PINTÓ RUIZ & DEL VALLE
Lawyers & Economists

# NEWSLETTER JUNE 2016

## CIVIL

### *TOTAL RETROACTIVITY IN FLOOR RATE CLAUSES*

In its verdict of 9 May 2013 (clarified by means of ruling on 3 June 2013), the Supreme Court declared the clauses limiting interest rate variability, or "floor rate clauses", null and void, where there is a lack of transparency towards the consumer at the time of contracting, although, and in contravention of the general rule of our legal system, proclaimed in Article 1,303 of the Civil Code, which establishes that anything that is null and void causes no effect, the Supreme Court declared the non-retroactive nature of the verdict handed down, such that the bank was not obliged to repay the interest unduly charged in application of the floor rate clause declared to be null and void. Although the majority stance of the different courts and county courts subsequent to said Supreme Court verdict of 9 May 2013 has been that of opting for "partial retroactivity", obliging banks to refund the interest unduly charged from May 2013 onwards only (the date of the verdict handed down by the Supreme Court), in recent months there have been increasingly more abundant rulings by the magistrate's courts and county courts that rule in favour of total retroactivity, obliging banks to repay all the interest unduly received from the start, i.e. from the contracting of the loan "as a logical consequence of the declaration of nullity and until such time as Article 1,303 of the Civil Code is amended or revoked".
To this effect, the ruling of the prejudicial issue proposed by the Granada Mercantile Court to the Court of Justice of the European Union (CJEU) on whether the limitation of the retroactive effects of the null and void clause set out by the Supreme Court is in line with EU law or not will be decisive and definitive, highlighting to this effect the report of the legal services of the European Commission of 13 July 2015, which has come out in favour of total retroactivity and has reported (non-binding report) that partial retroaction in cases of nullity is not in line with EU law.

## BANKRUPTCY

### *U-TURN IN THE INTERPRETATION OF THE BANKRUPTCY LIABILITY OF THE COMPANY ADMINISTRATOR*

In the culpable bankruptcy of a legal person, the persons affected by the qualification may be the administrators or liquidators, de facto or de jure, the general proxy holders and anyone who may have had any of these statuses in the two years prior to the date of declaration of bankruptcy, as well as the shareholders who have refused without reasonable cause the capitalisation of credits or an issue of securities or convertible instruments on the terms set out in Article 165.2 of the Bankruptcy Law, depending on their degree of contribution to the formation of the majority needed for the decision to be rejected. To this effect, we see how the Bankruptcy Law is clear, as at no time does it mention the physical representative person appointed by the legal person administrator. Consequently, their imputation as person affected by the qualification can only be as de facto administrator providing the imputation is gleaned from the bankruptcy administration report and from the ruling of the Public Prosecutor's Office given in the qualification section. This has been seen in, inter alia, the ruling of Barcelona Mercantile Court No. 3, of 5 October 2007, Bankruptcy Incident no. 36/2004, when it stated that "the only possibilities of attribution of liability to the physical person who represents a legal person that was the administrator of a company undergoing bankruptcy have to be either due to the evidence that that physical person was acting in fact as the de facto administrator of the bankrupt company — with it not sufficing that that physical person is the de facto or de jure administrator of the company that has been appointed administrator or board member — as the de facto situation must be accredited with regard to the bankrupt company, not with regard to a third company; or due to the channel of complicity with the bankrupt company and its administrators". This same criterion is the one that has been adopted by Barcelona County Court (rulings of 16 November 2011, 26 March 2014 and 20 October 2014, inter alia), by repeatedly sustaining that the liability lies with the legal person administrator and not with the physical person appointed as representatives.
Without prejudice to the above, we see how the reform of Article 236 of the Capital Companies Act carried out by Law 31/2014, of 3 December 2014, introduced a new Section 5 with the following content: "The physical person appointed for the permanent exercise of the duties of the post of legal person administrator must meet the legal requirements set out for administrators, will be subject to the same duties and will be jointly and severally liable with the legal person administrator". In other words, after the above reform, the Capital Companies Act speaks directly of joint and several liability between the legal person administrator and their physical representative person, which means that liability actions may be directed not only at the legal person administrator but also at the physical representative person.
Having set out the above, if we transfer this circumstance to the field of bankruptcy, and more specifically to the scenario of the bankruptcy liability of the qualification section – aimed at penalising certain conduct that may have caused or aggravated the state of insolvency that determines the declaration of bankruptcy – we see how it is not very different from the one set out in the Capital Companies Act. On the occasion of the recent ruling no. 83/2016 of Barcelona County Court, of 19 April 2016, in a case defended by the firm's Bankruptcy Department, we were able to see how the entry into effect of the above precept has represented a significant U-turn in the interpretation that the courts had normally been making, even considering that the bankruptcy liability of the company administrator "does not constitute a watertight room to which the general rules regarding the liability of company administrators do not apply". Because of this, although it was fairly clear, before the arrival of Section 5 of Article 236 of the Capital Companies Act, that the liability of the physical person appointed by the legal person administrator could only be constructed through the figure of the de facto administrator, we now see how after the reform, providing the facts imputed correspond to a time subsequent to the substantial amendment of the system of liability brought about by Law 31/2014, it could be extended to them jointly and severally without the need to attribute them with the status of de facto administrator or make use of the doctrine of piercing the corporate veil.

