

BANKRUPTCY

RESTRUCTURING DUE TO BANKRUPTCY PROCEEDINGS

The current economic situation is leading businesses into insolvency, in other words, they cannot meet their current payment obligations.

Those that find themselves in this situation need to remember their obligation of presenting themselves as voluntary bankruptcies, as required by bankruptcy law or, if they fail to do so, liabilities will be derived against the company administrators who fail to fulfil this obligation.

The situation in which credit and savings institutions find themselves encourages them to grant a valid alternative to the above obligation to file for bankruptcy for companies in general and for those linked to the property sector in particular. The restructuring of bank losses and, on the basis of this, even the release of sufficient funds to repay credits held by the rest of the debtor's creditors.

This consists of granting new payment conditions for the debt to date, agreeing a period of grace during the depreciation of the pending capital, the postponement of the payment of interest charges – with their amount increasing in the capital owing – and in certain cases the prolongation of the maturity period of the debt, as well as the revision of the agreed rate of interest.

The aim of this is to overcome the apathy in the market in the expectation of better times, so avoiding the disappearance of businesses and also the provisory obligations imposed on credit and savings institutions by the authority that regulates them.

The proposed restructuring will also help avoid the avalanche of bankruptcies that are surpassing all forecasts and consequently bringing Mercantile Courts to their knees, which just some five years after their creation are completely overwhelmed, despite the huge efforts of both their Senior Judges and legal office personnel.

COMMERCIAL

NEW REGULATION OF MODIFICATIONS TO REGISTERED COMPANIES

On 4 April 2009, the Official Gazette of the Spanish State published the Structural Modifications to Registered Companies Act 3/2009, of 3 April 2009, which, in accordance with the provisions of its Final Provision Eight, will come into effect on 4 July 2009. This entry into effect and its consequent application involves amendments, both to the Revised Text of the Public Limited Companies' Act, approved by Royal Decree 1564/1989, of 22 December 1989, and to the Limited Liabilities Companies' Act 2/1995, of 23 March 1995. The publication of this regulation is motivated primarily by the growing internationalisation process and consequent publication of Directives 2005/56/CE and 2007/63/CE, among others, which it transposes. The purpose of this regulation is to oversee the different structural modifications that registered companies may experience, such as their transformation into another type of company, but maintaining their legal nature; their merger, division or overall cession of both assets and liabilities; and also the international transfer of their registered address.

Although it applies to all trading companies, it contains an exception regarding cooperatives, because for these it refers to the rules established by the regulations that govern them. One of the main new features it contains is the one concerning regulations of the international transfer of the registered address, both in terms of the transfer of the registered address of a Spanish company abroad and that of a foreign company to Spain, an area which, to date, had never been regulated under Spanish law. In terms of the transformations themselves, we should stress the fact that regulation is the same for both public limited companies and limited liability companies. We should also point out that it does not just operate in the community sphere, but goes beyond it and also regulates mergers with extra-community companies, in recognition of the importance of this internationalisation. The Law is used to adapt the regulation of the right to preferential subscription and convertible obligations to the provisions of the Ruling of the European Union Court of Justice of 18 December 2008.

However, all this is merely a transitory measure until a unitary compilation of the companies law is conducted, which repeals the corresponding title of the 1885 Code of Commerce. As an advance of this proposal, this Law already authorises the Government to rewrite the laws on limited companies, limited liability companies and silent partners by shares

TAX

STREAMLINING VAT DEDUCTIONS SUSTAINED DURING TAXATION VERIFICATION PROCEEDINGS

The Supreme Court, in its Ruling of 29 September 2008 for the unification of doctrine, streamlined the requirements regarding the deduction of Value Added Tax (VAT) quotas sustained during taxation verification proceedings, based on the principle of tax neutrality which governs the application of VAT, by allowing the VAT sustained to be deducted even when the taxpayer has not complied with the formal obligations of registration and accounting. The Supreme Court obliges the Administration to consider all aspects, including VAT quotas sustained, for the settlement of the verified periods, without it being possible to adduce the expiry to deny the deductibility of the VAT sustained during the verified periods. This Supreme Court Ruling was passed in the same vein as that of 4 July 2007, which recognised the right to request the refund of excess quotas sustained that were not been deducted due to a lack of compensation once the right to deduct expired (4 years), with the only limit on the prescription of the right to request the refund.

