

Extraordinary situations as a result of COVID-19 Health crisis

I. Hotels, Tourism and Leisure

Activities linked to tourism and leisure are among the sectors that are being seriously affected by the COVID-19 emergency. There are many reservations of transportation tickets, in the different modalities, and of tourist accommodations that have been subject to cancellation in the days preceding the declaration of the state of alarm.

In this context, numerous provisions and measures are being adopted, both at the European Union and national level, and by the Autonomous Communities or local authorities, as the case may be, with an impact on the rights of passengers, restaurants and leisure accommodations which, among other activities, are forced to suspend their opening.

We are facing a unique and exceptional situation that, from a legal point of view, will raise many doubts and will require a case-by-case analysis, with special assessment of the time and particular circumstances in which the cancellations and cessations of activity occur, of the subjects involved in the contracting, of whether or not they refer to a combined trip (contracting the combination of air/rail transport and accommodation) and how the concept of force majeure is applied to each case.

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II. Questions related to the potential suspension or cancellation of lease agreements or obligations with suppliers

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In order to analyse the relationship between COVID-19 and a potential breach of obligations, it is necessary to first briefly analyse two concepts:

Force majeure exempts the need to comply with a specific obligation or allows its suspension until the cause disappears, if caused by the existence of an extraordinary, unforeseeable or unavoidable situation that prevents the performance of the obligation. It seems that COVID-19 in general terms obviously fulfils these first three requirements, but it is necessary to analyse the degree to which this issue is affected in each specific case and the result may be very different depending on the situation. The aim is to determine whether the compliance with the obligation has in fact been prevented or has simply been made more difficult or less interesting than it was before the new situation arose. Thus, by way of example, it could be that case when the activity to be carried out has been prohibited or intervened in by the Royal Decree declaring the state of alarm, or that production has been stopped or reduced because an outbreak of COVID-19 has been detected in the factory, or supplies have not arrived or personnel cannot go to work due to restrictions of personal movement established by the government or by an Autonomous community.

The ***rebus sic stantibus* doctrine is somewhat different**. It does not exempt from the compliance with an obligation, but rather allows that in those agreements in which the COVID-19 generates a serious imbalance of performance between the parties, the party most affected has grounds to demand the renegotiation of the contract and, perhaps, to be partially freed from the excessive burden that it entails. Unlike force majeure, which operates directly, the *rebus sic stantibus* doctrine allows to force the renegotiation of the contract in order to adapt to the new situation. And that renegotiation will have many nuances, because each case will be different. The application of this doctrine requires proof of a direct effect that leads to a situation close to "sale at a loss". In this sense, it should be remembered that the Supreme Court's ruling in which the *rebus sic stantibus* doctrine was applied based on the general impact of the 2008 crisis on the hotel business did not continue in subsequent ones and was the object of general criticism by the doctrine.

It is important not to confuse the above assumptions with the "difficulties, even extreme ones" that all companies are suffering as a result of the COVID-19 and which are generating cash flow tensions. Both in cases of lease agreements in which the activity is forbidden and in special situations where non-payment to suppliers is involved, our recommendation is to analyse each case in a special way because each situation is different and it is not possible to apply a general rule for situations as different as those that occur in practice.



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Marimón Abogados is a law firm founded in 1931 that offers legal services in all areas of law and has offices in Barcelona, Madrid and Seville.

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