

# COMMENTARY



## Recent Amendments Come into Force in Relation to the Spanish Public Notaries Act

### Executive Summary

The recent amendments to the Spanish Public Notaries Act (*Ley de 28 de mayo de 1862, del Notariado*), which became effective on October 15, 2015, strengthen the regulation for notarial enforcement, with recently enacted rules applicable to the nonjudicial procedure. The principal rules of the enforcement procedure are the following:

- An electronic auction will be convened by the Notary, after certifying the established legal requirements and the capacity and legitimacy to carry it out. The auction will be held in the Auctions Portal of the State Agency Official Spanish Gazette (*Portal de Subastas de la Agencia Estatal Boletín Oficial del Estado*).
- The procedure begins with an auction announcement to be published in the Spanish Official Gazette (*Boletín Oficial del Estado*) at least 24 hours prior to the opening of the auction's submissions. Once opened, it will be possible to make electronic bids for a period of at least 20 calendar days only.
- To participate in the auction, it is necessary to electronically consign 5 percent of the value of the asset or right to be auctioned.

- If no bidder submits a qualifying bid, the Notary shall declare the auction as deserted and will close the record.
- The auction may be suspended for different reasons, including: (i) judicial decision, (ii) falsehood of the title to the asset, (iii) debtor's insolvency, or (iv) filing of a third party domain (*tercería de dominio*) lawsuit. If the suspension lasts for more than 15 days, the procedure will start over at the point prior to the auction announcement.

On October 15, 2015, the new amendments to the Spanish Public Notaries Act (*Ley de 28 de mayo de 1862, del Notariado*) ("Notaries Act") related to the notarial enforcement entered into effect, enhancing and more extensively regulating the extrajudicial procedure provided in Article 1,872 of the Spanish Civil Code (*Código Civil*).

### Applicable Regulation

Auctions that may be made before a Notary pursuant to a legal disposition shall be governed by the rules established therefore or, in their absence, those set forth in Chapter V of the Notaries Act. Chapter V of the Notaries Act will also govern auctions carried out pursuant to a judicial or administrative resolution,

contractual or testamentary clause, arbitral award, mediation agreement, special agreement in public document, or voluntary auctions.

## Appointment of the Notary

In the absence of a specific provision, a Notary will be competent to conduct an auction within the context of a judicial or administrative resolution, if appointed by the title-holder of the assets or rights to be auctioned or the title-holder (if there are different title-holders) of the majority of such assets or rights. If there are several owners with equal share over the corresponding asset or right, the previous owner of such asset or right will have appointment power for the Notary.

In other cases, the Notary may be freely appointed by all interested parties. Otherwise, and in the absence of a specific provision, the Notary will be competent for these purposes if appointed by the title-holder of the assets or rights auctioned. If not, the Notary will be competent for these purposes if available in the domicile or habitual residence of title-holder(s) or in the location of the asset or the majority of the assets, at the discretion of the requesting party.

## Enforcement Procedure

Upon request from the person entitled to cause the sale of a particular asset or right, the Notary will proceed to convene the auction, after reviewing the application, certifying the identity and the capacity of its promoter and the legitimacy to cause such sale.

The auction will be electronic and will be held in the Auctions Portal of the State Agency Official Spanish Gazette (*Portal de Subastas de la Agencia Estatal Boletín Oficial del Estado*) (“Auctions Portal”).

The applicant must prove to the Notary the ownership of the asset or right to be auctioned or the entitlement to dispose of it, the status of any liens on the assets, the leasing and possessory status, the physical status, the outstanding obligations, the auction’s value, and any other information that may affect the value of the asset. After verifying the above information, the Notary may, with a previous consultation

to the Spanish Public Insolvency Registry (*Registro Público Concursal*) (“PIR”), accept or reject the request. In case of acceptance, the Notary will provide the PIR with the Tax Identification Number (“TIN”) of the title-holder (an individual or legal person) of the asset or right to be auctioned.

During the procedure, the Notary must inform the PIR about the course of the procedure, and the PIR must notify the Notary of any entry in the register associated with that specific TIN, for the purposes provided in the insolvency legislation. The Notary will also notify the PIR of the conclusion of the auction.

If the asset is a real estate or an *in rem* security right registered in the Spanish Land Registry (*Registro de la Propiedad*) (“Land Registry”) or Spanish Movable Assets Registry (*Registro de Bienes Muebles*) (“Movable Assets Registry”), the Notary will electronically request a registry certification of domain and encumbrances.

In case other titles are presented that modify the initial information, the applicable registrar will immediately inform the Notary and the Auctions Portal, by electronic means. The Auctions Portal will collect all the information provided by the corresponding Registry for those who wish to consult its content.

## Auction Announcement

The auction announcement will be published in the Spanish Official Gazette, in addition to those locations designated by the record’s promoter. In addition, the auction announcement must be announced at least 24 hours in advance before the opening of the auction.

The Notary shall notify the title-holder of the asset or right, unless it is the same as the applicant, the initiation of the proceedings, and the content of the announcement, as well as the procedure followed to fix the auction price. In addition, the Notary shall also notify to any title-holder of rights and burdens appearing in the certification of domain and burdens issued by the corresponding Registry.

