# The Legal 500 Country Comparative Guides

## Spain: Lending & Secured Finance

This country-specific Q&A provides an overview to lending & secured finance laws and regulations that may occur in Spain.

For a full list of jurisdictional Q&As visit here

### Contributing Firm

Araoz & Rueda

### Authors

Rafael Bazán
Partner

bazan @araozyrueda.com

1. **Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?**

   Lending money alone, without any additional banking activities (such as accepting deposits from the public) does not require the relevant lender to obtain an authorisation from the Spanish banking authorities.

   However, in most cases, entities which provide loans, factoring or financial leasing on a permanent basis usually set up of a regulated entity (*establecimiento financiero de crédito*).

   In any case, additional banking activities (such as accepting deposits from the public), can only be carried out by certain credit entities (banks, savings banks) which need to be authorised by the Bank of Spain.

   Notwithstanding the above, the following laws stablishes certain requirements to non-banking lenders which provide mortgage loans to consumers on a permanent basis:

   - Law 2/2009, of 31 March 2009, on contracts with consumers for mortgage loans or credit facilities and intermediation services for the conclusion of loan or credit facility agreements (Law 2/2009). This law establishes the following requirements: (i) the investor must be registered in the Public Register of Companies for the autonomous community where its registered office is located (or, if none exists, on the Central Government Register at the National Consumer Affairs Institute); and (ii) the investor must have insurance cover for civil liability or a bank guarantee covering any potential liability that the investor assumes with respect to the debtor.
   - The Real Estate Credit Act (*Ley reguladora de los contratos de crédito inmobiliario*) 5/2019 of 15 March transposes the European Directive (Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property) and seeks to enhance the transparency of mortgage contracts to be signed with individuals (customers).

   Article 42 of the Real Estate Credit Act provides mandatory registry for real estate lenders, unless they are credit entities, regulated entities (*establecimiento financiero de crédito*) or Spanish branches of credit entities.

   In principle, any kind of lending entity may take the benefit of the relevant Spanish security against a Spanish asset.

   Multiple lenders can benefit from Spanish security, notwithstanding their nationality or country of registration.

2. **Are there any laws or regulations limiting the amount of interest that can be**

**charged by lenders?**

There is no a specific concept of an usury rate in Spain, although some Spanish courts have declared null and void the application of certain default interest (eg: 29%) in consumer credit agreements.

Notwithstanding the above, the Supreme Court has sometimes declared that mortgage loan terms have been held to be unfair if default interest is above the following ceiling:

- Mortgage loans granted for the purchase of the main residence property, secured by a mortgage which is granted over such property: those clauses which include default interest rate greater than three times the legal interest rate effective at the time of accrual.

Interest may only accrue on the outstanding principal. Therefore, default interest may not be capitalized.

- Mortgage loans granted for purposes other than that referred to above, secured by mortgages granted over any properties irrespective of their nature: those clauses which include default interest rate representing an increase of more than two percentage points over the ordinary interest agreed in the corresponding Loan.

The court may also hold that a term is unfair if default interest requires any consumer to pay a "*disproportionately high sum in compensation*" even the above mentioned ceilings are not exceeded.

As has already been stated, the court decision which sets forth that these terms are unfair, based on the case law of the Supreme Court, will also render these null and void. Therefore, the corresponding terms shall be treated as if they had not been established in the relevant loan, and the only payable interest shall be the one stipulated in the loan until the enforcement order. From that moment onwards, a procedural delay interest (*interés de mora procesal*) will be applied (an annual interest equal to the legal interest plus two points.)

The Real Estate Credit Act (*Ley reguladora de los contratos de crédito inmobiliario*) 5/2019 of 15 March transposes the European Directive (Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property) and seeks to enhance the transparency of mortgage contracts to be signed with individuals (customers). According to the Real Estate Credit Act, delay interest may not exceed the ordinary interest agreed in the loan agreement more than three points.

3. **Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?**

When a Spanish resident receives funds from a non-Spanish lender, the Spanish resident must comply with certain reporting requirements (mainly for statistical purposes).

The parties are free to agree the conditions and covenants they deem appropriate. The legal framework is established by Bank of Spain's Circular 4/2012, which came into effect on January 1, 2013.

Individuals and entities residing in Spain (except payment service providers) engaging in transactions with non-residents in Spain or that have assets or liabilities in countries other than Spain, must inform the Bank of Spain of (i) any transactions they perform with non-residents; and (ii) the balances of assets and liabilities, and any changes in those foreign positions.

