

# COVID-19: PRESSURE POINTS: INTERIM RELIEF AWARDED IN RELATION TO A FACILITY AGREEMENT DUE TO "CHANGE OF CIRCUMSTANCES" (SPAIN)

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Legal Briefings - By **Miguel García Casas, Ana Velasco and José María Faz**

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Decision 155/2020, of 30 April, delivered by Court of First Instance 60 of Madrid (the “Decision”) has awarded the interim relief requested on a precautionary basis by Grupo Celsa in relation to a facility agreement without the lenders having previously called the loan or filed enforcement actions.

The interim relief was awarded on the grounds of a drastic and unforeseeable change in the circumstances established in the company’s viability plan. The Decision is **highly significant** in that the Court has been the first to analyse the ramifications of the crisis caused by the COVID-19 pandemic on facility agreements and on the basis of the change of circumstances principle. The interim relief awarded entails: (i) a deferral of principal and interest payments; (ii) a hiatus in the obligation to meet financial ratios; and (iii) a prohibition to terminate the facility agreement, to call the loan and a prohibition to enforce any of the guarantees securing the loan.

## BACKGROUND

On 31 October 2017, Grupo Celsa, a leading Spanish iron and steel producer, entered into a €900 million commercial loan agreement with a syndicate of banks. The agreement was signed by the group’s parent company, Barna Steel, S.A., as borrower; almost all of the group’s other companies act as guarantors; Banco Bilbao Vizcaya Argentaria, S.A. and a syndicate of banking institutions acted as lenders (the “**Agreement**”).

The Agreement also included an obligation to repay principal on certain dates set out in the repayments schedule, an obligation for Grupo Celsa to meet a series of financial ratios. Both obligations were made on the basis of a viability plan prepared by Grupo Celsa for the period 2017 to 2022 (both included).

The Agreement also established a number of events of default that would enable the lenders to call the loan and demand its repayment early, including principal, interest, expenses and any other items. Those events of default encompassed breach of any of the payment obligations or of the financial ratio undertakings for a period of two consecutive quarters (in the case of the leverage ratio) or two consecutive months (in the case of the cash ratio).

To be released from its payment obligations under normal circumstances, the Grupo Celsa would have to obtain the approval of the qualified majority of the lenders, representing 95% or 66.6% of the amount of the loan, depending on the obligation for which release is sought.

Given the extraordinary crisis caused by the COVID-19 pandemic, Grupo Celsa asked the banking syndicate for a pause in payments. However, the lenders did not respond to its request.

As a result, Grupo Celsa filed an application for interim relief, in which it requested: (i) a deferral on the repayment of principal and interest falling due in May and November 2020, which would be pushed back to the same dates in 2021; (ii) a hiatus in the obligation to meet the financial ratios from 1 April 2020 to 31 March 2021; and (iii) a prohibition on the lenders to terminate the Agreement, to call the loan or to demand its partial or full repayment, and a prohibition to enforce any of the guarantees securing the loan.

## **GROUND**

The Decision acknowledges the urgency of the measures requested given that the proximity of the repayment date (and likely breach) makes acceleration of the loan and the enforcement of the guarantees not only possible, but highly likely. The Court took into account, primarily, the type of guarantees that had been given (financial guarantees and a pledge over current accounts), which could be enforced out of court and in a very short timeframe without the borrower's opposition, as it would be impossible to hold a hearing and to deliver a decision before 4 May, date on which the next payment would fall due.

Secondly, as for there being a credible case for the claim (*fumus boni iuris*), the Decision considers that there is sufficient evidence that the repayments under the agreed schedule are a direct result of Grupo Celsa's ability to generate income on the basis of the hypothesis assumed in its viability plan, in which it was assumed that its plants would operate on normal conditions.

The Decision refers to the fact that Grupo Celsa has met its payment commitments to date and has improved its financial capacity in recent years. More importantly, though, it points out that **the COVID-19 pandemic was not foreseeable and that the situation caused in the wake of the pandemic has had a severe impact on Grupo Celsa's business model and the results that could have been expected had it been allowed to operate under normal conditions**; this is for two reasons: (i) a sharp fall in the group's production and sales as a result of the mandatory stoppage of non-essential activities imposed by Royal Decree-law 10/2020, of 29 March, which establishes recoverable paid leave for employees that do not provide essential services with the aim of reducing the movement of people in the fight against COVID-19; and (ii) the furlough (ERTE) application that affected 89% of its workforce (3,041 workers).

The Decision stated that there was prima facie evidence of the requirements being met to apply the "change of circumstances" rule as *"the applicant's ability to comply strictly with the agreed ratios"* had been significantly affected; however, the Decision does not assess the requirements for force majeure, which, it indicates, would be a matter to be looked at in declarative proceedings.

As for the "risk of delay" requirement, the Decision states that not awarding the requested interim relief could jeopardise Grupo Celsa's very survival, given the type of guarantees involved and the lenders' ability of calling the loan in the event of default.

Finally, the Decision set a bond of €750,000, as requested by the applicant, on the basis that *"the interim relief does not entail loss of the existing guarantees nor a reduction of the applicant's debt"*. The Decision does not however replicate the applicant's arguments for calculating that amount.

## **CONCLUSIONS**

- The Decision anticipates a trend that might be followed by case law when assessing the applicability of the "change of circumstances" (*rebus sic stantibus*) rule in relation to facility agreements and hints to a tendency to protect their continuation.
- It also points to what debtors' strategy might be when claiming a change of circumstances: requesting interim relief without a hearing to prevent the early termination of loan agreements and the enforcement of guarantees.
- If awarded, interim relief will prevent financial institutions from enforcing guarantees throughout court proceedings (at least during the first instance proceedings) and places financial debtors in a favourable position during refinancing negotiations.

Our recommendation is therefore for financial institutions to negotiate possible refinancing structures that prove acceptable to their debtors so as to avoid court proceedings frustrating – at least in the short term – the lenders’ interests.

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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