BARTOLOME & BRIONES

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DISPUTES

Modification of contracts due to force majeure: the rebus sic stantibus rule

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Over the first two months of 2021 initial court rulings have been given on lawsuits claiming the modification of the obligations of a contract due to the pandemic as force majeure in accordance with the *rebus sic stantibus* rule.

This doctrine, which is not regulated in any legal rule but rather has been created and interpreted by the case law of the Supreme Court, establishes that in the event that the circumstances of execution of a contract changing due to unforeseeable and unavoidable external elements the aggrieved party may claim a modification of its obligations from the other party, in order to adapt the obligations of the contract to the circumstances, seeking maximum balance between the rights and obligations of the parties in the new context.

This doctrine makes perfect sense in the context of the current global pandemic given that many contracts have seen their execution possibilities and business expectations completely changed. The clearest example are lease contracts, in which the lessee has often not been able to use the leased business premises because they have had to close due to the State of Alarm or have seen their business hours and premises customer capacity sharply reduced.

The specific judgements handed down are as follows:

(1) Ruling 1/2021, *Juzgado de Primera Instancia nº 20 de Barcelona* (Barcelona lower court) upholds the claim for objective novation of an industrial lease contract filed by a company engaged in the tourist accommodation business and agrees to a 50% reduction in the rent between 1 April 2020 and 31 March 2021 (the end date of the contract).

(2) Order 43/2021, *Audiencia Provincial de Valencia, sección 8ª* (Valencia Provincial Court), dismisses an appeal against an order for precautionary measures that agreed to a 50% reduction in the rent of an industrial lease (hotel) from June 2020 until a ruling is handed down in the main proceedings. In other words, it upheld the reduction, at least as a precautionary measure.

These decisions set similar parameters of interpretation, the following key points being worth highlighting:

> "This doctrine makes perfect sense in the current global pandemic given that many contracts have seen their execution possibilities and business expectations completely changed"

(a) The state of alarm and the market disruption caused by the global situation create exceptional circumstances which go beyond any pre-existing business forecast and in principle justify the application of the *rebus sic stantibus* rule.

(b) The application of the *rebus sic stantibus* rule is exceptional and does not apply when the contract already provides for the assumption of risk, although this concept of assumption of risk must be interpreted in each case (for example, in the order of the Provincial Court cited above, the fact that the rent was variable according to invoicing with a fixed minimum rent is not considered assumption of risk).

(c) The disruption must frustrate the very purpose of the contract or create a serious and unduly burdensome detriment to one of the parties, which means that it is in accordance with the criteria of good faith and fairness that this undue hardship should be borne exclusively by one of the parties.

(d) The parties must have attempted to negotiate the modification of their contract, without coming to an agreement.

(e) The remedy sought should terminate the contract or modify it in such a way that profits and losses are distributed between the parties in an equitable and fair manner.

(f) The fact that the Spanish Government has issued a series of special rules on lease contracts in recent months does not preclude a claim under the rebus sic stantibus doctrine, as these rules are neither exclusive nor excluding.

Finally, it is worth noting that in these proceedings it is essential to have an expert report that accredits the claimant's losses as this factor determines the rebalancing of benefits claimed. In other words, the basis of the action, which is the claim for a modification of contractual obligations due to the pandemic as force majeure, is one thing, and the specific measure requested is quite another, for example, a 50% reduction in rent, which must be specifically justified based on economic and technical parameters.

March 2021

ENERGY

New circular letter on access to and connection of electric power generation projects

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Circular 1/2021, dated January 20, from the *Comisión Nacional de los Mercados y la Competencia* (National Markets and Competition Commission, hereinafter "CNMC"), which establishes the methodology and conditions for access and connection to the transmission and distribution networks of power production facilities (hereinafter, the "Circular"), has been published in the Official State Gazette (BOE).

I. Context

The Circular aims to complete the regulatory process regarding the development of access and connection which has been carried out by means of three regulatory texts: (i) by Royal Decree-Law 23/2020, of 23 June, approving measures in the field of energy and other areas for economic reactivation (hereinafter, "RD 23/2020"); (ii) by Royal Decree 1183/2020, of 29 December, on access and connection to electricity transmission and distribution networks (hereinafter, "RD 1183/2020"); and (iii) now by the Circular here analysed.

