SQUIRE SANDERS

Spanish Corporate-Real Estate Legal Update

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Measures to reinforce protection for mortgage debtors

On 15 May, took effect Act 1/2013 of 14 May on measures to reinforce the protection of mortgage debtors, debt restructuring and social rental housing (the "Act"), which was published that same day in the Official Gazette of the Spanish State.

As we have been able to following during its high-profile legislative process, the Act has ultimately failed to include the proposals of the popular initiative that sought to regulate dation in payment and the suspension of evictions, as well as the amendments presented by the various parliamentary opposition groups.

As established in the preamble itself of the Act, its approval responds to the need to reinforce the scope of protection for the numerous debtors who, as a result of the current economic and financial crisis affecting our country, are experiencing difficulties in meeting the obligations assumed in the mortgages subscribed for the acquisition of their primary residences.

We will have to wait a few months to verify whether the measures adopted are the ones actually required at present or, to the contrary, other measures will need to supplement the Act and take it a step further, in order to mitigate the serious effects that the crisis is having on our society.

Among the main novelties introduced by the Act, structured into four chapters, the following are worthy of emphasis:

In the first place, Chapter I approves a 2-year suspension for the eviction of families at a special risk of exclusion, limited to those cases in which the primary residence of the debtor has been awarded to the creditor, or to the person acting on behalf thereof, along with a series of financial circumstances that must take place.

Nevertheless, pursuant to the requirements envisaged in the Act itself, everything appears to indicate that the suspension of the evictions on these grounds could be limited in scope.

Chapter II of the Act introduces a series of improvements in the mortgage market, by means of the amendment, among others, of the Mortgage Act and the Mortgage Market Regulation, among which we emphasize the following:

a) The deed for establishment of a mortgage on a dwelling should indicate the nature, primary or otherwise, sought

to be given to the dwelling being mortgaged.

b) Any default interest on the loans or credits for the acquisition of the primary residence secured by the mortgage may not be greater than three times the legal monetary interest rate, and may solely accrue on the principal pending of payment. The capitalization of default interest is likewise prohibited.

c) The system for the extrajudicial sale of mortgaged assets is reinforced envisaging, among others, that the value of the dwelling serving as the rate in the auction may not be less than 75% of the appraised value that served for the granting of the loan; that the sale will take place in one sole electronic auction or that the Notary may perform an ex officio evaluation of the existence of abusive clauses, informing the parties to this respect, and likewise being entitled to suspend the extrajudicial sale when either of the parties accredits having brought the abusive nature of such contractual clauses before the competent judge.

d) The independence of appraisal companies before credit entities is likewise reinforced.

e) The protection of the mortgaged debtor is strengthened in the marketing of those mortgages subscribed with individual lenders, and in which the mortgage is on a dwelling or used to acquire or preserve property rights to land or buildings constructed or to be constructed. Specifically, if such loans include restrictions to the variability of the interest rate, of the rate of ceiling or floor clauses, require the contracting of interest rate hedging instruments or are granted in one or several currencies, it will be necessary for the public deed to include, together with the signature of the borrower, a handwritten indication in which he states that he has been appropriately warned of the risks thereof.

Chapter III of the Act introduces a series of improvements in the procedure for mortgage foreclosure, by means of the amendment of the Spanish Civil Procedure Act, among which we emphasize the following:

a) Judges are authorized to perform an ex officio evaluation of the existence of abusive clauses in the enforceable title.

b) In the event of the foreclosure of the primary residence, the amount of the procedural costs for which the debtor is responsible is reduced to 5% of the quantity claimed in the action for foreclosure.

c) The possibility of cancelling part of the remaining debt is established if any is pending of payment following the foreclosure of the mortgage and award of the primary residence, providing that certain payment obligations are fulfilled. Specifically, if the judgment debtor is capable of paying either 65% of the remaining debt in 5 years or 80% in 10 years, increased exclusively by the legal monetary interest, he will be released from the rest of the debt.

