of the issuer.

The divestiture by the FROB will be conducted through repurchase by the issuer entity or transfer to third parties. If the second option is implemented, it must be undertaken through procedures ensuring competition and not exceeding five years from the date of completion of the integration plan, unless the integration plan cannot be implemented as a result of the evolution of the financial and economic situation.

In relation to potential insolvency situations where credit institutions might be involved, the duty to request bankruptcy declarations to the entities which have submitted any of the plans under the RDL, shall not be required. In case when the Bank of Spain has temporarily replaced bank management, the legitimacy to request bankruptcy proceedings shall correspond solely to FROB, if applicable.

Finally, it is important to mention that all measures in the RDL will have a temporary nature that will depend on the evolution of the financial crisis.

Borja Echevoyen

Draft of Law modifying Law 7/1996 of January 15, on Retail Trade Management.

The Spanish Government approved a Draft Act on July 10 to reform Act 7/1996 dated January 15, on Retail Trade Management, in order to adapt said law to the requirements resulting from Bolkestein Directive 123/2006 EC.

The aim of this reform is to facilitate free establishment of trade distribution services and their exercise by different traders, as well as ensuring free competition among them.

The free establishment of trade distribution will be restricted in case of public interest

For this purpose, and as a general rule, an authorization shall not be required for the establishment of large commercial facilities. In this regard, the definition of large commercial facilities as those with an area exceeding 2,500 m² is eliminated. However, in case of public interest, competent authorities shall be able to set up a system for administrative approval of the establishment of large commercial facilities.

Due to the abovementioned, a door has been left open regarding the restriction of the establishment of said facilities by the Spanish Autonomous Communities (hereinafter the "CCAA") or any other competent authority, thus allowing them to establish additional requirements for authorizing said installations.

Although the Act establishes the criteria to be followed, said criteria are stated in general terms. Thus, it can be said that the Act considers nature conservation, urban environment, territorial regulation, and Historic and Artistic Heritage conservation as general interest. This fact has been criticized by the National Competition Commission ("Comisión Nacional de la Competencia"). Similarly, the lack of clarity and the general provisions, together with the fact that a general restriction to free rendering of services and free establishment could arise from said "general interest" provisions, have been criticised.

This system could favour shopping centres already having a commercial establishment, to the detriment of potentially new shopping centres intending to set up in the same area. In such cases, the interests of consumers may be harmed due to the fact that they will have less choice of shops and therefore a competition restriction.

However, with the new regulation no economic requirements are envisaged. In this regard, proving the existence of an economic need or market demand or establishing that the activity is consistent with economic planning objectives set by the community responsible for granting the authorization, will not be allowed. The criteria provided for granting an authorization must be clear, predictable, transparent and public prior to granting.

Regarding proceeding regulation, it shall be submitted to the CCAA determining what competent autonomic or local authority shall authorise applications.

Authorizations shall be granted for an indefinite period of time and will refer to conditions of physical establishment; new authorizations cannot be demanded by a change of ownership or company succession once the impact of the establishment has been verified, as is currently the case with licensing regulations for commercial establishments in some CCAA. However, transmission shall be communicated to the grantor administration solely for informative purposes.

On the other hand, in relation to automatic sales, prior authorization shall not be currently needed.

Likewise, the regulation for entries in the Register of Distance Selling and the Register of Franchisors that exist in the Ministry of Industry, Tourism and Trade, is simplified and updated. In turn, the Special Register for Entities and Distribution Centres for Perishable Food Products is suppressed.

In terms of infringements and penalties, which are under the competence of CCAAs, a system that tries to adjust the quantity of penalties to the economic reality of the moment in which the infraction is committed is adopted. This system takes into account the capability or financial

No economic requirements are envisaged

Penalties shall be graduated according to the volume of sales involved

solvency of the company and also the impact the infringement committed had on the commercial distribution sector.

Thus, the draft Act states that penalties shall be graduated according to the volume of sales involved, the beneficiary amount obtained, the degree of intent, period of time in which the offense has been committed, as well as the relapse and capacity or economic solvency of the company.

As a result of the new Trade Act, Communities such as Andalusia, Canary Islands, Balearic Islands, Aragón, Extremadura, Asturias, Castile-La Mancha, Castile-León and Catalonia are already preparing their reforms in this matter. To this effect, we may advance that the draft under preparation by the Government of Catalonia aims to define the location of large commercial projects in a strategic way, thus reducing the mobility and pollution inherent to certain types of establishments.

While the European Court of Justice sanctioned Spain in 2007 because of the Catalanian trading rules and a sentence against the legislation applicable in Andalusia is yet to be resolved, the new draft Act transposes the European Services Directive inadequately, which means Spain will quite likely be sanctioned again as a consequence of this new Act.

