

**The application for precautionary measures through the REBUS SIC STANTIBUS clause**

The health crisis caused by COVID-19, which is provoking an economic and social crisis in Spain, after months of uncertainty due to the paralysis of economic activity and subsequent attempts to revive the economy, is causing entrepreneurs to look for ways to alleviate economic losses as quickly as possible.

The great majority of Spanish companies have had as their main common stumbling block the uncertainty of how to face up to a totally unpredictable and drastic financial risk regarding contracts signed with, among others, suppliers and partners: the payment of partial loan repayments through monthly, quarterly or annual installments in financing contracts, to cite a few examples.

In regard to private legal transactions, **FONT & YILDIZ** has already provided information on some of the exceptional legal institutions provided for the Spanish legal system in the event of supervening and unforeseeable circumstances (see [Client Alert #3/2020](#)). Here, we explain the requirements both of force majeure, as an exceptional form to suspend the obligations inherent to the parties in bilateral contracts, and the well-known doctrinal construction "*rebus sic stantibus*" clause, which allows the judicial resolution or review of contracts.

However, in this note of interest we will refer exclusively to the application that our courts are making in relation to the "*rebus sic stantibus*" clause through a provisional or precautionary judicial procedure called "*medidas cautelares*" or precautionary measures.

These precautionary measures are a procedural mechanism that can be requested prior to or simultaneously with the initiation of the principal judicial procedure, in which the resolution or revision of the contract that is the cause of the litigation will be clarified. Its purpose is to ensure the future outcome of the proceedings.

For its adoption, it is necessary to demonstrate the appearance of good standing (*fumus boni iuris*) and the danger of procedural delay (*periculum in mora*) that could originate in the temporary lapse understood during the pending of the process until its resolution by means of a sentence. In addition to these two requirements, the applicant for the measure must provide a sufficient guarantee (surety bond) in accordance with the requested precautionary measure. Despite the notoriety of the



generalized havoc that the pandemic is causing, it is necessary to prove before our Courts the compliance with the requirements of the precautionary measures.

In this respect, in order to prove the appearance of a valid right, it will be necessary to prove the concurrence of the assumptions of the application of the "*rebus sic stantibus*" clause. Thus, we would have to prove the existence of (i) a contractual relationship, (ii) the supervening change in the circumstances that were taken into account when the contract was concluded and (iii) that its fulfilment is extraordinarily onerous for one of the parties.

With regard to the danger in procedural delay, the detriment that may be caused in the economic sphere of the applicant in the event of the court not adopting the precautionary measures requested must be argued and it must be demonstrated that the danger is current and real.

However, we must bear in mind that its application is not exclusive but restrictive, and we have seen this in numerous judgments prior to the current situation in which the request was rejected on the grounds of normal risk inherent in or derived from certain contracts (STS 30 April 2015).

Our professional practice, which has experience in handling this type of judicial procedure, has found that despite its restrictive application, the current economic circumstances have demonstrated the need for its application in certain cases. Jurisprudence has admitted the modification of conditions in contracts through the request of precautionary measures in some cases and as an example we share the following:

**1) Syndicated Loan:**

The situation caused by the pandemic has led to a sharp drop in production as well as sales in a company that had a syndicated loan agreement with three (3) banking institutions.

In view of the adverse situation it was experiencing, the company requested the immediate adoption of the precautionary measures of (i) suspension of the maturity of the principal plus interest, (ii) suspension of the obligation to comply with solvency and leverage ratios, (iii) prohibition to terminate the contract and, consequently, being able to request the early maturity of the loan and (iv) prohibition on enforcing the guarantees.

The Court granted the precautionary measures after confirming that the requirements of the "*rebus sic stantibus*" clause had been met. In its resolution it warned of the need to apply the measures because, following a very



significant reduction in production and sales, the termination of the syndicated loan agreement and its consequent early maturity "could significantly compromise the survival" of the company (Madrid Court of Appeal No. 60, 30 April 2020, No. 155/2020, Rec. 310/2020).