COMMERCIAL

EMERGENCY MEASURES TO DEAL WITH THE ECONOMIC CRISIS

Royal Decree-Law 3/2009, of 27 March 2009, has introduced a series of measures to deal with the current economic situation. It came into effect on 1 April 2009 and affects three areas: taxation, finance and bankruptcy, which, as it is the one most affected (with around 40 articles of the Bankruptcy Act amended), it is this one that we will be referring to most, highlighting only the remaining modifications, which have dropped the rates of interest (legal rate for money and for delay) to 4% and 5%, respectively. In the area of bankruptcy, we will be highlighting certain aspects that we feel to be the most relevant:

Refinancing agreements are defined in order to help companies deal with their economic difficulties, without incurring on the budget covered by the obligation to file for bankruptcy. To achieve this, they are allowed to negotiate an extension or take on new obligations to replace others so as to expand significantly the available credit or modify their obligations. These agreements cannot be cancelled if they have been signed by creditors who hold 3/5 of the liability, have been formalised in a public instrument, and notified by an expert independently appointed by the Companies' Registry. This measure may aid credit being granted by financial institutions.

In connection with this, the treatment of **guaranteed credits**, as set out in the controversial Article 87.6, has been amended. The reform consists of limiting the less costly classification of the credit, not on any account, but solely for ones whose holder has been subrogated by payment. This is in response to demands by financial institutions who have been calling for measures that would allow them to grant credits guaranteed by companies from the borrower's group; their credit was classed as subordinate, due to its being the less costly solution, since it concerned a person who was specially associated with the Bankrupted party.

The regulation **delays the obligation of filing for Bankruptcy** to the circumstances in which adhesions to an advance proposal of the agreement are being negotiated; the timeline in this case is one month, after 3 months have elapsed since communication to the Court, from the start of these negotiations. The reform introduces the possibility of the written processing of the agreement and of requesting early repayment. As regards the procedural aspect, **it does away with the hearing for bankruptcy incidents** (unless expressly stated by the parties in their claim and response rectification documents), so streamlining the procedure.

We trust that these measures will help many companies reach out-of-court pre-bankruptcy settlements, with the economic savings that this involves for both the company in a position of insolvency, and its creditors, so providing the necessary freeing-up of the Mercantile Courts in general and Bankruptcy Judges in particular.

MORTGAGES

LOANS AND MORTGAGES TO CONSUMERS AND INTERMEDIATION

Law 2/2009, of 31 March 2009, which regulates taking out loans or mortgages and intermediation services with consumers in order to enter loan or credit agreements came into effect on 2 April 2009, so completing the framework of Consumer and User Rights approved by Royal Legislative Decree 1/2007, of 16 November 2007. Law 2/2009 recognises rights of an imperative nature to consumers for two scenarios; directly taking out loans or mortgages with a deferred cost and intermediation for entering loan or credit agreements for any purpose.

These rights consist of being able to obtain a brochure that provides information about these transactions, having information prior to the agreement and the valuation that may be carried out, and of receiving a binding offer. Notaries Public are required to inform and advise consumers.

Companies who provide these services (excluding credit companies) must access a Register managed by each Autonomous Community and make their general conditions available to consumers, on their website and at their offices, where they will have a permanent notice board with this information. Measures aimed at the transparency of rates and commissions that arise from these activities are also agreed, which stress the obligation of agreeing in writing the remuneration of an intermediation company.

SPORT

SPORTS LAW

On 14 March, José Juan Pintó, Chairman of PINTÓ RUIZ & DEL VALLE, gave a talk on "TAS & Football: The main decisions in 2008 and 2009" at the 3rd International Football Law Conference held in Madrid at the headquarters of the Royal Spanish Football Federation and attended by 350 specialists in sports law from all over the world. During his talk, José Juan Pintó highlighted a recent case law change in the decisions given by the TAS (Tribunal Arbitral du Sport which has its headquarters in Lausanne), backed by the Swiss Federal Court, to the effect that, at least as regards doping, the TAS is much more flexible by considering that it carries authority in appeals lodged against the decisions of the national Federations, even though these have not expressly and literally recognised this possibility on their statutes.

TRIBUNAL ARBITRAL DU SPORT

José Juan Pintó, Chairman of our firm, has been appointed ad hoc Tribunal arbitrator of the Tribunal Arbitral du Sport for the Winter Olympics taking place in February next year in Vancouver (Canada). It is the first time that a Spanish lawyer has been appointed an Olympic arbitrator.

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