d) In the event of an auction without any bidder, it is established that the creditor may request the award of the non-primary residence of the debtor for 50% of the opening value of the auction or of the quantity owed for all concepts. If it is the primary residence of the debtor, the Act increases such percentage to 70% of the opening auction value or, if the quantity owed is less than such percentage, sets it at 60%.

e) It is established that the entirety of the debt may only be claimed if there has been a breach in the payment of three monthly installments or a number of installments that entails a breach of a period equivalent to three months, and providing that this has been so recorded in the deed.

f) A series of measures are introduced to facilitate the access of bidders to

auctions, lowering the requirements for bidding, such as the reduction of the bond necessary for bidding, from 20% to 5% of the appraisal value, or doubling the period of time for the winning bidder to pay the price of the award.

Chapter IV establishes a series of amendments to Royal Decree-Act 6/2012, 9 March, on urgent measures for the protection of mortgage debtors without resources, broadening its scope of operation to mortgage guarantors with respect to their primary residences, and introducing other amendments relative to the characteristics of the measures that may be adopted, while maintaining the freedom of adherence to the Code of Good Practices by financial entities.

Lastly, it should be mention that the Act is completed with a series of additional as well as transitional provisions relative to procedures underway and mortgages established prior to its entry into force. Among the additional provisions, worthy of emphasis is the authorization for the Government to promote, along with the financial sector, the establishment of a Social Housing Fund property of credit entities, aimed at offering coverage to those persons who have been evicted from their primary residence for failure to pay the mortgage.

Alfonso López

Amendment of the Urban Leasing Act

On 5 June the Official Gazette of the Spanish State (BOE) published Act 4/2013, 4 June, on measures for increased flexibility and promotion of the rental housing market. The main objective of this Act is to achieve greater flexibility of the rental market, reinforcing freedom of contract and giving priority to the will of the parties, reducing the tacit renewal of the validity of the lease agreement and its extension, recovery of the property by the lessor in certain cases and allowing the lessee the ability to withdraw from the agreement at any time, after a minimum period of at least six months.

Among the main provisions that modify the Urban Leasing Act (LAU) applicable to rental housing agreements, the following are worthy of mention.

The drafting of the new Article 4 LAU establishes that the agreement will be governed by the pacts, clauses and conditions determined by the will of the parties. The LAU and Spanish Civil Code will be applied supplementarily.

With regard to the duration of the leasing agreement, the period of tacit renewal is reduced to a maximum period of 3 years instead of the 5 that was in force previously. The tacit renewal will not be applicable if the lessor, first degree relatives or spouse in the event of separation or divorce, need the property for use as a permanent dwelling and notifies this at least 2 months prior to the date on which it is going to be needed.

The drafting of the new article 11 LAU allows the lessee to cancel the agreement following a minimum period of 6 months, for which an advanced notice of 1 month will be enough. The parties may agree upon the compensation to be applied in the event of unilateral early termination by the lessee.

If the lessor loses his right as a result of a conventional right of first refusal, the opening of a trustee substitution, the compulsory transfer deriving from a mortgage foreclosure or legal ruling, or the exercise of a purchase option, the lease will be automatically terminated, unless such agreement is entered in the Land Registry, in which case it will remain valid for the duration stipulated. The automatic termination of the lease is likewise permitted if the property is transferred to a third party and the lease agreement has not been previously entered in the Land Registry.

With regard to the rent for the lease agreements, the amendment of the LAU establishes that it is permitted that the *lessee cover the expense of the fitting out of the dwelling in exchange for a rental period. It likewise allows that the rent be updated yearly by the amount that has been agreed upon by the parties. In the absence of an agreement, it will be updated by application of the Consumer Price Index. If renovation works

are performed to the dwelling, the rent may be updated upon the conclusion of a term of 3 years. The new Article 25 LAU establishes that the parties may resolve to waive the right of first refusal by the lessee, which will be applicable at any time for the duration of the agreement and not following the tacit renewal, as set forth in the repealed version thereof.