With regard to foreign financial loans, post-closing reporting obligations are set if the value of the transactions during the previous year, or the balance of assets and liabilities on December 31 of the previous year, is more than €1 million.

4. **Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.**

   Yes. Security can be taken over those types of assets in order to secured obligations under a foreign law governed document.

   The customary types of security are the following:

   - Real Estate mortgage.
   - Pledge over shares.
   - Pledge over credit rights (receivables, bank accounts, intercompany loans).
   - Chattel mortgages over plan, intellectual property (IP), inventory or machinery.

   In general terms, under Spanish law, any guarantee, pledge or mortgage must guarantee or secure obligations to which they are ancillary and such obligations must be clearly identified in the relevant guarantee or security agreement. Such security follows the underlying obligation. As such, the security is terminated on the termination of the underlying obligation. However, the cancellation of the guarantee or security needs to be documented in a public deed and, in certain cases, filed in the relevant registry (real estate mortgage, chattel mortgage).

1. Bank Accounts

Pledges may be granted over credit rights arising from bank accounts.

As a general rule, Spanish pledges over credit rights arising from bank accounts must comply with the following requirements in order to be perfected:

- notarisation; and
- notification to the depository bank.

Such security must be governed by Spanish law if the relevant account is located in Spain. Security over cash accounts held off-shore must be governed by the relevant foreign law.

2. Intercompany Loans

Pledges may be granted over credit rights arising from intercompany loans.

As a general rule, Spanish pledges over credit rights arising from intercompany loans must comply with the following requirements in order to be perfected:

- notarisation; and
- notification to the borrower.

3. Intellectual Property

Mortgage over intellectual property (hipoteca) should be used to secure such asset.

The security still allows the chargor to use the relevant intellectual property right. The mortgage must be executed before a notary and must be registered at the Movable Property Registry (and, in some cases, notified to the relevant intellectual property registry).

4. Land and Buildings

Mortgage over real property (hipoteca) should be used to secure such asset.

The security still allows the chargor to occupy the land and buildings. The mortgage must be executed before a notary and must be registered at the Land Registry.

5. Movables

Security can only be taken over movables if the grantor of the security has the freehold right over the assets, and is entitled to freely dispose of them.

There are the methods of taking security over movables:

1. Mortgage over movables (*hipoteca mobiliaria*)

-

Movables (e.g. commercial establishment, motor vehicles, tramways, train carriages, intellectual and industrial property, aircraft, and industrial machinery) can remain in the chargor's possession.

Movables must be adequately described in the security document.

Creditors usually incorporate a clause in the security agreement which states that the chargor can use the assets while the security exists, as long as it has notified the secured creditor of its proposed dealings and has obtained the secured creditor's written consent.

The security document must be executed before a notary and must be registered with the competent Movable Property Registry.

2. Pledges without delivery (*prenda sin desplazamiento*)

Security can be taken over machinery, inventory and other types of movable goods (e.g. agricultural machinery, stored merchandise, raw materials and art).

Movables can remain in the chargor's possession.

Movables must be adequately described in the security documents.

Creditors usually incorporate a clause in the security agreement which states that the chargor can use the assets while the security exists, as long as it has notified the secured creditor of its proposed dealings and has obtained the secured creditor's written consent.

The security document must be executed before a notary and must be registered with the competent Movable Property Registry.

3. Security can also be taken over the business by a mortgage over the "commercial establishment" (*hipoteca mobiliaria*)

The mortgage covers the premises of the business, its commercial signs and intellectual property, the lease and all rights in the lease, stock and machinery (if owned and paid for by the chargor) and permanently used for the business).

Movables can remain in the chargor's possession.

Movables must be adequately described in the security document.

Creditors usually incorporate a clause in the security agreement which states that the chargor can use the assets while the security exists, as long as it has notified the secured creditor of its proposed dealings and has obtained its written consent.

The security document must be executed before a notary and must be registered with the competent Movable Property Registry.

4. Receivables

Creating pledges over present and/or future credit rights arising from receivables is the best way to secure the receivable. Although there is still some doctrinal controversy about the effectiveness of the pledges over credit rights, most recent case law by the Spanish Supreme Court acknowledges the monetary value of credit rights, their suitability to be charged with a pledge and the setting-off as a means to enforce a pledge over such credit rights.

Spanish pledges over credit rights arising from receivables must comply with the following requirements in order to be perfected:

- Notarisation
- The receivables must be adequately identified in the security document. It is advisable to

take all possible steps to identify the receivables (by detailing, if possible the underlying agreements from which the relevant receivables shall arise and any calendar of payments related thereto).
- Notice of the security must be given to the debtor.

