Informative Note

Practical questions on leases and eviction procedures during the COVID-19 health crisis

24th March 2020

Regarding the Royal Decree-Law 8/2020 on urgent extraordinary measures to deal with the economic and social impact of COVID-19

The economic impact of the Covid-19 on trade relations seems beyond doubt. Therefore, it is worth analysing what legal tools exist to offer solutions to extraordinary situations produced by the Covid-19 outbreak in relation to contracts signed.

Spanish law regulates two key institutions that we must take into account when analysing the different cases of existing contractual relations: (**i**) force majeure -regulated in art. 1105 of the Civil Code-; and, (**ii**) the *rebus sic stantibus* clause -of doctrinal creation-.

We will now answer some of the first questions that our clients are beginning to ask themselves in the face of the legal uncertainty they have suffered since the state of alarm was decreed by Royal Decree 463/2020 of 14th March, which declared the state of alarm for the management of the health crisis situation caused by Covid-19 (hereinafter "**RD 463/2020**").

1.- Can the tenant of a business premises be interested in the suspension of the obligation to pay rent as a result of the declaration of the state of alarm?

The analysis of this situation requires differentiating between two cases: (i) that the activity carried out in the premises is one of those that has not been suspended by RD 463/2020; or (ii) that the activity carried out is one of those that has been suspended by RD 463/2020. Although a similar solution is reached in both cases, there are nuances that must be considered depending on the case in question.

1.1.- Activities carried out in the business premises that have not been suspended by RD 463/2020

In principle, in those premises where an activity is carried out that has not been suspended by RD 463/2020, there would be no cause for exemption from payment or modification of the monthly rent, since the operation of the premises, office or industrial warehouse depends solely and exclusively on the will of the tenant.

However, the truth is that there are many activities that, due to the scope of the content of RD 463/2020, have been directly and seriously affected despite not being specifically included within the activities whose cessation has been ordered.

The various limitations imposed on most citizens have de facto restricted the activity of many businesses.

It is difficult to defend the possibility of peacefully operating a business premises such as a physiotherapy clinic or an orthopaedic clinic, to give some examples, while at the same time complying with the content of RD 463/2020. So much so that the Spanish government has provided specific benefits for those business owners who see their turnover decrease by 75% with respect to the six months prior to the adoption of the state of alarm.

In any case, it is reasonable that cases be studied individually, without it being possible to propose general solutions, although it is possible that what is indicated with respect to the rebus *sic stantibus* clause will also apply to businesses whose activities have not been legally suspended, but which comply with the requirements of the doctrine, as we shall see.

It should also be borne in mind that the first source of regulation is the *lex contractus*, since the parties may have allocated the contractual risks in a certain way, which must be the first solution. The profile of the tenant and the landlord is not insignificant either.

1.2.- Activities carried out in the business premises that have been suspended by RD 463/2020

The cases in which the activity carried out in the business premises has been suspended by RD 463/2020 are less controversial because of the declaration made by the Government.

In order to determine the solutions applicable to the contingencies that arise in a contractual relationship as a result of Covid-19, attention must always be paid, first of all, to the **terms and conditions expressly agreed** by the parties to the lease contract in relation to extraordinary situations or force majeure.

If the parties have not agreed to anything in this regard, we will then have to resort to the various figures developed in our legislation and case law.

1.2.1.- Of the rules that regulate leases in the Civil Code (hereinafter CC)

Arguments for suspending rent can be found in the CC's general rules on rent. Article 1554.3 of the CC establishes the obligation of the landlord to maintain the tenant in useful and peaceful possession of the property, an obligation that is now impossible to fulfil. The SC has understood that the lessor is liable for the disturbances caused by him in fact and in law and for the disturbances in law caused by third parties - judicial actions, but also administrative decisions - (SSTS 24 January 1992 (RJ 1992, 204); 11 February 2002 (RJ 2002\2889); 8 January 2019 (RJ 2019\34). Since the impossibility is temporary and the payment of the rent derives from or depends on the peaceful enjoyment of the thing (ex arts. 1555.1 and 1556 CC), the suspension of the rent could be legitimized during the time that the measures of the state of alarm last. However, it should be noted that Article 27.3.b) LAU establishes that the de facto or de jure resolutory disturbance is that "carried out by the lessor".

