

ADOPTION OF INTERIM MEASURES IN THE FRAMEWORK OF A FINANCING AGREEMENT, BASED ON THE APPLICATION OF THE “REBUS SIC STANTIBUS” CLAUSE, IN LIGHT OF THE CURRENT COVID-19 PANDEMIC

First Instance Court number 60 of Madrid has been the first court to approve the postponement of certain payment obligations of the borrowing party under a financing agreement, based on the application of the “rebus sic stantibus” clause, in light of the impact of the COVID-19 pandemic on its business. The following is a summary of the facts, as well as the requirements that characterise the application of the “rebus sic stantibus” clause and that formed the grounds for the court's decision.

1. Background

On 31 October 2017, the CELSA group (a leading company in the Spanish steel sector) entered into a financing agreement, through its company Barna Steel, S.A., as borrower, and with the majority of the companies in the group as guarantors, amounting to 900 million euros, with a syndicate of banks and Banco Bilbao Vizcaya Argentaria, S.A. acting as the agent entity (the “**Financing Agreement**”).

The Financing Agreement was signed on the basis of the feasibility plan prepared by the CELSA group through KPMG, S.A., which acted as an independent advisor, in the context of the situation and position of the group on the date of said agreement (the “**Feasibility Plan**”). In this regard, the Financing Agreement establishes a number of obligations for the borrower and the guarantors, including the obligation for the borrower to comply with a specific repayment schedule for the principal and interest payments (due on 4 May and 4 November of each year), as well as the obligation to meet certain financial ratios (leverage ratio and cash ratio).

In addition, the Financing Agreement expressly empowers the lenders to accelerate said agreement in certain circumstances, including any default regarding repayment and/or financial ratios over a certain period of time and, therefore, to demand the payment of all amounts due under it (including principal, interest and expenses) and to enforce the corresponding security.

The CELSA group, as a consequence of the impact that the COVID-19 pandemic has had on its business activity, as well as its inability to make the payment of the instalment scheduled for 4 May (of approximately 34 million euros), asked the syndicate of banks to grant a moratorium on said payment. According to the decision of First Instance Court number 60 of Madrid, in order number 155/2020 (the “**Court Order**”), the CELSA group received no formal response to that request.

In addition, as a result of the impact of the COVID-19 pandemic, the CELSA group requested a bridge loan from certain Spanish banks, with the guarantee of the Official Credit Institute, of 51 million euros (expandable to 75 million), for the purpose of strengthening its liquidity.

2. Interim measures

In this context, the CELSA group asked the court, as a matter of urgency, to grant certain interim measures before it files the claim it intends to bring against the syndicate of banks. The purpose of the interim measures is to ensure the viability of the effects of the final decision of the court on the merits of the case.

The following interim measures were requested:

- (i) The suspension of the due date of the repayment instalments scheduled for 4 May and 4 November 2020 (the latter amounting to approximately 103 million euros), so that they become due on 4 May and 4 November 2021;
- (ii) The suspension of the obligation to comply with the financial ratios provided for under the Financing Agreement, from 1 April 2020 to 31 March 2021; and
- (iii) A ban on the lenders declaring the termination of the Financing Agreement and demanding partial or total repayment of any amounts due under it, either due to non-payment of 2020 repayments or due to non-compliance with the above financial ratios.

Article 733.2 of the Spanish Civil Procedure Act (the “LEC”) provides that, in order for interim measures to be granted as a matter of urgency, by court order and without a prior hearing for the defendant, the claimant must demonstrate that there are grounds of urgency or that the preliminary hearing could jeopardise the interim measures in question.

To this end, the CELSA group argued that the aforementioned measures were urgent because, inter alia, the possible enforcement of the security and guarantees as a result of the breach of the Financing Agreement (in particular, bearing in mind that some of them qualify as financial security, the enforcement of which is more expeditious as they can be enforced by creditors extrajudicially and without opposition from the debtor) would entail the liquidation and disappearance of the group, which employs more than 9,000 workers worldwide. It also alleged that holding a preliminary hearing before the adoption of such interim measures would in practice imply that the court would not be able to issue a decision before 4 May 2020, i.e. the due date of one of the repayment instalments of the Financing Agreement that the group expected to be unable to make.

3. The decision of the Court. “Rebus sic stantibus” clause

The LEC regulates the adoption of interim measures in Article 721 et seq. In particular, Article 728 provides that the following circumstances must be present for interim measures to be granted

(together with a cross-undertaking in damages as regards any loss or damage that the adoption of the measures might cause for the respondent):

- (i) “*fumus bonis iuris*” or the appearance of good law, that is, the likelihood of success on the merits of the case. To this end, the LEC requires that the claimant submit, together with the request for interim measures, the arguments and documentary justifications on the basis of which the court concerned could base a favourable provisional and indicative ruling, without prejudging the merits of the case; and
- (ii) “*periculum in mora*” or danger in delay, that is, that while the proceedings are pending, if the requested measures are not adopted, situations may arise that prevent or hinder the effectiveness of the protection that may be granted in the event of a judgment in favour of the claimant.