The pledge of receivables could also be created as a possessory pledge in order to avoid the application of the rules governing non-possessory pledges, which establish the need to register the pledge in the Registry of Movable Assets.

5. Shares

Shares in SA (*sociedad anónima*) companies may be represented by share certificates (in registered form or bearer form (ownership of bearer shares transfers by delivery)) or by book entries. SL (*sociedad limitada*) companies do not have shares. Members of SLs hold participations.

Security perfection requirements and enforcement procedures differ depending on the type of shares given as security:

Pledge over unlisted shares represented by share certificates

-

The pledgor should deliver the share certificates to the secured creditor or to a third party acting as a custodian.

As a general rule the pledge agreement should be executed before a notary. This makes it effective against third parties and facilitates enforcement.

The pledgor will retain voting rights and the rights to receive payment of dividends until enforcement, unless otherwise agreed in the pledge agreement.

It is particularly advisable to endorse (note) the creation of the pledge on the share certificates.

It is advisable to review the bylaws of the company whose shares are pledged in order to assess whether there are certain limitations on, or requirements for, the creation or enforcement of the pledge, e.g. restrictions on transfers or who can exercise voting or dividend rights.

Pledge over shares (listed or unlisted) represented by Book entries

The creation of the pledge should be entered into the registry where the book entries are kept. This is required to make the pledge effective against third parties.

As a general rule the pledge agreement should be executed before a notary. This is required to make it effective against third parties and facilitates enforcement.

The pledgor will retain voting rights and the rights to receive payment of dividends until enforcement, unless otherwise agreed in the pledge agreement.

A certificate evidencing the creation of the pledge will be issued by the entity in charge of the registry where the book entry is kept.

It is advisable to review the bylaws of the company whose shares are pledged in order to assess whether there are certain limitations on, or requirements for, the creation or enforcement of the pledge (e.g. restrictions on transfers or who can exercise voting or dividend rights).

-

Pledge over Participations.

Participations are not in paper form so the participation itself cannot physically be delivered to the secured creditor or to a third party. Notice to the company shall be given and the pledge should be entered into the book registry of participation holders (*socios*).

The pledge agreement should be executed before a notary. This makes it effective against third parties and facilitates enforcement.

The pledgor will retain voting rights and the rights to recover payment of dividends until enforcement, unless otherwise stated in the by-laws of the company.

It is advisable to review the by-laws of the company whose participations are pledged in order to assess whether there are certain limits on, or requirements for, the creation or enforcement of the pledge, (e.g. restrictions on transfer).

It is advisable to endorse the creation of the pledge on the public document evidencing the ownership of the participations.

5. **Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?**

Security over certain future assets, such as receivables and inventory, is available in Spain. The majority of scholars admit that a pledge may secure future obligations, provided that such obligations (a) are linked to an underlying legal relationship (already existing when the security is created) and (b) can be identified. A general "all monies" charge is therefore unlikely to be enforceable.

The Spanish Insolvency Act states that pledges over future credit rights will be privileged provided that the following requirements before the declaration of insolvency are met:

- Future credit rights must derive from contracts concluded or legal relationships born prior to the declaration of insolvency.
- Pledges will have to be executed by means of a public document, or, if said pledges are considered non possessory pledges ("*prenda sin desplazamiento*"), they must be registered in the Registry of Movable Assets ("*Registro de Bienes Muebles*").

For other future assets, such as land and shares, promissory security is available. Please note that the promissory security will not grant the lender any right over the assets expressly subject thereto, until the relevant security documents have been executed, and each of the actions required for the perfection of the security (e.g., registration in the case of a mortgage) has been fully performed.

Promissory security usually has a "trigger event" such as a breach of certain covenants. It is advisable to complement the promissory security with an irrevocable power of attorney, so that the lender may execute and perfect the security if the chargor does not create it when requested. In relation to the irrevocability of powers of attorney, please note the following:

- The irrevocable nature of a power of attorney is based on Spanish case law. However, since such irrevocable nature may be considered as an exemption to the rules generally applicable to powers of attorney under Spanish law (Civil Code), we should not disregard a different view by the Spanish Courts.
- If the grantor of the power of attorney is declared insolvent, any power of attorney granted by it will become invalid.

6. **Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?**

Separate agreements in relation to each type of assets will be required in Spain. Spanish law does not recognise the concept of floating charges, however, the specification of certain types of Spanish security may result in a similar effect.

