

## NEWSLETTER AUGUST 2015

### **BANKRUPTCY**

#### *CONCURRENT GUARANTEES*

Concurrent guarantees are those that are given by the bankrupt party to a third person who receives credit simultaneously. To speak of whether it is rescindable or not, we must determine whether it is legally possible to rescind a personal guarantee while leaving in effect the contract whose fulfilment it guarantees. In a significant ruling of the Supreme Court, on 30 April 2014, the rescission of a mortgage awarded simultaneously to the loan was admitted. Despite this, and fortunately for those of us who believe that the autonomous rescission of concurrent guarantees entails an attack on the essential requirements that prevail for the validity of contracts, this same Supreme Court ruling contains a dissenting opinion, that of Magistrate Sebastián Sastre Papiol. This dissenting opinion, after stressing the legal causality connection between the two legal acts (the loan and the mortgage guarantee), which, as we are informed, constitutes its basis and grounds — as the one is the cause of the other and without a guarantee there is no loan — concludes that the rescission of a guarantee constituted simultaneously to the awarding of a loan, leaving the loan in effect, entails harm to the essential elements of the business, its cause, and the consent provided in entering into the business (Articles 1261.1 and 1262 of the Civil Code). On the basis of this, he understands, rightly so in our opinion, that if the guarantee provided by the bankrupted guarantor is prejudicial to the overall assets, the entire operation should be rescinded and the effects set out in Article 73.1 of the Bankruptcy Act applied, in accordance with Article 1295 of the Civil Code, the reciprocal restitution of the provisions made that "may only be carried out when the party that has sought it is able to return what it is obliged to do", being the reciprocal restitution to which the bankruptcy precept refers. Having stated the above, and although we believe that the arguments of the Supreme Court Ruling, of 30 April 2014, are perfectly constructed, we state that we are more in favour of the thesis that argues that credit and guarantee cannot be kept separate with regard to rescission, in the sense that to rescind a guarantee constituted simultaneously to the awarding of a credit, besides accrediting the prejudicial nature of this, in any event, the business as a whole should be contested.

### **VOLUNTARY JURISDICTION**

#### *THE NEW NON-CONTENTIOUS PROCEEDINGS ACT 15/2015*

The new Non-Contentious Proceedings Act 15/2015 was published on 2 July, the aim of which, in the words of the Executive, is the simplification and streamlining of the Spanish judicial system. The Non-Contentious Proceedings Act chooses to attribute the hearing of a significant number of cases that have traditionally been included under the title of non-contentious proceedings to legal operators not invested with jurisdictional power, such as Court Clerks, Notaries Public and Land and Companies Registrars. Up to twenty clauses have been amended by the publication of this rule, notable among which is Royal Legislative Decree 1/2007, approving the revised text of the Capital Companies Act, the Civil Register Act and the Code of Civil Procedure.

Its articles are structured according to the principal matters liable to actions submitted to non-contentious proceedings cases, distinguishing between procedures relating to the person as legal subject, family, property rights and commercial matters.

We should highlight a number of new legislative features introduced by the legal text, such as the introduction of an alternative procedure for monetary debts claims, always providing there is no opposition from the person against whom the claim is lodged. By means of this procedure, a recognition of debt before a notary public may be executed without the need for court intervention. Another of the new features attributed to notaries public, taking advantage of their status as public commissioners for oaths, is the authority to officiate at civil weddings. With regard to the new powers of companies registrars, their attributions include the possibility of calling General Meetings or appointing auditors to examine annual accounts. Although the rule seeks to simplify the daily workload of judges, all matters relating to fundamental rights continue to be their exclusive authority, such as authorisation or approval of the recognition of non-matrimonial parentage. Another of the amendments, and probably the one that most affects the legal professions, is the reduction of cases with the compulsory intervention of lawyer and solicitor to process them, leaving this at 17 types.

Finally, parliament has sought to adapt the terminology relating to people with disabilities to the provisions of the 2006 United Nations Convention on the Rights of Persons with Disabilities. The term "unable" disappears from Spanish legislation and is replaced by "persons with legally complementary ability".

Beyond, then, the more or less fortunate adaptations of the language of our times, what is sought with this new legislation is to streamline and simplify all the processes that have to be pursued by the procedures of non-contentious proceedings, and we will have to await the passage of time to be able to assess properly the initiative of extending more jurisdictional responsibilities to other legal agents to whom this activity has been outside their sphere of activity to date.