In its new version of Article 27.4, the amendment of the LAU also establishes the possibility of terminating lease agreements in cases in which the lack of payment by the lessee refers to agreements entered in the Land Registry. In this case, the termination will take place with full rights once the lessor has sent a legal or notarial summons to the lessee, petitioning for the payment or fulfillment thereof and the latter does not respond to the summons within the next 10 business days, or responds by accepting the termination, all of which by means of the judge or notary that sent the summons. The supporting document furnished to the proceeding and the copy of the deed of summons, with or without a response accepting the termination, will suffice for the cancellation of the lease in the registry.

Finally, we should emphasize that Act 4/2013 also includes given changes to the Spanish Civil Procedure Code in order to expedite eviction processes. To this regard, the eviction is linked to the lack of opposition of the defendant, so that if the latter fails to address the payment notice or appear to challenge or settle, a decree will be pronounced deeming the trial as having ended and ordering the eviction. Lastly, and for the protection of lessors, a registry of final rulings for the nonpayment of rent is created, to which all property owners that wish to execute leasing agreements for these will have access. The persons entered in such registry may seek the cancellation of the entry once they have paid the debt to which they were convicted. Entries will be cancelled automatically once the maximum period of 6 years has elapsed.

The new provisions of the LAU will be applicable for any new lease agreements executed as of 6 June 2013. The new provisions of the Spanish Civil Procedure Code will not be applicable for those processes that were already underway on 6 June 2013.

Certificate of Energy Efficiency

Royal Decree 235/2013, of 5 April, was published in the BOE [Official State Gazette] on Saturday, 13 April 2013, thereby approving the basic procedure for certifying the energy efficiency of buildings.

This Royal Decree, following the requisites of recent EC directives (Directive 2010/31/EU) regarding the energy efficiency of buildings, sets forth the obligation to make an energy efficiency certificate available to buyers or users of buildings, which must include objective information about the energy efficiency of a building. To learn what the minimum energy efficiency requirements of buildings or building units are, the Technical Building Code must be used.

The Certificate of Energy Efficiency is a report that contains information about the energy characteristics and energy rating of a building or a part of the same. Once obtained, it must be submitted by the builder or owner of the building to the competent body of the Autonomous Community regarding certification on energy performance of buildings for the recording thereof in the corresponding territorial registry. After recording, the owner of the building must keep the certificate for its maximum validity of ten years, at which time it must be renewed, unless previous variations had occurred to aspects that might affect the previously issued certificate.

Certificates of energy efficiency must be at the disposal of competent authorities, either included in the Building Book, if it were mandatory to keep one, or in the possession of the owner of the building or of a part of the same or in the possession of the president of the property owners association.

Obtaining the certificate of energy efficiency confers the right to use the so-called energy efficiency label during its period of validity. This label should be included in all offers, promotions and advertising used for the sale or lease of a building or units of the same.

All buildings or units of buildings that are privately owned and that are regularly frequented by the public, with a surface area that is equal to or greater than 500 m2, must display the energy efficiency label in a prominent location that is fully visible to the public. Buildings that are occupied by public authorities and that are regularly frequented by the public, with a total surface area exceeding 250 m2 must also display said label in a visible and prominent location. For all other cases, displaying the energy efficiency label will be voluntary and according to the provisions approved by the autonomous communities for such purpose.

The following buildings are not bound to obtain the energy efficiency certificate: i) Officially protected buildings and monuments due to being a part of a designated environment or due to their particular architectural or historical merit; ii) Buildings used exclusively as places of worship or for religious activities; iii) Temporary buildings with a time of use of two years or less; iv) Industrial, defence and agricultural buildings; v) Buildings whose surface area is less than 50 m2; and vi) Buildings that are purchased for major reforms or demolition and residential buildings or parts of existing residential buildings whose intended use is less than four months of the year and with an expected energy consumption of less than 25% of what would be the result of all-year use, as long as a statement to such effect is made by the owner.