7. **Are there any notarisation or legalisation requirements in your jurisdiction? If so,**

**what is the process for execution?**

All security documents (including receivables, inventory, real estate and chattels) may need to be signed before a Spanish notary public.

The powers of attorney granted by foreign entities must be notarized by a local Notary Public. The signature of the Notary Public must be authenticated by attaching an “Apostille” pursuant to The Hague Convention of October 5, 1961.

8. **Are there any security registration requirements in your jurisdiction?**

   Some security documents (real estate and chattels) need to be registered in the Land Registry or Registry of Movable Assets in order to be validly perfected.

9. **Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?**

   Real estate and chattels bear a significant stamp duty tax (up to 0.5%-1.5% over the amount of the secured obligation) and other fees, such as notarial and registration fees.

   Notarial fees are calculated based on the secured amount. If the secured amount is higher than € 6,000,000 notarial fees can be negotiated with the Spanish notary. Registration fees depends on the relevant registry, but generally speaking do not significantly differ from the notarial fees.

   Clauses imposing expenses on the borrower are usually included.

   Notwithstanding the above, in relation to mortgage loans signed with consumers, the Supreme Court has rendered as unfair those terms that pass all the loan and mortgage formalization expenses of the mortgage loans on to the borrower based on the following reasons: (i) due to the fact that costs, which by virtue of its nature or law should be borne by the creditor are charged to the borrower and (ii) because there is not a minimum fair distribution of the costs among the parties.

   Based on the case law, this leads to a relevant imbalance in the rights and obligations of the parties which the consumer would have not reasonably accepted in the context of an individual negotiation.

   The Real Estate Credit Act 5/2019 of 15 March transposes the European Directive (Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property) and seeks to enhance the transparency of mortgage contracts to be signed with individuals (customers). It states that notarial fees, registration fees and stamp duty tax will be paid by

the lender.

10. **Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?**

    Cross, down and upstream guarantees by group companies are available under Spanish law, provided that the necessary corporate resolutions are granted and the financial assistance prohibition (see answer to question 11 below) is not violated.

    In any event, we describe below several potential grounds for the relevant security to be challenged. These are as follows:

    1. transgression of the corporate object of the grantor; and
    2. security deemed contrary to Spanish public policy.

11. **Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?**

    There is no corporate benefit requirement in Spanish law. Nevertheless the application of certain general principles of Spanish law aimed at protecting shareholders, employees or other creditors may affect the actions of a company. For example:

    - minority shareholders may challenge a transaction on the basis that the directors were acting against the law (e.g., abuse of the controlling position (*abuso de derecho*)) or negligently;
    - a company must act in good faith; and
    - on insolvency of the chargor, if there are insufficient funds to satisfy all creditors, creditors could challenge certain transfers or security (see answer to question 24 below).

    The financial assistance prohibition states that a company may not advance payments, grant credit or loans, give any kind of security or personal guarantee or provide financial assistance for the acquisition of its own shares or: (i) shares in its controlling companies by third parties (in the case of a SA); or (ii) shares in any of its group companies (in the case of a SL).

12. **Are there any restrictions against providing security to support borrowings incurred for the purposes of acquiring shares: (i) of the company; (ii) of any company which directly/indirectly owns shares in the company; or (iii) in a related company?**

    The financial assistance prohibition states that a company may not advance payments, grant credit or loans, give any kind of security or personal guarantee or provide financial assistance for the acquisition of its own shares or: (i) shares in its controlling companies by third parties (in the case of a SA); or (ii) shares in any of its group companies (in the case of a SL).

13. **Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?**

    Spanish law does not recognise the concept of security trustee. The security must be granted in favour of each and every existing lender (as direct beneficiaries) not just in favour of the security agent.

    Therefore, if the enforcement of the security is carried out by the agent of the syndicate, such agent will need to prove that it is duly and expressly empowered by means of a power of attorney granted in its favor by each of the lenders, which will need to be legalised with the "Apostille" pursuant to The Hague Convention of October 5, 1961.

14. **If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?**

    Security trustee structures are a common feature of international syndicated transactions. In order to avoid the enforcement by individual lenders separately, the enforcement by the security agent should be regulated in the relevant security agreement and all lenders must grant powers of attorney (duly legalized with the "Apostille" pursuant to The Hague Convention of October 5, 1961, in case of foreign lenders), in favour of the security agent.

15. **Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?**

    - Payments of interest to domestic or foreign lenders:

    Firstly, individuals (which do not carry out any business activity) are not obliged to withhold on interest paid in favor of others. Therefore, in our analysis, we assume that the borrower is a company.