This foreseeable sanction to Spain could be passed by the Spanish Government to the CCAAs based on the Additional Provisions of the draft Act, which states that Public Administrations not complying with the new Trade Act or Community law, which may lead Spain to be sanctioned by the European institutions, will assume the attributable part that will result from said liability. The amount of said sanctions may be compensated with the financial transfers to be received by the CCAAs from the Spanish Central Government.

This foreseeable sanction to Spain could be passed by the Spanish Government to the CCAAs

Sandra Paoletti

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

Court Resolution of the Balearic Islands' Court, March 31, 2009.

This resolution aims to study the termination of a dwelling lease contract after the death of the usufructuary lessor. The events that prompted the lawsuit began when the owner of the house filed lawsuit against the lessee, requesting that the lease contract be terminated following the termination of the usufruct of the lessor, which occurred as a consequence of the death of the lessor.

The first instance resolution established the termination of the lease agreement, condemning the lessee to leave the dwelling free and unhindered and available for its legitimate owner as established under article 13.2 of the Urban Lease Act of 1994 (hereinafter the "LAU"). Since it was an agreement executed by the usufructuary, said agreement was terminated, regardless of its duration, with the extinction of the lessor's right.

On appeal, the lessee claimed that after the death of the usufructuary lessor, on April 3 2003, there was a new verbal agreement because the lessee was not given formal notice to terminate the agreement until April 20 2007, thus ending the forced extension of 5 years on April 2 2007 and,

since it was not terminated with a notice period of thirty days, the new agreement entered into the tacit extension for three years under article 10 of the LAU, which means it was in force at the moment the lawsuit was filed.

The appeal, dismissed altogether as unfounded, based its main arguments on two considerations. The first one states that article 13.2 of the LAU is clearly and fully applicable to this scenario since the lease agreement was terminated on the date of death of the usufructuary lessor because the usufruct ended with the death of the usufructuary (Art . 513.1 of the Civil Code). Likewise, it must also be pointed out that since the date of death of the usufructuary lessor, the owner has been requesting the lessee to leave the dwelling, rejecting the payment of the rent, which proves that a verbal agreement was not celebrated, and therefore that the minimum mandatory extension of 5 years provided in article 9.1 of the LAU cannot be applied, just as the subsequent three year term stated in article 10 cannot apply.

Secondly, the resolution examines the concept of renewal, not just the so-called self-renewal or extinctive renewal, which results in the termination of the existing obligation through the establishment of a new obligation that replaces the prior one, but also the amending or non self-renewal, which arises from the modification of the benefit payable in terms of content, time, place and conditions. This figure has been analysed several times by Case Law; as an example, we shall refer to the Supreme Court Decision of February 24 1984 regarding the requirements for renewal. These requirements are as follows: (i) the existence of a pre-existing obligation that is modified or terminated, (ii) the creation of an obligation, when it is a self-renewal, (iii) disparity between two successive obligations, (iv) the capacity of the parties for the act; and (v) the willingness to carry out the termination of the original obligation and its replacement with another obligation, i.e. the *animus novandi*.

The Supreme Court states that renewal shall never be presumed and must be expressly established for and that the terms of the act shall clearly establish the willingness to carry out the termination of the original obligation.

When applying the abovementioned to this case, the automatic termination of the contract seems absolutely clear, as there is no evidence of an *animus novandi* or of a new verbal agreement.

Jaime de la Lastra

General Directorate for Registries and Notary Services–Resolution May 25, 2009.

This resolution discusses whether or not it is necessary to get the segregation license as a result of the non registration of a segregation and new building declaration public deed.

Through a Public Deed, a total of 107 plots were segregated and construction work for 107 houses was declared. The following certificates issued by the competent authorities were attached to the public deed: certificate issued on January 31, 2007 by the mayor of the city council where the plots are located stating that the division of the segregated plots

The renewal shall never be presumed and must be expressly established

cannot be considered as a planning division or unit because the creation of a centre of population is not envisaged as a result of the above, and therefore a segregation license was granted, and a certificate dated February 18, 2008, whereby the secretary of the city council certifies the granting of the Segregation License.

The Land Register considered that the division was not possible without the prior approval of the planning and the urban development program and that the abovementioned certificates did not transcribe the agreement reached. Furthermore, it stated that the division or segregation of rustic land is not allowed by law.

The applicable legislation, i.e. the Act for the Management of the Territory and the Planning and Urban Development of Castilla La Mancha ("*Ley de ordenación del Territorio y de la Actividad urbanística de Castilla La Mancha*"), does not allow the division into plots if the area is considered to be rustic. In this regard, it must be pointed out that the appellant did not deny that the land was rustic, as the Register stated, but declared instead that it does not constitute a new population centre, reason why he believed that no segregation license was required.