The certificate of energy efficiency must include at least the following information: i) The identification of the building that is being certified; ii) An indication of the procedure used to obtain the energy efficiency rating; iii) An indication of the applicable regulations on energy savings and efficiency at the time of construction; iv) A description of the energy characteristics of the building; v) The energy efficiency rating, expressed by the corresponding label; vi) For existing buildings, recommendations for improvement of the optimum or cost-effective levels, if necessary; vii) A brief description of the tests conducted for the energy rating; and viii) Compliance with the environmental requisites required of technical installations.

The Royal Decree sets forth that a breach of the precepts of the Basic Procedure included in the same will be considered, in any event, a violation regarding certification of the energy efficiency of buildings and will be fined in accordance with the provisions set forth in the legal rules that may be applicable. Likewise, it sets forth that if a breach of the precepts of the basic procedure could constitute a violation regarding the defence of consumers and users, it will likewise be fined in accordance with the Royal Legislative Decree 1/2007 of 16 November. Article 51 of said Royal Legislative Decree sets forth the amount of minor, serious and very serious violations, which can range from the amount of 3,005.06 euros for minor violations up to between €15,025.31 and €601,012.10, this amount even exceeding by up to five times the amount of the assets or services, object of the violation, for very serious violations.

While Royal Decree 235/2013 entered into force on the day following the publication thereof in the BOE (BOE number 89 of Saturday, 13 April 2013), making the certificate of energy efficiency available to buyers and lessees is enforceable for purchase or lease agreements that have been signed as from 1 June 2013.

One more step toward the Single Business License in Spain

On January 25, 2013 the Council of Ministers approved the Bill for the Guarantee of Market Unity (hereinafter, “the Bill”), whose purpose is to bring about market unity throughout national territory.

The aim of such regulation is to stimulate competition and the investment of economic operators undertaking activities in Spain, facilitating the use of economies of scale as well as the scope of the market by means of free access, exercise and the expansion of economic activities.

Without prejudice to any amendments that such text may withstand in its parliamentary process, the following are the main issues regulated therein.

In the first place, the principle of effectiveness will be guaranteed throughout national territory, recognizing the right of the operator that has legally established himself in a location within Spanish territory to exercise his economic activity throughout the territory without having to request additional authorization, providing he fulfills the requirements for access to the activity in the place of origin.

This precept does not include any authorizations, statements of responsibility and communications linked to one specific installation or physical infrastructure.

The supervision of the economic activity of the operators, when the authority is non-State, will be distributed among the authorities of origin and destination, with the former having competence for the supervision of compliance with the requirements for access to the economic activity and the latter for the supervision and control of the exercise of the economic activity.

To this respect, if the authority of destination, as a result of the control performed, detects the breach of the requirements for access to the activity of operators or production standards, or product requirements, it should notify this to the authority of origin, which will be competent to adopt any appropriate measures, including any disciplinary measures that may correspond.

For the purpose of attaining a single market, the creation of a single electronic database is sought for all Public Administrations containing common data in the various registries relative to economic operators, establishments and installations, as necessary for the exercise of the authorities attributed on supervision and control to the competent authorities.

In addition the Single Market Council will be created as the board of administrative cooperation and supervision and impetus for the effective application of the single market measures, presided over by the Minister of Finance and Public Administrations, with the presence of the Secretary of State of the Economy and Business Support, the Undersecretary of the Office of the Prime Minister and with the representation of competent members from the Autonomous Regions.

Lastly, as a mechanism for protection of economic operators, a new claim procedure through administrative channels is envisaged, as well as a dual channel for direct contentious-administrative appeal via the future National Markets and Competition Commission.

Sandra Paoletti

Recent Case Law

The possible application of the "rebus sic stantibus" rule for the termination of real estate purchase agreements affected by the financial crisis may not be based solely on financing difficulties, but instead require a set of factors that always require evidence

Supreme Court, Civil Chamber One, Ruling 820/2013, 17 January

This extraordinary appeal concerns the termination of a real estate purchase agreement by the buyers because they were unable to pay the price due to the impossibility of attaining financing.