    Payments of interest to domestic lenders are subject to a withholding tax of 19% on interest's gross amount, regardless the status of the lender (individual or company). However, interest paid to both financial institutions and permanent establishments in Spain of foreign financial institutions included in the relevant registry of the Bank of Spain shall be exempt from withholding tax.

    Regarding lenders residents in a jurisdiction other than Spain, interest payments are subject to a withholding tax of 19%, unless the rate is reduced by an internal exemption or any applicable double taxation treaty.

    If the lender is an EU tax resident, the Spanish Non-Resident Income Tax Act establishes that

payments of interest from a Spanish company to other EU company shall be exempt from withholding tax, provided that the lender (i) does not operate in Spain through a permanent establishment and (ii) is not based in a tax haven. This regulation implements the Directive 2003/49/EC on taxation of interest and royalty payments made between associated companies but less restrictively, as this exemption applies regardless the entities are related for tax purposes or not.

In accordance with the OECD Model Treaty (which is the basis for the double taxation treaties entered into by Spain), interest arising in a contracting state and paid to a tax resident of the other contracting state may be taxed in both states. However, the withholding tax rate applied by the first contracting state shall not exceed generally 10% of the gross amount of the interest insofar as the interest' beneficial owner is a tax resident of the other contracting state. Note that this withholding tax rate varies depending on the specific double taxation treaty entered into by Spain.

For the purpose of applying an exemption or a lower tax rate than the one established in the domestic legislation, the lender shall provide the borrower with a tax residence certificate in order to justify the tax residence in the relevant jurisdiction, issued by the relevant tax authorities. Said certificate is valid for one year.

- Proceeds of enforcing security or claiming under a guarantee:

Assuming that the lender is a non-resident company, the borrower's withholding obligation arises when interest are due/payable according to the agreed terms, or at the time of their payment, if the latter takes place before.

There is no specific provision regarding proceeds of enforcing security or claiming under a guarantee and therefore, the general rules established in the Spanish non-resident income tax act would be applicable. In general, proceeds would be regarded as an interest or a capital gain depending on the moment of the enforcement and the nature of the underlying asset. If it is regarded as an interest, the tax treatment explained below would be applicable. If it would be seem as a capital gain related to a real estate located in Spain, Spanish taxation would arise.

Additionally, note that other taxes (e.g. value added tax, stamp duty, etc.) may be applicable in said case.

16. **If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?**

As we have already stated in the previous point, the standard withholding tax rate is 19%, although domestic regulation and some double taxation treaties entered into by Spain reduce

it up to 0%, provided that the legally established requirements are fulfilled.

17. **Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?**

    Under Spanish law, there is no provision which establishes the generation of income solely because of a loan to or guarantee and/or grant of security from a company, apart from the interest agreed by the parties.

    Notwithstanding, note that the following tax issues could arise from a loan:

    - Spanish government has recently passed a new rule applicable to mortgage loans (*Real Decreto-ley 17/2018, de 8 de noviembre, por el que se modifica el Texto refundido de la Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados, aprobado por el Real Decreto Legislativo 1/1993, de 24 de septiembre*), by virtue of which the lender of a mortgage loan is subject to stamp duty (the tax rate varies between 0.5% and 1.5% of the mortgage loan's amount depending on the specific characteristics of the real estate).
    - All transactions carried out by related parties shall be valued at arm's length. Otherwise, Spanish tax authorities are entitled to modify the interest agreed by the parties and therefore to issue the corresponding tax adjustments, unless the parties justify the agreed interest rate is in compliance with the arm's length principle and would have been the rate agreed by independent parties.

18. **Are there any tax incentives available for foreign lenders lending into your jurisdiction?**

    In general terms, there is no tax incentive available for foreign lenders lending into Spain, except the exemption stated in the Spanish non-resident income tax act or in the relevant double taxation treaty.

    However, a new provision entered into force on 20 October 2019 establishes that EU pension funds (as well as their permanent establishments) and collective investment institutions, which fulfil the legally established requirements, could prove their tax residence for non-resident income tax purposes through other special means (e.g. a sworn declaration by the pension funds' representative). This new provision allows said non-resident lenders to prove their tax residence more easily.

19. **Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.**

    The following two financing structures were challenged by the Spanish tax authorities:

    - Profit participating loan:

Until 2013, interest from profit participating loans were deductible for tax purposes. Nevertheless, the Spanish Supreme Court issued on 27 September 2013 a decision which denies the deductibility of such interest payments, since they are deemed as equity payments and the loan was granted by related parties.

