

EFFECTS ON COMMERCIAL LEASES

The extraordinary measures adopted by the Spanish Government to combat the COVID 19 pandemic are having a significant impact on the rental of commercial property. While the current nationwide state of emergency continues, many business and commercial premises have had to close and are experiencing financial losses. The inability to use the rented premises, combined with moderate or even non-existent income, raises the question for many lessees as to whether current commercial leases can be amended, suspended or terminated in light of this situation.

1. Freedom of contract

In order to answer this question, the specific lease agreement would first have to be subjected to a detailed review. By way of freedom of contract, the parties can make numerous individual agreements. In this context, it must be reviewed whether the contract itself does not already contain possible solutions for special situations, such as rights of withdrawal or contract adjustments.

2. Force majeure

It is questionable whether the COVID-19-pandemic can be considered a case of force majeure. According to Article 1105 of the Spanish Civil Code, nobody is liable for events that could not have been foreseen or, if they were foreseeable, could not have been avoided. Both jurisprudence and literature agree that the decisive characteristics are unpredictability and inevitability. Both characteristics are undoubtedly present in the current situation for lessees of commercial property.

However, force majeure only exempts from liability for breach of the debtor's obligation to deliver a certain item or perform a certain act. On the other hand, it does not exempt from the obligation to pay a monetary debt. Therefore, there is no complete and final impossibility of fulfilling a monetary debt which could relieve the lessee from the obligation to pay rent. Consequently, the lessee cannot be released from his financial obligations even if unforeseeable and unavoidable circumstances arise, such as the COVID-19-pandemic and the public measures adopted to combat the pandemic as a result.

3. *Rebus sic stantibus* – principle

An amendment or even termination of the lease agreement could result from the application of the principle *rebus sic stantibus*. According to this principle, which derives from Roman law, contracts can be modified if the decisive circumstances that form the basis of the transaction change and if, as a result of this change, it is impossible or unreasonable for one of the parties to comply with the contract.

This principle, which is applied very restrictively by the courts, is an exception to the principle laid down in Article 1258 of the Spanish Civil Code, according to which contracts must always be kept (*pacta sunt servanda*). According to settled case law, the application of this principle is subject to four conditions: change of circumstances, a certain duration of the event (i.e. not only temporary), unforeseeability of the event and excessive hardship for one of the parties as a consequence of the change of circumstances.

All the requirements seem to be met in view of the ongoing COVID 19 crisis. However, we believe that a distinction should be made: Lessees who have been obliged to close their commercial premises as a result of the declaration of a Spanish state of emergency are directly affected and could thus make use of the *rebus sic stantibus* principle. The situation is different for lessees who have not been obliged to close down. They will have to put forward further arguments to show that, despite the possibility of continuing their activities, they are very much affected by the current situation and are therefore no longer able to meet their rental obligations.

The solution cannot be to pass on the lessee's losses to the lessor and thus create a new contractual imbalance.

4. Conclusion

As seen, the economic consequences of the national state of emergency may well give rise to a renegotiation of the contractual terms between the two parties on the basis of good faith and contractual freedom. Alternative solutions such as a partial reduction of rent during the state of emergency, a deferment of payment of rent or even a suspension of the contract or a waiting

period during which no rent is due from the lessee should be considered and discussed by the parties.

Please do not hesitate to contact us if you have any questions:



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