The Court of First Instance rejected the action to terminate the real estate purchase agreement by the buyers, who furthermore exercised action to claim the quantities paid to the seller until that time, as stipulated in the sale agreement itself.

The Court of Second Instance upheld the appeal of the buyers, furthermore rejecting the counterclaim filed by the seller to convict the buyers to fulfill the agreement and pay the pending portion of the price. The seller appealed for annulment and the Supreme Court upheld its appeal, overturning the appeal ruling and confirming the first instance ruling.

The Supreme Court, in addition to dismissing the grounds on which the ruling of First Instance was based, referred to the doctrine of the clause on

"rebus sic stantibus" (i.e. things thus standing), on which the ruling of appeal was based in accordance with the restriction of credit caused by the financial crisis and the subsequent difficulties of buyers to obtain a mortgage.

To this regard, the Supreme Court overturns the appealed ruling, establishing that while the aforementioned clause could be applied to given cases of the inability to obtain financing (something unforeseeable when concluding the purchase of the real estate), it does not justify on its own that the financial crisis allows buyers to unilaterally terminate the purchase agreement, since this would be a clear and manifest imbalance against the seller.

The Supreme Court likewise cites a series of factors that would justify the application of the "rebus sic stantibus" rule to purchases of dwellings affected by the financial crisis: (i) the use of the dwelling purchased as the primary or secondary residence; (ii) the contractual assignment of the risk of not obtaining financing, distinguishing between contracting parties that are real estate professionals and those that are not; (iii) the financial situation of the buyer upon concluding the agreement and when having to pay the pending portion of the price for which financing was expected; (iv) the real degree of the impossibility of financing and its specific causes added to the general financial crisis, along with the evaluation, where appropriate, of the conditions imposed by the credit entities for granting financing; or (v), the possibilities of negotiating payment conditions with the seller and, therefore, of maintaining the agreement as a preferable alternative to its invalidity.

Annulment of the resolution that exempted the Director from the non-competition clause who was, in turn, the Director of the shareholder that voted in favor.

Supreme Court, Civil Chamber One, Ruling 781/2012, 26 December

The Commercial Court upheld the action to challenge the resolution of the Shareholders Meeting that authorized the directors of a limited liability company to devote themselves, on their own or on behalf of another, to the same, similar or complementary type of activity as the one constituting the corporate purpose, based on the infringement of the duty of abstention of the voting right established in the current Article 230 of the Capital Companies Act, by understanding that three partner companies of the firm were affected by a conflict of interest, whereby they should have abstained from voting on such resolution.

In Second Instance, the Madrid Provincial Appellate Court revoked the ruling, dismissing the suit by understanding that the three shareholder companies were not affected by any conflict of interest with respect to the authorization to the three joint directors to undertake such activity, which would prevent them from voting on the mandatory resolution in the shareholders meeting.

Lastly, the Supreme Court overturned the appeal ruling and confirmed the First Instance ruling, considering that the current Article 230 of the Capital Companies Act prohibits directors of the company from devoting themselves to such activity, barring express authorization from the company, by means of the resolution from the General Meeting, since the current Article 190 of the Capital Companies Act provides that "the shareholder may not exercise voting rights corresponding to his equity shares (...) when, as director, the resolution refers to the exemption from the non-competition clause".

Although, in principle, in order for a conflict of interest to occur that excludes the vote of the shareholder, the latter must be the director exempted from the non-competition clause, the truth is that the duty of abstention is applicable if the conflict of interest exists with respect to the shareholder as well as if it exists with respect to the person specifically exercising the voting right.

This interpretation of the Supreme Court endeavors to avoid the corporate conflict of interest caused when, during the vote on the resolution to exempt the director from the non-competition clause, the affected director himself takes part, either because he is the shareholder that is directly exercising the vote, or because he is acting as the representative thereof. The

relevant point is that whoever holds the outside corporate interest in conflict with corporate interest cannot take part in the vote.

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