In order to regulate this issue more clearly, the new Corporate Income Tax Act, in force since 2015, establishes expressly the non-deductibility of interest accrued as a consequence of a profit participating loan entered into between companies which form part of the same corporate group.

- Brazilian interest payments on net equity (*juros sobre o capital própio*):

This special investment instrument is used by the Brazilian companies in order to distribute profit to their shareholders. Such payments are deductible for tax purposes, although they are deemed as dividends according to Brazilian corporate and accounting regulations.

The above-mentioned instrument has been widely used by international investors in Spain. In this regard, the administrative tax court (*Tribunal Económico-Administrativo Central*) in a decision issued on 13 April 2011, confirmed the participation exemption was not applicable to this case at hand, interest paid on equity by Brazilian subsidiaries to their Spanish shareholders should be treated as interest by the latter.

Nevertheless, on 16 March 2016, the Spanish Supreme Court issued a decision stating that the interest payments on net equity received by Spanish companies were assimilated to dividend distributions. Therefore, they were eligible to apply the participation exemption, provided that other legally established requirements are met.

Additionally, please bear in mind that Spanish Corporate Income Tax Act establishes some restrictions concerning the deductibility of interest for borrowers:

- The deductibility of net financial expenses (i.e. financial expenses – financial income) is restricted to the higher of the following two amounts: a) 30% of the operating profit of the company or b) € 1 million. In other words, they are fully deductible if they do not reach € 1 million per year.
- The deductibility of interest derived from leveraged buyout acquisitions is also restricted to 30% of the acquiring entity's operating profit, calculated on a stand-alone basis.
- Interest payments arising from equity instruments registered as debts for accounting purposes (e.g. non-voting shares) are not deductible for Corporate Income Tax purposes.
- Interest arising from debts artificially allocated to Spanish related entities of the group are not deductible for Corporate Income Tax purposes.

20. **Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a**

**company incorporated in your jurisdiction?**

The general rule is that the parties are free to choose the governing law to be applied to civil and commercial contractual obligations, provided it is not contrary to law, morality or public order. In particular, Spanish courts may apply the public policy restriction, in relation to the protection of consumers and competition restrictions as well as labor contracts, insurance contracts and transport contracts.

The law chosen by the parties to govern the contract applies not only to the contract itself but also to the performance of the contract and its interpretation, as well as the consequences of breach of contract (such as, the remedies available and the assessment of damages) and issues relating to limitation of actions.

The only requirement is that the governing law must have a connection with the subject matter of the contract.  Spanish courts must apply the Convention on the law applicable to contractual obligations (80/934/EEC) (Rome Convention) or Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I), as appropriate, to determine the law governing a contract.

Article 10.5 of the Spanish Civil Code will apply in cases where the EU regime does not apply, according to which the parties can choose the law that will govern their contract provided it has a connection with the subject matter of the contract.

The “connection” should be interpreted in a very broad sense. It is enough that either: (i) One of the parties is a resident of the jurisdiction relating to the law that has been selected by the parties or (ii) the contract has been executed in the jurisdiction or it is to be fulfilled in the jurisdiction.

In cases of ambiguity regarding the applicable law, Spanish courts are likely to apply Spanish law over the law of a foreign jurisdiction when it is the law of an EU non-member state. Where the parties choose a foreign governing law that is not an EU member state law, bilateral or multilateral international conventions or treaties subscribed to by Spain are also relevant. For example, the United Nations Convention on International Sale of Merchandises made in Vienna (1980) could be considered by the court in the event of foreign commercial transactions not involving residents in any EU member state.

In any event, as per Article 281.2 of the Spanish Procedural Law and Article 33 of Act 29/2015 dated 30 July 2015 on international legal co-operation in civil matters, foreign law must be proved, with the burden of proof being on the party who invokes it. Proof must be given not only about the contents of the foreign law but also about its actual validity in the relevant country and the way in which it is interpreted and applied by the courts in that country. If the party who claims the application of a foreign law fails to provide proof of these issues, the law of the forum must apply to the contract, irrespective of the governing law

chosen by the parties. Typically, proof of the validity, interpretation and the application of a foreign law is achieved by producing to the court an affidavit issued by the competent court of the relevant foreign country. Spanish courts also admit as proof affidavits issued by reputable jurists (their involvement at court is limited to ratifying their affidavits).