## 2) Industrial Lease Contract:

A reputable company in the tourism sector concluded an industrial lease contract in Valencia. Faced with the immediate suspension of hotel and restaurant activities through Royal Decree 463/2020, which declared a state of alarm, this company sustained, during the lockdown, a considerable loss of income.

Therefore, as a precautionary measure in view of possible eviction due to non-payment of rent, the company requested a postponement of 50% of the rent and the suspension of enforceability of the bank guarantee at first request made as a guarantee of payment.

The request entailed a prior examination by the Judge, who argued that such a situation *"has meant a substantial decrease in income, or even the total absence of income, for almost four months, which, also taking into account that the resumption of tourist arrivals is not going to happen suddenly but, in accordance with the macroeconomic forecasts of the effect on the economy in general, it will be relatively slow and gradual, that the opening season of the hotel for the tourist purpose for which it is intended is until October [...], such circumstance is going to mean that at least the current season will experience a very high degree of frustration, thus preventing or seriously hindering the payment of the lease price in the agreed way."*

The Judge admitted the requested precautionary measures as, in their opinion, it was clear that the crisis resulting from COVID-19 was not foreseeable. And this has produced a situation that has immediately and extraordinarily affected the financial situation of the tenant, since the declaration of a state of alarm has meant a substantial decrease in, and even the total absence of, income for several months. At no point, at the time of contracting, was such a risk from a global pandemic of the magnitude generated foreseen or could have been foreseen.

However, the request for a provisional postponement applies to income generated *"from the June 2020 monthly payment until the ruling is issued, with the deferment of income generated as of March 2021, when the new hotel season will begin, only if the current legal restrictions on capacity and access at the border for European tourists remain in place"* (Auto JPI Valencia No. 1, of 25 June 2020, No. 256/2020, Rec. 505/2020).

### 3) Local Lease Contract:

- i. A company dedicated to the hotel and catering sector, as in the previous case, saw its income reduced in an unexpected manner with the application of Royal Decree 463/2020 and requested, as a precautionary measure on the lease of premises, the provisional suspension of the obligation to pay the lease price by a percentage, the reduction of rent and the prohibition of filing an eviction action during the processing of the main proceedings.

The Court issued the corresponding self-assessment of the measures requested, arguing that *"there is an appearance of good standing at the time when there is a lease of business premises in force at the date of filing of the application and where a bar-cafe activity was being carried out that has been interrupted as a result of the state of alarm in Spain due to COVID-19"*. And, as a result, it was provisionally agreed to reduce *"a 25% of the income from March 2020, 50% of the income from April to June 2020 and 35% of the income from July to December 2020"* (Auto JPI Benidorm No. 2, 7 July 2020, No. 162/2020, rec. 601/2020).

- ii. A company that leases premises, through a contract of lease of premises, in the "Splau" shopping center, requested as a precautionary measure the suspension of the claim of the rents, in an extrajudicial or judicial way, and the execution of the guarantee given as a warranty. This is because, after the declaration of the state of alarm proclaimed by Royal Decree 463/2020, of 14 March, and the successive extensions, caused by the pandemic generated by COVID-19, they have been forced under the rules cited to temporarily close the commercial establishments.

The Court granted the precautionary measure requested since *"in view of the new situation generated by the Covid-19 pandemic and the restrictions on mobility and freedom of enterprise, with the consequent closure of stores and shopping centers (where the leased premises are located), it is certainly plausible that the plaintiff's claim could succeed, even partially, so that the guarantee linked to it would not be enforceable either"*. Furthermore, it adds that *"it must be taken into account that the immediate execution of the guarantee would harm the defendant by becoming a debtor of the guarantor, who would most likely claim the payment of such amount with the corresponding costs and interest"* (Auto JPI Order No. Prat de Llobregat of July 15, 2020, No. 55/2020).

The great health crisis created by COVID-19, which is causing an economic and social crisis in Spain, is a challenge for all companies. Not only must they be concerned about the risks inherent in their activity, but they must also try to promote



the best measures available to them to overcome the current economic situation as diligently as possible.

At **FONT & YILDIZ** we believe that all entrepreneurs should consult a specialized law firm to find out whether they can process or request precautionary measures as a means of suspending the execution of a specific legal transaction.

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