With the publication and entry into force of the Circular, the provisions of article 33.11 of Law 24/2013, of 26 December, on the Electricity Sector (hereinafter, the "ESL") are complied with. This establishes that "the CNMC shall approve by Circular the methodology and conditions for access and connection which shall include: the content of applications and permits, financial criteria, criteria for capacity assessment, grounds for refusal, minimum content of contracts and the obligation of publicity and transparency of relevant information for access and connection".

It is worth noting that the Circular is limited in scope as it only regulates access and connection for producers, leaving the specific treatment of consumers and distributors for another circular. The Circular is also a significant relevant milestone, since in accordance with the eighth transitory provision of RD 1183/2020 network operators did not admit new access and connection requests until the approval of this Circular. However, for the admission of new applications, there is still another milestone to be reached, this one regarding the IT and systems adaptation of network operators.

II. The most important aspects

a. Simplification of administrative formalities

Transmission and distribution system operators shall make available on their

website a standard application form for access and connection permits.

The application must contain at least: (1) applicant's identification, (2) copy of the receipt certifying that the financial guarantee has been deposited, (3) the preliminary project of the installation and, where appropriate, (4) accreditation of the submission of the application for the determination of the scope of the environmental impact study if it is an ordinary application, or a request for initiation if it is a simplified application.

To lighten the administrative load, if the procedure corresponds to the abbreviated procedure (art 16 RD 1183/2020), the Circular provides for a simplified application that must contain: (1) applicant's identification, (2) facility identification, (3) node or exact position and, where appropriate, (4) information regarding hybridisation, energy storage or, in the case of self-consumption, the contracted power for the associated consumption.

"To ensure transparency, in the case of high voltage grids, the obligation for transmission and distribution operators to publish on their website the necessary information relating to the capacities of their nodes, as well as to update it monthly is established"

b. Transparency and publicity of information in the access and connection processes

Transparency in the access and connection request processes is a fundamental part of guaranteeing non-discrimination and equality of the right of access for producers.

In this regard, in the case of high voltage grids, the obligation for transmission and distribution operators to publish on their website the necessary information relating to the capacities of their nodes, as well as to update it on a monthly basis is established.

This minimum information required is the following: (i) name; (ii) georeferencing; (iii) voltage level; (iv) available access capacity; (v) occupied access capacity; and (vi) access capacity corresponding to requests for access and connection permits received and not yet decided.

In this way developers can find out the most saturated nodes in advance and, as far as possible, assess the possibility of making access and connection requests at points with the best chance of acceptance by network managers, thereby optimising the use of these networks and maximising the integration of projects into them.

c. Encouraging shared use of disposal facilities

In order to maximise the use of the networks, the Circular establishes the obligation to allow the shared use of the connection facilities, provided that this does not affect the permits already granted and without prejudice to the signing of the corresponding compensation agreement.

For this reason, the Circular establishes the obligation to inform the network operator and the competent public administration of the compensation agreements.

d. Regulation of disputes and discrepancies over access and connection permissions

The CNMC will be the competent body to hear any disputes that may arise in relation to the granting or refusal of permission to access transmission and distribution networks. Furthermore, this body will be competent to resolve any discrepancies that may arise in relation to the granting or refusal of permission to connect to the networks under the jurisdiction of the General State Administration.

However, any discrepancies that may arise in relation to the granting or refusal of permission to connect to grids authorised by a *Comunidad Autónoma* (Autonomous Community) shall be resolved by the competent body of the corresponding Autonomous Community.

e. Incorporation of technical criteria

Finally, the Circular includes three Annexes which establish a series of technical criteria necessary to: (i) assess access capacity; (ii) assess the feasibility of connection; and (iii) determine the influence of the production facility on a grid other than the one to which it is connected, for the purposes of establishing the need for the corresponding acceptability report.

March 2021

EMPLOYMENT

New developments concerning Salary Records and Equality Plans

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Royal Decree 902/2020, of 13 October, on equal pay for women and men and Royal Decree 901/2020, of 13 October, regulating equality plans and their recording were published in October 2020.