21. **Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

The general rule is that the parties are free to choose the governing law to be applied to civil and commercial contractual obligations, provided it is not contrary to law, morality or public order. In particular, Spanish courts may apply the public policy restriction, in relation to the protection of consumers and competition restrictions as well as labor contracts, insurance contracts and transport contracts.

The law chosen by the parties to govern the contract applies not only to the contract itself but also to the performance of the contract and its interpretation, as well as the consequences of breach of contract (such as, the remedies available and the assessment of damages) and issues relating to limitation of actions.

The only requirement is that the governing law must have a connection with the subject matter of the contract. Spanish courts must apply the Convention on the law applicable to contractual obligations (80/934/EEC) (Rome Convention) or Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I), as appropriate, to determine the law governing a contract.

Article 10.5 of the Spanish Civil Code will apply in cases where the EU regime does not apply, according to which the parties can choose the law that will govern their contract provided it has a connection with the subject matter of the contract.

The “connection” should be interpreted in a very broad sense. It is enough that either: (i) One of the parties is a resident of the jurisdiction relating to the law that has been selected by the parties or (ii) the contract has been executed in the jurisdiction or it is to be fulfilled in the jurisdiction.

In cases of ambiguity regarding the applicable law, Spanish courts are likely to apply Spanish law over the law of a foreign jurisdiction when it is the law of an EU non-member state. Where the parties choose a foreign governing law that is not an EU member state law, bilateral or multilateral international conventions or treaties subscribed to by Spain are also relevant. For example, the United Nations Convention on International Sale of Merchandises made in Vienna (1980) could be considered by the court in the event of foreign commercial transactions not involving residents in any EU member state.

In any event, as per Article 281.2 of the Spanish Procedural Law and Article 33 of Act 29/2015 dated 30 July 2015 on international legal co-operation in civil matters, foreign law must be proved, with the burden of proof being on the party who invokes it. Proof must be given not only about the contents of the foreign law but also about its actual validity in the relevant country and the way in which it is interpreted and applied by the courts in that country. If the party who claims the application of a foreign law fails to provide proof of these issues, the law of the forum must apply to the contract, irrespective of the governing law chosen by the parties. Typically, proof of the validity, interpretation and the application of a foreign law is achieved by producing to the court an affidavit issued by the competent court of the relevant foreign country. Spanish courts also admit as proof affidavits issued by reputable jurists (their involvement at court is limited to ratifying their affidavits).

22. **What (briefly) is the insolvency process in your jurisdiction?**

The Spanish insolvency regime is regulated by the Spanish Insolvency Act 22/2003, dated 9 July (the "**Insolvency Act**"). All debtors are subject to the same insolvency proceedings, namely "*concurso de acreedores*", which may lead to either the restructuring of the business or to the liquidation of the assets of the debtor.

A debtor is obliged to file for insolvency proceedings when it becomes insolvent (a debtor will be deemed insolvent if it fails to comply on a general basis with its outstanding obligations). In this case, the proceedings would be deemed as "compulsory insolvency procedure". In addition, the debtor may ask the Courts for a declaration of insolvency when it is foreseen that it will become "insolvent" in the near future. In this case, the insolvency proceedings would be deemed as "voluntary".

Differentiation must be made between two stages within the insolvency proceedings:

(a) The first stage is the determination of the assets and the liabilities of the debtor, leading to the preparation by the court receivers of the inventory and the creditors' list, respectively.

(b) The second stage leads either to an arrangement between the debtor and its creditors, or to the liquidation of the debtor's assets.

23. **What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?**

According to the Spanish Insolvency Act, secured creditors are considered privileged creditors (*acreedores con privilegio especial*) which may initiate separate proceedings, though subject to certain restrictions derived from a waiting period as stated below.

The declaration of insolvency would, in principle, prevent creditors from enforcing such

security or would suspend enforcement currently underway. Enforcement would become possible when:

- one year has elapsed after the declaration of insolvency and the liquidation stage has not yet been initiated; or
- an arrangement has been accepted and approved, which does not prevent the secured creditor from enforcing its security (this would be the general rule except if such creditor has decided to support the arrangement).

Privileged creditors are not subject to the "*convenio*", or arrangement under statutory insolvency procedures, except if they give their express support by voting in favour of the arrangement. In the event of liquidation, they will be the first to collect payment against the attached assets.

24. **Please comment on transactions voidable upon insolvency.**

According to section 71 of Spanish Insolvency Act, the receivers may only challenge those transactions which could be deemed as having "damaged" the interest of the debtor, provided that they have taken place within the two years immediately prior to the declaration of insolvency (transactions taking place prior to two years before insolvency has been declared would not be subject to challenge).