According to Royal Decree 1093/1997 of July 4, which approves additional rules to the regulation executing the Mortgage Act, in case of division or segregation of plots located in areas protected from urban development, when as a consequence of said divisions the resulting plots are below the minimum approved harvesting unit, or when, although larger, there are doubts as to the possibility of establishment of a population centre, then the Registrars shall act in accordance with the provisions of this legislation.

In this regard, the Registrars shall send a copy of the title or titles submitted to the City Council together with a written request for the adoption of the agreement. The submission of the aforementioned documentation shall be kept outside the registration provisions, which will be extended up to a limit of one hundred and eighty days from the date of said filing. Should the City Council inform the Registrar that the existence of an illegal urban division does not arise from the documents filed, then the Registrar will proceed with the registration of the requested transactions, without prejudice to the provisions of Article 80 of the abovementioned provisions (regarding the minimum approved harvesting units). Notwithstanding the above, if the City Council sends the Registrar a certificate stating that an urban centre or a potentially illegal subdivision could arise from the filed documents, then the Registrar will reject the registration of the requested transactions and the resolution from the city council will also be transcribed at the margin of the plot records at the Public Registry.

In case a term of four months elapses since the date the transcription was introduced in the registration title, if no document stating that an urban centre or a potentially illegal subdivision can arise is submitted to the Registry, then the Registrar will proceed with the registration of the requested transactions.

The General Directorate considered that given the nullity of the plotting made in rural land as stated in the applicable legislation of Castilla La Mancha and the fact that a population centre could result as a consequence of the segregation of the 107 plots and the declaration of new works, the Land Registrar's opposition to the registration of the abovementioned segregations complied with the law.

Alejandra Fernandez de la Cigoña

Supreme Court Resolution of October 22 2008

This resolution analyses the majority required to authorize the installation of an air conditioning unit on the roof and facade of a building.

The plaintiff requested the court to declare, firstly, that the agreement of September 20 2001 adopted by the Community of Owners does not legitimize, authorize or legalize the installation of air conditioning units and other elements in the roof of the building, and, secondly, that in those cases in which it may be understood that the Community of Owners expressly authorized said installation in accordance with the aforementioned agreement, said agreement shall be considered void or voidable in the event of a filing of a claim.

The first instance resolution upheld the claim, ordering the defendants to accept the declaration of nullity of the agreement of the Community of Owners and to remove the air conditioning units and their connections to the roof of the building, thus leaving it as it was, at their own cost, expressly imposing the costs of said proceedings to the defendants. The defendants appealed to the "Audiencia Provincial de Mallorca", which overturned the convictions in all respects.

Once the case was presented before the Supreme Court, the issue was settled on appeal in order to determine whether or not unanimity is legally required in the agreement adopted by the Community of Owners for the installation by the owners of one apartment of an air conditioning unit on the roof and facade of the building.

In this regard, the appellant considered that the Community of Owners is governed by its By-Laws, its Internal Regime Regulation and the provisions of the Horizontal Division Act ("LPH"). It must be pointed out that article 6 of the LPH provides that "to regulate the details of the coexistence and the appropriate use of services and common areas, and within the limits established by the Act and the By Laws, all owners may set internal rules, which shall be in force and shall be respected unless they are amended according to the provisions agreed for the approval of management agreements.

Furthermore, the appellant considers that articles 13 and 16 c) of the By-laws of the Community of Owners include some provisions that limit and restrict the exercise of the rights and powers of the owners on common elements such as the following forbidden activities: a) the prohibition to use the roof for any use other than a clothesline and recreation area; b) prohibition to occupy any kind common areas with objects; c) the prohibition to implement changes that affect common areas, load-bearing

Works carried out in
common areas require the
unanimous agreement of
the community

walls, façade; and d) the prohibition to place objects other than flowerpots or ornaments on the balconies, windows or terraces.

Article 7 of the LPH limits the powers of the owner, who, although entitled to use its own property as he considers fit, does not have the capacity to modify any other part or area of the building.

Therefore, with respect to air conditioning units, both doctrine and jurisprudence argue that the placement of equipment without drilling works is not to be considered as a modification of the common elements. On the other hand, when drilling is indeed required, the use and enjoyment of technical advances in all buildings not prepared for this purpose is forbidden.

However, it shall not be understood from the provisions of the previous paragraph that the owner can perform works on the roofs, facades or other common areas that can be detrimental or disturbing for the other owners, something which is fully and clearly prohibited.

Since in this case we are dealing with works that are to be carried out in common areas, something which is prohibited by the By-laws, the unanimous agreement of the community of owners is thus required.

Jaime de la Lastra

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