1.2.2.- Of force majeure

Article 1105 of our Civil Code regulates the figure of **force majeure**:

> *"Apart from the cases expressly mentioned in the law, and those in which the obligation is so declared, no one will be responsible for those events that could not have been foreseen, or that, if foreseen, would be unavoidable."*

The outbreak of Covid-19 could be framed within what jurisprudence has understood as an *"act of force majeure"* as it is an unforeseeable and inevitable event, and which is objectively irresistible to the parties, deriving from an external origin. This has been determined in similar cases of health emergency (although of lesser scope) by our Courts, as in the case of influenza A (see for example the Decision of the Illustrious Provincial Court of Madrid of 10 December 2013).

However, the application of force majeure as a cause to exempt the tenant from the obligation to pay rent during the time that the activity is suspended or the movement is limited must be adopted with extreme caution in view of the exceptional treatment that the jurisprudence of this figure carries out in the fulfilment of pecuniary obligations.

It must also be borne in mind that a generous application of force majeure in the payment of any obligation determines the attribution of contractual risk for the unforeseeable event to only one party, when in fact it affects both contracting parties on many occasions. An example of the restrictive application of this concept is the use of force majeure in rural leases (article 1575 of the Civil Code), which only allows for a reduction in rent (not exemption) in the event of extraordinary loss of the harvest.

Thus, while it cannot be ruled out that force majeure may exonerate tenants from paying rent, it cannot be guaranteed with complete certainty and, therefore, if payment is suspended, it could lead to contractual non-compliance.

Finally, it should be mentioned that one of the elements to be considered when approaching this type of situation is the principle of contractual good faith. The parties to a contract must not only act correctly and honestly at the time of negotiating and concluding a contract; they must also behave in that way at the stage of performance, so that, if it is finally necessary to clarify the consequences of the crisis in the context of legal proceedings, we have no doubt that the **good faith of the parties (ex Art. 7 and 1258 CC)** shown during the crisis will be a fundamental element in the assessment of the situation by our judges.

1.2.3.- Of the rebus sic stantibus clause.

In direct relation to the above, we could ask ourselves if it is possible to revise the obligations and contracts due to the declaration of the state of alarm.

The *rebus sic stantibus* clause allows the modification of the obligations of a contract (and even the termination in some cases) when, due to supervening circumstances, the economic equilibrium of the contract is broken and one of the parties finds it impossible or very burdensome to fulfil it. In the case we are analysing, it could allow a reduction or reduction of the amount of the rent, and even, in certain cases, the temporary suspension of the payment of the rent for a determined period.

In order for it to be applicable, the following must be jointly assessed: (i) an extraordinary, unforeseeable and unimputable alteration of the circumstances at the time of performance of the obligations in relation to those existing at the time

the contract was entered into; (ii) an exorbitant disproportion, beyond all calculation, between the performance of the parties that would result in the collapse of the contract by annihilation of the balance of benefits; and, (iii) the absence of any other remedy for the resolution of the problem -subsidiary application-.

There is case law in which our High Court has decided to apply the rebus sic stantibus clause in order to temporarily modulate the agreed rent, all of which it considers to be unpredictable and excessively onerous. Specifically, Judgment No. 59[1]/2014, handed down on 15 October 2014, provided that

> *"But in addition, and in any event, the amending scope also corresponds better to the nature and characteristics of the contract concluded of a long-term lease.*
>
> *Secondly, with regard to the moderation of the rent initially agreed, (...) the conclusions of this report are in line with the basic parameters of the application of this clause".*

In short, following the Supreme Court's line, **the appearance of the COVID-19 as an unforeseeable event could allow the activation of the *rebus sic stantibus* clause, provided that the disproportion of the tenant's benefits is proven. The consequences inherent in the application of such a clause would consist precisely in restoring the balance between the parties, which could be, by means of a reduction in rent, thus sharing the risk between the parties, or even establishing the possible temporary suspension of the payment of the rent as a formula for modifying a long-term lease, given the explicitly temporary nature of the extraordinary alteration.**

Notwithstanding the above, we consider it appropriate to point out that the Supreme Court also considers the application of the *rebus sic stantibus* clause as an extraordinary and exceptional remedy. By way of example, the High Court (STS No. 19/2019 of 15 January 2019) rejected the application of this clause in a case in which the economic crisis was alleged to have occurred in order to modify a lease contract because it was a "business risk".

It is therefore extremely important that when the parties are negotiating the application of the rebus sic stantibus clause, the reasons for its application to the specific case are detailed. In other words, it should be stressed that: (i) the modification of the price of the income or the temporary suspension of the payment of the same is due to the expansive risk of the pandemic, and consequently the impossibility of providing the activity due to the sanitary emergency situation in which we find ourselves, and to the measures agreed in this respect in RD463/2020; and that, (ii) the referred modification will cease to be applied at the moment in which the Spanish Government lifts the state of alert and the rest of the legal restrictions.