*In accordance with the Personal Data Protection Act 15/1999, of 13 December 1999, we would like to inform you of the existence of a file the property of the Bufete Pintó Ruiz S.L. which contains your personal details (which are exclusively your name, position, company telephone number and e-mail), and the aim of which is to inform you about legal and case law news. Similarly, we would also like to inform you about the possibility of exercising your rights of access, rectification, cancellation and opposition in the terms established in current law, by means of a letter which you may send to the BUFETE PINTÓ RUIZ S.L.P, Calle Beethoven 13, planta 7.ª Barcelona or by e-mail to the following address info@pintoruizdelvalle.com.*

## SPORTS

*APPOINTMENT OF LUCAS FERRER AS ARBITRATOR OF THE 35TH AMERICA'S CUP*

March saw the official appointment of Lucas Ferrer, Director of the Pintó Ruiz & Del Valle Sports Law Department, as arbitrator on the Arbitration Tribunal of the 35th America's Cup. This yacht race is one of the most important sporting events in the world and the third sporting event worldwide with the greatest economic impact for the host country. This year's America's Cup is divided into two large areas: the "Louis Vuitton Cup", which consists of several stages that will be held in various cities throughout 2016 (Oman, Chicago, New York, Portsmouth and Toulon); and the "Defence of the Cup" per se, which will be held in June 2017 in Hamilton (Bermuda). The 35th America's Cup has six participating teams (Emirates Team New Zealand, Oracle Team USA, Land Rover BAR, Soft Bank Team Japan, Artemis Racing and Groupama Team France) from six different countries (New Zealand, United States, United Kingdom, Japan, Sweden and France).

Owing to the sporting and economic magnitude of the competition, there was the need to create a specialist Arbitration Tribunal to rule on all the lawsuits that may arise during this year's competition. Besides lawyer Lucas Ferrer, the Arbitration Tribunal also comprises US lawyer Jeffrey A. Mishkin (President) and Australian Mathew C. Allen.

*INTERNATIONAL CAS HEARING*

A hearing of the Court of Arbitration for Sport (CAS), based in Lausanne (Switzerland), was held on 14 April for the first time at the Austral University (Argentina). This Tribunal rules on international lawsuits relating to sports since the majority of the International Federations and the International Olympic Committee have included an arbitration clause in their statutes that obliges all their members to settle their disputes, in the last instance, in the CAS. The hearing was chaired by Efraim Barack, from Israel, and the arbitrators were Nicolas Ulmer, from Switzerland, and Gustavo Abreu, from Argentina. Participating as Ad Hoc Clerk was Yago Vázquez, of Pintó Ruiz & Del Valle, and all the actions were supervised by CAS Director, Antonio de Quesada, from Peru.

## PALMA

*NEW ADDITION TO THE PALMA OFFICE*

The Palma office has recently brought in lawyer Juan Cerdó Morell, who specialises in the branches of civil and mercantile law, with a track record in other renowned firms on the island and who brings along his fluent knowledge of German. His addition extends the firm's traditional vocation in advising foreign clients and investors, and it can now offer services in Spanish, Catalan, English, Italian, Finnish and now also in German, without having to use external interpreters.

## CHAMBERS & PARTNERS

*CHAMBERS EUROPE 2016 SELECTS PINTÓ RUIZ & DEL VALLE*

The prestigious legal directory *Chambers Europe 2016* has, for the sixth year running, placed Pintó Ruiz & Del Valle among the elite of Spanish law firms, so consolidating its presence in sports law and IP, areas in which the firm was already outstanding in previous editions, and recognised the great prestige of Carlos Noguera in restructuring.

*Chambers* distinguishes in Band 1 (leading the ranking) our strong sports law team headed up by José Juan Pintó — President and partner of Pintó Ruiz & Del Valle — whose experience and in-depth knowledge of the sports world bring in warm recommendations from colleagues and clients.

José Juan Pintó stands out as one of the 100 most relevant lawyers in Spain, and he is also named one of the 13 "star" lawyers in the whole of Spain. *Chambers* considers that José Juan Pintó "has a splendid reputation among his peers as a 'superstar' in the field of sports law, both in Spain and worldwide. One of the sources declared that 'he is one of the first in the sports world and a benchmark'." Also, as stated, the Director of the Sports Department, Lucas Ferrer, "gains recognition among his peers as an increasingly more important figure in the area of sports law. He acts as a lawyer in disputes before the CAS".

*Chambers* highlights our Industrial Property Department and recognises its excellent reputation in activities in the Industrial Property sector. Special mention is made of Eva Ochoa, partner at Pintó Ruiz & del Valle and highlighted, both in *Chambers Europe* and in *Global Chambers*, in Band 4. Highly rated by clients and professionals in the sector, especially for her work in the field of trademark protection and her defence against possible breaches of this, she takes charge of commercial trademark infringement cases in the courts in Alicante. Clients praise the firm for its excellent clientele and the good reputation of its lawyers.

Finally, in the area of restructuring/insolvency, *Chambers* highlights the Director of the Bankruptcy Department, Carlos Noguera, who comes in for excellent praise in the market as a professional specialising in insolvency who acts for both creditors and debtors. According to *Chambers*, his clients say of him that "'he is a firm negotiator; he knows how to deal with the person before him and he knows at all times when he has to argue the case,' say his clients, who also 'highlight his prestige and his absolute dedication to cases'."


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