

CORONAVIRUS: INTERIM MODIFICATION OF THE RENT OF A PREMISES BY APPLICATION OF THE REBUS SIC STANTIBUS CLAUSE

As a result of the Pandemic ("Covid-19"), a lively debate has arisen regarding the possible application of the *rebus sic stantibus* or hardship clause to contractual disputes. In addition to the now-familiar interim measures on guarantees¹, we have a recent ruling in interim proceedings which modifies the rent owed by a tenant. Ruling no. 447/2020 issued by Court of First Instance no. 81 in Madrid on 25 September 2020 (the "**Ruling**") ordered (i) a 50% reduction in the rent under a lease agreement for a nightlife venue (the "**Venue**") with a duration of twenty-five years (the "**Lease Agreement**") which is to take effect as of when it is allowed to reopen; and (ii) suspension of payment of the rent (maintaining payment of supplementary amounts paid by virtue of Royal Decree-Law 15/2020) until the Venue is allowed to reopen (the "**Interim Measure**").

As a result of the measures adopted to reduce the spread of Covid-19, the activity of the Venue was interrupted and it has not been able to resume at all. In this context, the tenant company (the "**Tenant**")—taking advantage of the moratorium envisaged in Royal Decree-Law 15/2020— filed a claim (i) requesting the application of the *rebus sic stantibus* clause to the Lease Agreement due to the circumstances derived from Covid-19 and, consequently, that the rent be modified; and (ii) seeking the adoption of interim measures.

The Ruling, applying the *rebus sic stantibus* clause, acceded to the Tenant's request at the interim stage and amended the terms of the Lease Agreement for the Venue, in view of the economic consequences of Covid-19.

On a preliminary basis, the Ruling indicates that it is a well-known fact that existence of a health crisis situation derived from Covid-19 has affected all sectors of the economy in general, and nightclubs and dancehalls, in particular, by virtue of the regulations approved to halt the spread of Covid-19.

Key issues:

- The Ruling upholds an application for an interim measure ordering suspension of payment of rent until reopening and a 50% rent reduction as of reopening.
- The existence of the healthcare crisis derived from Covid-19 is considered a well-known fact that has affected all sectors of the economy in general, and nightclubs and dancehalls in particular.
- It recognises that in this case the conditions for application of the *rebus sic stantibus* clause are met, in light of the case-law doctrine of the Civil Chamber of the Supreme Court.
- The Ruling recognises that the closure of the Venue as a result of Covid-19 is a risk that is extraneous to both tenant and landlord.
- The risk that the tenant's business may not survive as *periculum in mora*.

¹ For example, the Ruling of [30 April 2020 from Court of First Instance no. 60 in Madrid which upheld an application for interim measures \(ex parte\) designed, among other things, to prevent the enforcement of financial guarantees](#) and the Ruling of [13 August 2020, from Court of First Instance no. 74 in Madrid, which upheld an application for interim measures \(ex parte\) preventing a landlord from claiming the guarantees established in the lease agreement either judicially or out of court.](#)

In order to justify the appearance of solid legal grounds for the Interim Measure, the Ruling concluded that, without pre-judging the main plea, the conditions for the application of the *rebus sic stantibus* clause were met according to the case-law doctrine of the Civil Chamber of the Supreme Court:

- Extraordinary alteration of circumstances: in the words of the court's decision "*the extraordinary and supervening nature of this health crisis derived from the pandemic and its impact on the economy of the country is well known*";
- It breaches the equivalence of the parties' benefits and obligations: the fact that payment of 100% of the rent was agreed in "*radically different circumstances to the current ones*" means that "*prima facie*" the parties' benefits and obligations have become disproportionate; and
- Both elements are derived from "*radically unforeseeable*" circumstances: the Ruling finds that (i) the closure of the Venue as a result of the spread of Covid-19 was not foreseeable when the Lease Agreement was signed and "[*not*] even a few months prior to the declaration of the state of emergency" and; (ii) "*in this case, unlike what occurred at the start of the financial crisis in 2008, the extraordinary nature of the change of circumstances does not need to be proven*".

Beyond the considerations relating to the specific case at hand, the Ruling makes certain statements of a more general scope that are worth bearing in mind:

- Although Supreme Court doctrine has only allowed for its application in exceptional circumstances, "*the rebus clause is an intrinsic instrument to the dynamic of law and its economic counterpart*";
- It underlines the importance of the agreement not attributing risk in the event of a pandemic; and
- It recognises that "*the intention of Royal Decree-Law 15/2020 [rent payment moratorium] is not, per se, to impede a potential future application of the rebus sic stantibus clause*".

The reasoning with regard to the requirements to be met to uphold the Interim Measure is also worth noting:

- The Ruling takes it as established that there is a danger of procedural delay, principally, because (i) "*given the global economic situation, it is self-evident that there is a risk that the business will not be able to survive*"; and (ii) if the Tenant has to continue paying the rent agreed in the Lease Agreement in full without earning income to cover its fixed costs, it could become financially suffocated in such a way that "*the business ends up closing*". This, along with the fact that (i) the Tenant cannot determine *ex ante* how much time it could survive under these conditions; (ii) the health crisis caused by Covid-19 has not ended (iii) it is possible that the suspension of procedural time limits established by Royal Decree 463/2020 and the increase in litigation could cause a delay in the prosecution of the proceedings; and
- From this perspective, the Landlord's economic loss is considered in order to reduce the scope of the Interim Measures, and the application for interim measures is only partially upheld, with the requirement that a bond of EUR 15,000 be provided ("*to cover the entire rent for November and December (EUR 7,500 each month)*").

Pending potential legislative measures, in the terms established in Additional Provision Seven of Act 3/2020, of 18 September, everything would appear to indicate that we will be seeing further applications of the *rebus sic stantibus* clause in relation to leases in the coming months, also involving interim injunctions.

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