If the valuation is not contractually established or has not been given by the applicant if possible, it will be established by an

expert (*perito*) appointed by the Notary. Such valuation will constitute the price (*tipo*) of the auction. Bids lower than the price established by any of these methods will not be admitted.

The Notary will note whether the title-holder or a third-party claimant is opposed to the initiation of the auction and will suspend the procedure if the corresponding lawsuit has been filed. The Notary will resume the procedure if the lawsuit is finally not admitted.

## Auction Rules

The electronic auction will be carried out, subject to the following rules:

- The auction will be held in the Auction Portal.
- The auction will be opened at least 24 hours after the date of publication of the announcement in the Spanish Official Gazette.
- Once the auction is opened, it will be possible to make only electronic bids for a period of at least 20 calendar days after the opening of the auction.
- To participate in the auction, bidders must be in possession of the appropriate accreditation, after having electronically consigned 5 percent of the value of the asset or right. In case the applicant or the co-title-holders of the asset or right want to participate in the auction, such a consignment shall not be required.

Upon closing the auction, the Auctions Portal will send the Notary all the information of the winner, as well as the information of the other bidders.

If no bidder submits a conforming bid, the Notary will declare the auction as deserted and will agree to close the record.

The following proceeding diligences to be issued by the Notary shall contain: (i) the payment of the rest of the price offered by the winner within 10 business days in the entity adhered to the Auctions Portal, at the Notary's disposal, (ii) the delivery by the Notary to the applicant or the deposit in favor of the interested parties or the corresponding court of the amounts received from the successful bidder, and (iii) the refund of the electronic consignments to the unsuccessful bidders.

If the successful bidder fails to comply with the payment obligations, the award shall be made to the second highest bidder. In this circumstance, the defaulting successful bidder will lose the previously deposited consignment amount. Nonetheless, the auction will be suspended until the period established to exercise the corresponding first refusal right by the quota-holders or the shareholders of the company has elapsed.

If the law requires a public document to transfer an asset or right as a condition of validity and effectiveness of the transfer after the auction, the title-holder or its representative will grant a public deed of sale in favor of the successful bidder before the Notary at the time the price is completely paid.

## Suspension of the Auction

The auction that causes a forced sale may lead to a suspension or closure of the proceeding, based on the following causes:

- When a judicial decision is submitted to the Notary supporting the absence or the extinction of the secured obligation, and in the case of assets or registered rights, a certificate of the corresponding Registry attesting that the lien has been cancelled, or public deed of letter of payment is submitted evidencing the change of the asset's ownership or charges over the same.
- In case of shares or quota-shares, certificate signed by the director or Secretary Non-director of the company legitimated by the Notary, demonstrating the cancellation of the *in rem* security right or seizure over the rights of the shareholder/quota-holder is required.
- Upon assertion of a criminal cause alleging falsehood of the title or the invalidity or the unlawfulness of the sale procedure.
- If debtor's insolvency or the cessation of the enforcement actions is justified to the Notary, even if the auction was already announced and in cases specified in the insolvency legislation.
- Upon filing of a third-party domain (*tercería de dominio*) lawsuit, certified by the corresponding title of ownership.
- If it is proved that another auction procedure over the same assets or rights has been initiated.

If the suspension would affect only a part of the assets or rights, the procedure can continue for the others, if it is requested by the creditor or the procedure's promoter.

In the case of loans, personal credits, or any other financing instruments (and without prejudice to the application of the specific regulation), the auction may also be suspended if the competent judge is made aware of abusive or unclear content of any of the clauses that constitute the basis of the auction or of any clauses that had affected the amount due.

If the suspension of the auction lasts for a period longer than 15 days, the consignments and the guarantees provided by the bidders shall be released and the procedure will be reset to the point prior to the announcement of the auction. The resumption of the auction may occur upon a new publication of the auction and a new request of registry information.

In case of registered assets, if the creditor's claim and the initiation of the extrajudicial sale is based on any cause other than (i) the nonpayment of principal or interest or (ii) any breach of other debtor's obligations, the auction procedure may be suspended if, prior to the auction, an objection to the Land Registry or to the Movable Assets Registry was made through a declarative judgment. In this event, the judge will notify the Notary of the resolution taken.

## Voluntary Auctions

Voluntary auctions may be convened under particular conditions included in the specifications (*pliego de condiciones*) and will be realized through the Auction Portal. The applicant, in the particular condition specifications (*pliego de condiciones particulares*), may, among other resolutions, increase and decrease or eliminate the electronic consignment. In all other matters, the general rules analyzed above (except in relation to the appointment of an expert above) shall apply.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

### **Javier López Antón**

Madrid

+34.91.520.39.39

[jlopezanton@jonesday.com](mailto:jlopezanton@jonesday.com)

### **Fernando Lillo**

Madrid

+34.91.520.3989

[flillo@jonesday.com](mailto:flillo@jonesday.com)

### **Sergio Cires**

Madrid

+34.91.520.3939

[scires@jonesday.com](mailto:scires@jonesday.com)