"Damage" does not make reference to the intention of the parties, but to the consequences of the transaction on the interest of the debtor. In any case, the law is referring to transactions which are somehow exceptional; in this sense, damage would be deemed to: (i) exist (as an irrebuttable presumption) in the case of donations and advanced payment obligations becoming due after the declaration of insolvency provided that they are not secured by an "*in rem*" security; (ii) exist (as a rebuttable presumption) in the case of transactions entered into with persons having a special relationship with the debtor as well as in the case of rights "*in rem*" that have been created in order to protect already existing (non-secured) obligations and advanced payment obligations becoming due after the declaration of insolvency provided that they are secured by an "*in rem*" security; in the remainder of cases, damage would have to be justified.

However, paragraph 5 of the abovementioned article states clearly that transactions executed within the ordinary course of business of the debtor and within normal market conditions are not avoidable.

25. **Is set off recognised on insolvency?**

Set-off is prohibited once the insolvency of the debtor is declared, unless the right to set-off exists before the insolvency is declared (and not, for instance, as a result of the declaration itself).

As an exception, set-off will be allowed when permitted by the law applicable to the obligation (e.g., a hedging agreement governed by a law that permits set-off after the insolvency declaration).

Notwithstanding the above, Royal decree Law 5 / 2005, of 11 March (*Real Decreto Ley 5 / 2005, de 11 de mayo, de reformas urgentes para el impulso de la productividad y para la mejora de la contratacion pública* ("RDL 5 / 2005")), has implemented the EU Collateral Directive and removed all formal requirements provided for the execution, validity, evidence and foreclosure of certain pledges (i.e. over shares and bank accounts). It also states that collateral governed thereunder may be directly enforced pursuant to the terms expressly agreed by the parties without being limited, restricted or affected in any manner by the opening of any insolvency proceedings, applies to such pledges.

26. **Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?**

Spanish law does not contain any differential treatment for foreign creditors neither in enforcement nor in insolvency proceedings. Therefore, the success for foreign creditors in these proceedings may only depend on the quality of the security and on the solvency of the debtor.

27. **Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?**

No. See answer to question 2 above.

Lending money alone, without any additional banking activities (such as accepting deposits from the public) does not require the relevant lender to obtain an authorisation from the Spanish banking authorities.

In any case, additional banking activities (such as accepting deposits from the public), can only be carried out by certain credit entities (banks, savings banks) which need to be authorised by the Bank of Spain. Non-EU lenders shall apply for authorisation before the Bank of Spain in order to carry out banking activities in Spain, but this is not the case for EU lenders. The latter only require a notification to the Bank of Spain from the relevant supervisory authority of the EU member state.

However, note that there are two Spanish impending reforms that may affect foreign lenders on the date hereof:

- The Real Estate Credit Act (*Ley reguladora de los contratos de crédito inmobiliario*) 5/2019 of 15 March transposes the European Directive (Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property) and seeks to

enhance the transparency of mortgage contracts to be signed with individuals (customers). This law shall entry in force as of the date falling three months since the date it is published.

Article 42 of the Real Estate Credit Act provides mandatory registry for real estate lenders, unless they are credit entities, regulated entities (*establecimiento financiero de crédito*) or Spanish branches of credit entities.

- Law Decree no. 5/2019 on contingencies actions in event of no-deal Brexit (*Real Decreto-ley 5/2019, de 1 de marzo, por el que se adoptan medidas de contingencia ante la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea sin que se haya alcanzado el acuerdo previsto en el artículo 50 del Tratado de la Unión Europea*.).

In relation to banking services, this law decree establishes that agreements entered into by legal entities with registered office in United Kingdom or Gibraltar and authorised by the relevant authority in United Kingdom or Gibraltar before Brexit shall keep being in force with the terms and conditions agreed. After Brexit, regulation for non-EU legal entities will apply to UK-based and Gibraltar-based legal entities.

However, regarding agreements entered into before Brexit, this law decree provides a nine-month transitional period, extending the validity of the authorisation granted to said entities in order to (i) terminate this agreements or (ii) apply for a new authorisation in Spain.

In any case, they must apply for the relevant authorisation in order to amend or extend the existing agreements or to enter into new agreements.

28. **What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?**

In general terms, traditional bank debt (e.g. bank loans and leasing) remains the most relevant source of lending for companies in Spain (as well as in the euro area).

Consistent with the above, Spain has a low weight of shadow banking. However, we do anticipate a higher proportion of shadow banking in the following years as in other countries.