### **ABUSIVE CLAUSES**

#### *RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION RELATING TO THE INTERPRETATION OF ABUSIVE CLAUSES IN MORTGAGE AGREEMENTS*

On 9 July 2015, the Court of Justice of the European Union (hereafter, CJEU) gave a response through a ruling to the question of first ruling posed by the Court of First Instance number 2 of Santander, in which the latter body made two queries. The first of these related to the repercussion understanding a clause that establishes 20% late payment interest as abusive has on mortgage enforcement proceedings, and the second was in relation to the establishment of early expiry clauses. With regard to the first question, the CJEU understands that in a loan agreement with mortgage guarantee that contains clauses considered to be abusive, the judge will

not be authorised to make alterations to its content or recalculate the accrued interest, and the judge must, therefore, leave these clauses inapplicable. As regards the second query, and with regard to the establishment of abusive early expiry clauses that allow the claim for the refund of the loan due to the non-payment of a fraction of a single payment, the CJEU declares in its ruling that these clauses are abusive insofar as they do not stipulate that in order to exercise the early expiry, a delay in payment of at least three monthly payments must occur, and in turn it adds that when the national judge has noted the abusive nature of a clause, the fact that this has not been applied does not in itself oppose the judge deducting all the consequences derived from the abusive nature of the clause in question. For this reason, and by way of conclusion, this ruling establishes new interpretative bases applicable to current mortgage legislation and that is under constant review by the CJEU with a view to ensuring harmonisation in defence of the mortgage debtor, with the decision being clear in this case of the non-application of all the clauses relating to the calculation of the accrued late payment interest declared abusive and contained in mortgage agreements, and in turn eliminating all those early expiry clauses that do not specify or respect the minimum period of three late payments for them to be exercised.

## CATALONIA

### CONDOMINIUM SYSTEM IN CATALONIA

June saw the entry into effect of Law 5/2015, of 13 May 2015, amending Book Five of the Civil Code of Catalonia relating to property rights. This pursues the objective of correcting the imprecisions, dysfunctions and contradictions detected in the previous regulations, introducing improvements to the general provisions and clarifying the legal text. Of note are a number of new features introduced by the new piece of legislation, which affect not only structural/organisational questions (the accumulation of the reserve fund for each year, the regulation of the role of the vice-president and revision of the duties of each body in the association) but also executive and governance questions (the removal of the second call in owners' meetings, the conducting of the owners' meeting irrespective of the number in attendance and the creation of successive formation agreements, inter alia) or those of an essential nature in terms of responsibility (such as the extension of the period of allocation or encumbrance of the property). Similarly, the new legislation promotes the inclusion of new technologies as a mechanism for notifications and requirements, and the possibility of attendance at meetings by videoconferencing or other means, after prior establishment in the statutes. Finally, with the aim of streamlining private processes, the out-of-court resolution of any conflicts that may arise in the condominium area by arbitration is favoured.

These new features introduced by this law constitute in-depth reforms to Catalan condominium property law, all of which without entailing any amendment to any of the principles that have inspired the current system to date.

## SPORTS

The José Juan Pintó Symposium on sports law was held on 19 June to celebrate the 40-year career as a practising lawyer of José Juan Pintó, a partner director of Pintó Ruiz & Del Valle. The event brought together in Barcelona leading national and international jurists specialising in sports law. The symposium, which was attended by Angel M.<sup>a</sup> Villar, President of the Royal Spanish Football Federation; Miguel Cardenal, President of the Spanish National Sports Council; Gianni Infantino, UEFA General Secretary; Matthieu Reeb, CAS General Secretary; Omar Ongaro, Head of the FIFA Players' Status and Transfer Department; Pedro Tomás, President of UEFA's Appeals Committee; Alasdair Bell, UEFA's Director of Legal Affairs; Emilio García, Director of UEFA's Disciplinary Department; José Luís Vilaseca, former Minister for Sport of the Government of Catalonia and former President of UEFA's Control and Discipline Committee. The event was also attended by the most respected CAS referees and international sports lawyers, including Michele Bernasconi, Efraim Barak, Massimo Coccia, Luigi Fumagalli, Juan de Dios Crespo, Rui Botica Santos, Gianpaolo Monteneri, Ettore Mazzilli, Marcos Motta and Manfred Nan.

### 2015-2016 LA LIGA SPORTS LAW MEETINGS

Last 8 July saw the opening of the 2015-2016 La Liga Sports Law Meetings, in which Pintó Ruiz & Del Valle took part as guest firm. At the opening event, chaired by the President of the Spanish Professional Football League Mr Javier Tebas, partner in the firm Jordi López gave a paper on the "Treatment of penalty clauses in the jurisprudence of the Court of Arbitration for Sport". These Meetings will take place eleven times over the year, where legal issues of the most up-to-date relevance in football, and sport in general, will be discussed.

## PLG INTERNATIONAL LAWYERS

On 13 June, the Hotel Mövenpick in Istanbul (Turkey) hosted a new session of the Board of Directors of the PLG International Lawyers group, of which our firm is a founding member and which is present in 23 countries. Attending the Board meeting in representation of Pintó Ruiz & Del Valle was Mr Alfonso Abadía Jordana. Also held were the various work meetings organised by speciality, on the basis of comparative law, which were attended by Mr Alfonso Abadía Jordana as President of the Comparative Commercial Law, Mergers and Acquisitions and Tax Law group and Ms Eva Ochoa as President of the Industrial and Intellectual Property, Patents and Trademarks group.

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