

CRISIS COVID-19

HOW DOES THE STATE OF EMERGENCY AFFECT THE MY PREMISES LEASE AGREEMENT?

This one of the most frequent questions that both landlords and tenants are asking at the moment, and we will try to answer it from a practical point of view.

On the basis that the obligations assumed in a lease must be fulfilled or otherwise responsibilities are incurred, a situation such as the present one (the state of alarm and the official measures taken in the framework of the current crisis caused by the COVID-19 virus) means that this general rule can have its exceptions.

Indeed, the current crisis resulting from the declaration of the COVID-19 pandemic is affecting a large number of businesses and activities, including, clearly, businesses that require commercial premises or establishments open to the public in order to operate.

The measure adopted by the Government, consisting of suspending the opening to the public of commercial premises and establishments, establishments where public shows are held, hotels and restaurants, completely affects the development of activity in these establishments, indirectly causing a **serious imbalance in the benefits/obligations** assumed by the parties under the commercial establishment's lease contract.

In view of this situation, our legal system, as well as our jurisprudence, provides for the possibility of applying the **so-called rebus sic stantibus clause** or, in other words, "**as long as things remain like this, the contract must be complied with**".

The rebus sic stantibus clause allows the revision of the contractual obligations when, due to supervening circumstances, the economic equilibrium of the contract has been broken and one of the parties finds it impossible or very burdensome to perform, and this with the aim of restoring the internal economy of the contract.

Therefore, the applicability of this clause opens the door to the possibility that, in the event of a change in the circumstances existing at the time the contract is concluded, together with the concurrence of certain other requirements, **the terms and conditions of the contract may be revised** (among others, the rent), always under the principle of contractual good faith.

Despite its exceptionality and cautious acceptance by the courts, the **requirements** for the application of the rebus sic stantibus clause are the following:

- These must be contracts in which the performance of the parties' obligations is reiterated over time (i.e. contracts of a successive nature)
- The change in circumstances:
 - it has to be overcome
 - it has to be unpredictable
 - cannot be attributed to one party alone
 - must lead to an imbalance in the parties' compensation

- The contract must not contain any clause assigning the risk to one of the parties

In our opinion, although, as always, it is appropriate to analyse it on a case-by-case basis, the invocation of the rebus sic stantibus clause in a crisis such as the current one is fully applicable to those cases where the activity has been interrupted as a result of the suspension of the opening of the premises to the public.

It should be made clear that what is appropriate in such a situation is for both parties, the lessor and the lessee, to **negotiate a solution** and to record it in writing. It is important to stress that, in order to avoid disparate interpretations, the parties must detail in writing the reasons for the application of the rebus clause, the temporary period of application and the moment when it will cease to apply (or the moment when the conditions of the contract will be renegotiated). It should be noted that the application of the rebus sic stantibus clause does not operate automatically.

The **solutions** being agreed upon include

- (i) freezing the effects of the contract (including not only the payment of rent but also its duration);
- (ii) (remission of all or part of the rent for the months during which the restrictions are in force; and
- (iii) deferral of the payment of the accrued rent until the pace of activity on the premises has been recovered.

In case of failure to reach an agreement, the tenant always has the possibility to go to court to have the court rule on the applicability or not of the rebus sic stantibus clause.