Regarding the appearance of good law, based on the documents presented, the CELSA group stated that the repayment schedule is derived from the group's cash generation capacity, as provided for in the Feasibility Plan, and that complying with the ratios is linked to the financial and economic situation of the group, since the obligation to meet the agreed thresholds is aimed at detecting financial difficulty and the solvency of the group.

In this regard, the CELSA group alleges that it has been fulfilling, diligently and at all times, its obligations regarding payment and complying with the ratios under the Financing Agreement, and that the serious detriment to its activity, as well as its current inability to meet certain obligations, is derived from the current situation caused by the COVID-19 pandemic, and argues that the crisis was not foreseen in the Financing Agreement and that it was unforeseeable.

To this end, the CELSA group argues that the impact on its business has been significant on the basis of, *inter alia*, (i) the loss of at least 144 million euros in revenue; (ii) a 45% decrease in the group's operating income; (iii) a cash position at the end of April of 60 million euros (instead of the 83 million euros expected); and (iv) the temporary workforce restructuring plan which was approved and affects 89% of its workforce.

In view of the above, the court considered that the crisis caused by the COVID-19 pandemic has led to a “plummet” in the sales of the CELSA group, and has seriously affected its business model and the results that were expected and could be predicted in a normal situation. It also considered that the situation that has arisen due to COVID-19 is completely exceptional, bearing in mind that the Financing Agreement and the Feasibility Plan took into account a normal and standard scenario, and not a global pandemic such as the COVID-19 crisis.

Notwithstanding the foregoing, the Court Order analyses the negative impact that the COVID-19 pandemic has had on the economic activity of the CELSA group, as well as the exceptional nature of the pandemic, based on the application of the “*rebus sic stantibus*” clause, which was alleged as regards the approval of interim measures, along with *force majeure*.

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The “rebus sic stantibus” clause, as defined by the Supreme Court’s case law, is one that allows the debtor to be released from or lessen the negative impact of a contractual risk that was not assigned at the time of the entering into the agreement, and that materialises due to the existence of extraordinary and unforeseeable circumstances which are not attributable to either party¹. The Court Order refers to the following requirements which must be met for this rule to apply, as established by Supreme Court case law:

- (i) That the crisis be unforeseeable, taking into account the normal and ordinary situation of business activity at the time of the agreement;
- (ii) That there be an intense or noticeable economic impact, which leads to a difficulty in fulfilling the agreed conditions or implies that compliance is excessively onerous (generating a clear disproportion of the benefits); and
- (iii) The impact of the crisis in the specific case has been proven. In other words, simply citing the crisis situation is not enough, the claimant must demonstrate in what way the agreed conditions are more onerous due to the extraordinary change in circumstances as a result of the crisis.

On the basis of the above, the Court Order provides that, in “an indicative manner and without prejudging the merits of the case”, the above requirements have been met in the case in question. The court considered that (i) the crisis resulting from the COVID-19 pandemic was not foreseeable; (ii) the crisis has severely affected the economic activity of the CELSA group; (iii) the commitments made by the CELSA group under the Financing Agreement were made on the basis of the Feasibility Plan, which in turn was based on a normal situation; and (iv) the fulfilment of certain obligations by the group has been severely altered in the context of the crisis.

The Court Order does not assess the existence of the requirements to apply force majeure. The court considered that “the prudence required in the framework of interim measures determines that it is not beneficial” to consider whether force majeure applies. However, it states that the arguments established by the CELSA group could be extrapolated.

Lastly, with regard to the other two requirements needed for interim measures to be granted, in accordance with the above (i.e. providing a cross-undertaking in damages and the danger in delay), the court set the cross-undertaking in damages at 750 thousand euros and considered the danger in delay to have been proven on the basis of the above arguments, taking into account the existence of the CELSA group's obligation to comply with certain financial ratios, the existence of significant security and guarantees to ensure compliance with the agreed conditions and the possibility of the lenders accelerating the agreement and enforcing the guarantees in the event of non-compliance with the ratios, or the due dates.

¹ Sergio Agüera and Adriana Martín, *La cláusula “rebus sic stantibus” y otras fórmulas alternativas utilizadas en la jurisprudencia. Especial referencia a los recientes pronunciamientos judiciales*, Aranzadi Digital, S.A., number 1/2014.

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Ultimately, on the basis of the foregoing and in accordance with the request made by the CELSA group, the court has ruled in favour of the claimant, granting the interim measures the group requested and setting a period of twenty days for the filing of the claim.

This Briefing was prepared by Patricia Mateos, an associate in the Banking and Finance practice. The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 19 June 2020 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

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