The main new features introduced by the new regulations on the Salary Record and Equality Plans are as follows:

a) The obligation to implement a Salary Record as of 14.04.21 is established

First, Royal Decree 902/2020 on equal pay established its entry into force within six months of its publication, which means that all companies are obliged to adapt their salary records to the new regulations as it comes into force on 14 April 2021.

The Salary Record must be kept by all companies, regardless of their size, and consists of a record with the average values – arithmetic mean and median – of salaries, salary supplements and non-wage payments of the entire workforce (including management and senior management), disaggregated by sex and distributed by professional groups, professional categories and jobs of equal responsibilities or equal value.

Employees also have the right to access information on the average percentage differences between men and women in the record. And, in the event that the company has legal representation for its workers, they have the right to know the full content of the remuneration records.

Furthermore, when in a company with 50 or more employees there is an average gender pay gap of at least 25%, the company must demonstrate that this is not related to gender discrimination.

It is important to bear in mind that the absence of the above-mentioned pay information may lead to penalties for discrimination being imposed on non-compliant companies, in accordance with the *Ley sobre Infracciones y Sanciones del Orden Social* (LISOS), a regulation on Social Order Infringements and Penalties.

b) Equality Plans

Second, Royal Decree 901/2020 of 13 October, which regulates equality plans and their record, came into force on 14 January 2021 and requires companies to adapt the content of equality plans by 14 January 2022.

The Equality Plans must contain measures adopted after a diagnosis of the situation, aimed at achieving gender equality in the company and eliminating gender discrimination. The success or otherwise of these measures must be verifiable.

Royal Decree 901/2020 provides for a gradual application of the obligation to draw up equality plans depending on the size of the company, in accordance with the following deadlines:

- Companies with between 151 and 250 employees must have equality plans approved by 7 March, 2020.
- For companies with between 101 and 150 employees, equality plans must be approved by 7 March, 2021.
- For companies with between 50 and 100 employees, equality plans must be approved by 7 March, 2022.

> "The Salary Record must be kept by all companies, regardless of their size, and consists of a record with the average values of salaries of the entire workforce disaggregated by sex and distributed by professional groups"

In this regard, all equality plans must be compulsorily registered in the Register of Equality Plans, whether they are mandatory or voluntary, and regardless of whether or not they have been adopted by agreement between the parties.

It is important to bear in mind that equality plans, including the diagnoses prior to their elaboration, must be negotiated with the Workers' Legal Representation. Therefore, the company must provide all the data and information necessary to elaborate the diagnosis to the negotiating committee.

In addition to this, when drawing up an equality plan, all companies are obliged to include a pay audit, which will consist, first, of carrying out a diagnosis of the pay situation in the company, i.e. assessing its job positions in relation to the pay system and the promotion system and – taking into account the relevance of other factors that produce pay differences – potential deficiencies or inequalities in the company's reconciliation and co-responsibility measures, and difficulties in professional or economic promotion derived from other factors. Second, an action plan will be established to correct pay inequalities, with objectives, specific actions, a timetable, and staff responsible for its implementation and monitoring, based on the results obtained.

At Bartolome & Briones, we are ready to provide you with any necessary clarifications about these new measures and offer you the necessary legal advice to draw up and/or adapt Salary Records as well as the obligatory Equality Plans required with the entry into force of the new regulations.

March 2021

NEGOTIATION

How to diagnose a conflict and find out if your negotiation has a good prognosis

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I. Why diagnose a conflict?

The first step in any conflict management process is to determine the best way to resolve it. Generally, the options are negotiation or litigation. Most of the time we prefer to negotiate and leave litigation as a last resort. But it is not always clear to us whether a negotiated solution is possible, which can lead us to make two mistakes: to give up prematurely (e.g., if there is a mistake or false move), which would make us wrongly think that an agreement is not possible, or to spend more time than necessary wrongly thinking that an agreement is possible. Therefore, before starting a negotiation, it is important to determine whether the chances of reaching a negotiated agreement are high or low.