[1] 1. "In the present case, the appellant (...) but **does not express the specific reasons why in the case the risk of a reduction in the yield from the operation of the hotel should be transferred to the defendant, a risk which, because of the deterioration of the economic situation and the variations in the market, should be considered to be typical of the business activity of the lessee, a company engaged in hotel management".**

Nevertheless, and given the constant and different measures that the Spanish Government is adopting throughout these days, the previously exposed answers could be modified.

2.-The tenant who was going to sign the termination of his lease on 31 March and has rented another property on 1 April, but cannot move in under the circumstances, is obliged to pay the new rent and what happens with the termination of the previous one and the handing over of possession of the new one?

In order to answer this question, it is worth recalling the main obligations undertaken by each of the parties. On the one hand, the landlord undertakes to make the rented property available to the tenant so that he can use and enjoy it. On the other hand, the lessee undertakes to pay the rent monthly.

Thus, and taking into account the explanation of the cases of application of "force majeure" and the clause *"rebus sic stantibus"* as well as the restriction to the freedom of movement imposed to most of the citizens by the art. 7 of the RD 463/2020, it could be concluded that

(i) In the event that it is proven that the removal cannot be carried out, the tenant would not be obliged to pay the new rent, given that he cannot use and enjoy what is rented due to a cause of force majeure - restriction on freedom of movement, and therefore on carrying out the removal.

In this case, access to the new property has become impossible, so there is no obligation to pay the new rent, at least as long as the state of alarm lasts for the reasons given above.

(ii) The tenant may also defer the obligation to return the property whose contract was to be terminated after 31 March 2020 on the grounds of force majeure (the same restriction on freedom of movement referred to above) for the entire duration of the alarm condition. The above does not prevent the continued payment of the rent of the dwelling it occupies.

This is based on the fact - after consulting the relevant local authorities - that it is extremely difficult to carry out removals, which we recommend should be postponed until the state of alarm is lifted, and being aware of the serious and restrictive measures imposed by RD 463/2020 on the movement of people.

In any case, as with the other issues, these are interpretations that require individualized analysis of the cases and circumstances to be evaluated.

3.- Should the 30-day period granted to the tenant in debt to pay be understood as suspended for the purposes of Article 22.4 *in fine* of the Code of Civil Procedure?

The Second Additional Provision of RD 463/2020 establishes the suspension of the terms, as well as the suspension and interruption of the terms provided for in the procedural laws, for all jurisdictional orders.

Article 22.4 of Law 1/2000, of 7 January, on Civil Procedure (hereinafter, "LEC") provides that the tenant may not stop the eviction proceedings initiated by the lessor when the latter has requested payment by any reliable means at least thirty days before the filing of the lawsuit and payment has not been made at the time of such filing.
Well, in order to determine whether the period of 30 days provided for in Article 22.4 in fine LEC can be understood suspended, it should be clarified whether this period can be considered as a procedural period.

Article 132 LEC deals with "the time limits and terms". The normative provision states that "the proceedings shall be carried out in the terms or within the time limits indicated for each one of them". In other words, the regulation places special emphasis on the fact that for a time limit to be considered procedural, it must be implemented in the framework of procedural actions.

However, according to the literal wording of Article 22.4 in fine LEC, the 30-day period set forth in Article 22.4 LEC cannot be qualified as a procedural period. This time limit is granted in the payment order that the lessor makes to the lessee by any reliable means prior to the presentation of the eviction complaint, so that we are dealing with an action that is carried out in a pre-litigation environment and independent of the process.

Therefore, it must be concluded that the 30-day period granted to the debtor tenant to pay for the purposes of art. 22.4 *in fine* LEC cannot be understood as suspended by the declaration of the state of alarm caused by the health emergency derived from the Covid-19 virus based on the suspension of the procedural deadlines decreed by the Second Additional Provision of RD 463/2020.

Notwithstanding the above, it cannot be ruled out that the lessee may claim that the possibility of enervating constitutes a right specifically regulated in his favour and that, as such, in accordance with the content of the provisions of the Fourth Additional Provision of RD 463/2020, the period for exercising this right must be suspended.

We hope the information is useful and of your interest. At Andersen Tax & Legal we have created a multidisciplinary team to deal with all the questions that may arise on this aspect or in relation to the COVID-19 and all the professionals of the firm are at your disposal.

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