CLIFFORD
CHANCE

Briefing note

July 2013

Alteco, Mag Import, Autopista Madrid-Levante, Bami-Newco… Interim decisions causing concern in the financial sector

In recent months, Commercial Courts in Madrid have handed down decisions that are causing concern in the financial sector. We are referring to the interim injunctions ordered in the insolvency proceedings of Alteco and Mag Import (Courts nos. 8 and 5 respectively) and in the insolvencies of Autopista Madrid-Levante and Bami Newco (Court no. 2).

Common backgrounds

The four decisions to which we are referring all had something in common: the existence of a syndicated loan for a high amount, equipped with a series of guarantees, including security protected by Royal Decree Law 5/2005, of 11 March, which was the result of the transposition of Directive 47/2002, on Financial Collateral Arrangements, into Spanish law. In all cases, the borrower was drawn into insolvency and requested (either itself or via its receivers) that the financial institutions be prohibited from enforcing the security. This request was made in the form of an application for interim injunctions, stressing the urgency with which a decision had to be obtained.

The courts grant the interim injunction and do so without requiring the applicant to provide a bond, assuming that an insolvent company is not going to be in a position to supply a guarantee.

Content

Specific circumstances

As of this point, the circumstances of the different proceedings we have mentioned diverge.

In the insolvencies of Alteco and Mag Import, the interim injunction (which had initially been denied to the insolvent company) is ancillary to a claw back action filed by the Receivers a few days later.

However, in the cases of Autopista de Levante and Bami, Court no. 2 granted the interim injunction for its own sake, at the debtor's request. As such, it is not a measure designed to bring forward the effects of the declaration of insolvency (as it is simultaneous to said declaration) - instead it is a new effect of the declaration of insolvency, falling outside any existing legal provisions.

Therefore, in the decisions handed down by Court no. 2 there is no need to analyse the existence of the requirements for the adoption of the measure: the appearance of sufficient legal grounds and danger in delay. Rather than seeking to protect a situation temporarily, while it waits for the main decision which is what would have to be secured, what the court is doing is simply blocking any enforcement.

Ancillary nature of the interim injunction

In the cases of Alteco and Mag Import, the interim injunction is in theory ancillary vis-à-vis the main plea.

The circumstances of these cases are complex. Essentially, the insolvent companies had granted certain financial guarantees (pledges under Luxembourg law) the text of which only referred to enforcement in the event of early maturity. The way the banks saw it, backed up by legal opinions from said country, this was no obstacle to enforcement once ordinary maturity was reached; however, the Spanish courts had some doubts in this regard.

The receivers, aware of the fact that EC rules prevented them from attacking the effectiveness of the pledge, filed their claw back action against a novation of the financing from which they deduced an attempt had been made to extend the range of scenarios in which the pledge could be enforced (in order to enforce when ordinary maturity was reached, which was what ultimately occurred).

Without wishing to get bogged down in the details of the case, the fact is that the ancillary nature of the interim injunction was highly questionable, as the main action was brought against one transaction (the financing) and the interim injunction was ordered against another (the pledge). The interim order categorically prohibited the enforcement of the pledges.

Requirements for the adoption of interim injunctions

In the cases of Alteco and Mag Import, the court decisions assessed the existence of the requirements for the adoption of interim injunctions, albeit somewhat fleetingly.

In terms of the appearance of sufficient legal grounds, the applications presented by the two receivers hardly addressed the applicable law at all, not even in appearance. Proof of this is the fact that they failed to even identify the law applicable to the pledges (which was the law of Luxembourg, the special regulations on financial collateral in particular). In reality, the applications for interim injunctions did not specify whether the rescission action was directed at the pledge or the financing. In one of the cases, it did not even state an intention to file a rescission action, which led the court to instruct the applicant to clarify the main action.

As for the *periculum in mora*, the rulings deduced that it existed “automatically” on the basis of the existence of a financial collateral. Thus, the fact that there is a pledge of shares that are liable to be seized by creditors became a situation that merited interim court protection, a very worrying development as it renders vulnerable precisely those guarantees that, because the parties so agreed (and due to the requirements of Community law), allow rapid enforcement. This collateral does not rule out judicial protection, instead they reverse it, as is the case with an on-demand guarantee (on the basis of the *solve et repete* principle).

Practical considerations

When the news first broke that the Commercial Courts had suspended the enforcement of the financial guarantees provided by Alteco and Mag Import, it was thought that this cast doubt upon the single European market for financial collateral (Directive 47/2002), which requires precisely that this kind of guarantee be immune in the event of insolvency.

This conclusion may be something of an exaggeration, as the factual scenarios being judged were undeniably

complex. One is inclined to think that if the court had been dealing with a financial collateral that left no doubt as to enforcement scenarios, these decisions would never have been handed down.

However, one thing cannot be denied: these court rulings represent a material shift in our civil system of interim protection.

A claimant looking to obtain an interim injunction instantly, without proving the appearance of sufficient legal grounds, alleging a *periculum* that does not exist and without being prepared to supply a bond, would have his application rejected out of hand. However, the receivers of an insolvent company can obtain this interim protection in a question of hours, despite the fact that their application has manifest, irremediable flaws. As of that point, creditor entities find themselves living with the risk derived from the fluctuation in the value of the pledged shares, with the pledges having been suspended, until the intricate judicial debate is resolved.

In the case of the injunctions handed down by Court no. 2, the situation is even more anomalous, as the interim injunction does not depend on any main proceedings which could have an outcome that affects the provisional measure. The Court has created an additional effect of the declaration of insolvency, which now implies an autonomous prohibition on the enforcement of guarantees.

It is logical that these decisions should cause concern. The delicate balance of interests established by the Insolvency Act cannot be upset in favour of the insolvent party, as this does irreparable harm to legal certainty. While some may argue that, in the short term, decisions such as these favour insolvent companies, in the long run what they do is close the credit market down even further, as financiers will not accept a scenario in which the interests of the insolvent party can justify virtually anything.

Contacts

Iñigo Villoria
Partner responsible for the Insolvency and Restructuring Department at Clifford Chance

T: +34 91 590 94 03
E: Inigo.Villoria
@cliffordchance.com

Alberto Manzanares
Partner responsible for the Finance and Banking Department at Clifford Chance

T: +34 91 590 94 90
E: Alberto.Manzanares
@cliffordchance.com

Clifford Chance, Paseo de la Castellana 110, 28046 Madrid, Spain

www.cliffordchance.com