Without seeking to go into the depth of analysis proposed by Raúl Calvo Soler in "Mapeo de Conflictos", I would like to point out three questions that will give an initial idea of the harmonization potential of a given negotiation.

	DIAGNOSIS OF THE CONFLICT	YES	NO
1	**Actors: Are we negotiating/mediating in such a way as to include all those whose opinions are key to the resolution of the conflict?**		
2	**Interests: Are the principal interests and necessities of the parties compatible?**		
3	**Alternatives: Are the potential consequences in the case of not coming to an agreement (for example, going to court) perceived as negative by all parties?**		

These three questions aim to identify the extent to which there may be potential gains for all stakeholders that are of a sufficient magnitude to justify their active involvement in a negotiation process.

II. The questions in detail:

1. Actors: Are we negotiating/mediating in such a way as to include all those whose opinions are key to the resolution of the conflict?

This looks at whether we can bring the people who directly or indirectly are decisive in choosing whether or not to sign an agreement to a negotiation table. Sometimes, in addition to the parties involved, it may be necessary to bring in a professional advisor (e.g., a lawyer), a family member or a colleague. In the case of organizations, it could be the person with the best knowledge of the matter or the person who has the final word.

Therefore, the questions we should additionally ask are: what is the capacity of these people to condition the outcome of the negotiation, and what are their interests, if any?

Example: I remember the conflict between a homeowners' association and a telephone company. The company had dug a trench in a private area of the homeowners' property to run a cable, causing considerable damage. The homeowners' sued the telephone company for damages, but on becoming aware of how long this would take and the need to find a quick solution to their problem, they proposed to the company's lawyer to negotiate a settlement in exchange for prompt payment. The lawyer responded that he found the proposal attractive, as it would allow a reasonable solution to be found that would benefit everyone involved, but that unfortunately, this would not be possible, as he did not have direct access to the telephone company's decision-makers and was not authorized to negotiate out-of-court settlements. Thus, the trial had to continue to its conclusion.

2. Interests: Are the principal interests and necessities of the parties compatible?

In negotiation, the word "interest" refers to the benefits that a party seeks to obtain with its requests and demands.

What matters for a good prognosis is that the interests and needs (i.e., the "what for" of what the parties are initially asking for) are at least partially compatible.

If the real interests of the parties are different or even common, this indicates that they can most likely be reconciled in a "win-win" formula. On the other hand, if the main interests are opposed, it will be more difficult to generate win-win agreements and often there will be no choice but for a third party to decide the issue.

Take, for example, two parents who disagree about where their child should go to school. If the main interest of one is that they learn languages and the other that they have a religious education, it is hypothetically possible to find a school that satisfies both of them. On the other hand, if the main interest of one is to provide a secular education and the other a religious education, it will be very difficult to find a win-win solution.

"What matters for a good prognosis is that the interests and needs of the parties are at least partially compatible"

3. Alternatives: Are the possible consequences in the case of not coming to an agreement (for example, going to court) perceived as negative by all parties?

This question could be phrased differently: "If I don't perceive that I have anything significant to lose, why am I going to make my life difficult by negotiating?"

This means that even if there are potential gains, they may not be sufficiently attractive for either party to decide to invest time and effort in a negotiation.

A very common example of this situation is that of staff members of organizations who, because of the large number of disputes they

have to manage or their relatively small financial value, find it more convenient to resolve them in court through their lawyers than to invest hours in them. For such people, their time is worth more than the gains they could make by mediating or negotiating these conflicts.

III. Conclusion:

- Yes, to all three questions: The negotiation has a good prognosis. The likelihood that attractive settlement options (because they satisfy the interests of all parties significantly better than their best alternatives to a negotiated settlement) will emerge and be validated is high.

- Yes, to two or one questions: The prognosis for the negotiation is uncertain. There is a risk that settlement options that are attractive to all participants cannot be generated or are not validated.

NB: Just because a negotiation has a good prognosis does not mean it will be easy. It only means that there is light at the end of the tunnel. On the other hand, it is not always possible to answer these questions clearly at the outset. Therefore, it is often necessary to hold exploratory meetings in order to obtain this information.

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*This text is for information purposes only and does not constitute legal advice.