Pérez-Llorca

Special Information Briefing
COVID-19 (No. 6):
The legal consequences in the civil sphere due to potential contractual breaches resulting from COVID-19

Index

Madrid, 19 March 2020

1. On 11 March 2020, the World Health Organization ("**WHO**") declared COVID-19 to be an international pandemic. With the goal of confronting the health crisis, on 14 March the Spanish Government declared a state of alarm for a period of 15 days, adopting extraordinary temporary measures in order to contain the virus and mitigate the health, social and economic impact thereof[1] (the "**COVID-19 Crisis**"). The COVID-19 Crisis could be considered to be an extraordinary situation and, while it continues, many contractual relations may be affected in the sense that parties may not be able to comply with their contractual obligations in a timely and complete manner.

2. Contracts have the binding force of law between parties and they obligate them to comply with the agreed terms[2], meaning that the debtor assumes responsibility in the event of a breach[3]. In cases whereby compliance with the contract is impossible or whereby there is a sudden change in the circumstances, the law demands that the parties do everything possible in order to overcome this situation and comply with the agreement, for example, by way of the extension of deadlines or alternative compliance[4].

3. If performance is not possible, and based on the principle of good faith, the law allows for various exceptions that add flexibility to the compliance obligation and the responsibility of the debtor: those being force majeure and *rebus sic stantibus*. In accordance with these exceptions, the party obligated to comply is released of its liability for non-performance (the obligation being temporarily or permanently extinguished) or the contractual relationship is amended or terminated.

4. In so far as these remedies do not apply automatically and there exists a wide range of relevant special circumstances (contractual parties, clauses within the contract, the relevant business sectors, measures adopted by the Government, duration of the contract, etc.) we set out below a general framework for understanding the implication that the COVID-19 Crisis may have on the development of contracts – to which Spanish law is applicable – and the possibility that this situation will come before Spanish civil courts.

---

[1] Royal Decree 463/2020, of 14 March, by which a state of alarm is declared in order to manage the current health crisis caused by the COVID-19 published in BOE. no. 67, of 14 March 2020, Section I (the "**RD 463/2020**").

[2] Articles 1091, 1256 and 1275 of Royal Decree of 24 July 1889 by which the Civil Code ("**CC**") is published.

[3] Articles 1101 and 1107 CC.

[4] Supreme Court Judgment (First Chamber, Civil) no. 318/2004 of 5 June, presiding judge Mr. Xavier O'Callaghan Muñoz, ES:TS:2015:2254 "*There is no impossibility **when compliance is possible by way of a voluntary effort by the debtor**. The Judgment of 14 February 1994 refers to analysing the due diligence **doing all that is possible to overcome the impossibility** and the Judgment of 2 October 1970 invoked **having exhausted all possibilities of compliance**.*"
Supreme Court Judgment (First Chamber, Civil) of 11 November 1987, presiding judge Mr. Gumersindo Burgos Pérez de Andrade, RJ 1987\8372: "***the impossibility** of performance, in the precise method agreed upon in the obligations, **determines the adjustment (…) of the content of the clause**, in a manner that (…) rationally results adequate in relation to the pursued ends.*"

I. FORCE MAJEURE

What is understood by a force majeure event? What are the necessary requisites?

5. Spanish law, by way of difference from other jurisdictions, regulates and defines a case of force majeure as an event that (i) is unforeseeable, or if foreseeable, unavoidable[5]; (ii) is outside the control of the parties and, therefore, not attributable to either of them[6]; and that (iii) results in one or all of the parties to the contract not being able to comply with their obligations[7].

Could the COVID-19 Crisis be considered a case of force majeure?

6. In view of the previously mentioned requisites and the declaration of the state of alarm by the Spanish Government, the COVID-19 Crisis could be understood as being unforeseeable and outside the control of the parties, although, in order to be able to consider whether it is a case of force majeure it is necessary to examine case by case whether, as a result of this event, the party obliged to perform was not able to do so under any circumstance.

7. While the impact of COVID-19 has brought about an unprecedented situation in Spain, the health crisis event most similar that our Courts have seen is swine flu in 2009, which the WHO declared to be pandemic and the jurisprudence understood that, in certain cases, this could meet the requisites to be considered a force majeure event (note that its reach and its impact are not comparable with COVID-19) [8].

---

[5] Article 1105 CC.

[6] Supreme Court Judgment (First Chamber, Civil) no. 185/2001 of 2 March, presiding judge Mr. Pedro González Poveda, RJ 2001\2590. Supreme Court Judgment (First Chamber, Civil) of 5 November 1993, presiding judge Mr. Mariano Martín-Granizo Fernández, RJ 1993\8970.

[7] Supreme Court Judgment (First Chamber, Civil) no. 741/2014, of 19 December, presiding judge Mr. Antonio Salas Carceller, ES:TS:2014:5347.

[8] Another example of a pandemic that Spain has faced is the "Spanish flu" of 1918, which caused the death of 300,000 people in Spain alone. The governmental decisions that were taken under the CE of 1876 were similar to the measures adopted due to the COVID-19 Crisis and force majeure as contemplated in the CC was clearly applicable.
Judgment of the Court of Appeals of Valencia (Section 7) no. 204/2011 of 11 April, presiding judge Mr. José Antonio Lahoz Rodrigo, ES:APV:2011:2556; "*an outbreak of **swine flu (…) falling within a clear case of force majeure**, was able to affect the claimants' expectations in the carrying out of its scheduled trip.*"
Judgment of the Court of Appeals of Madrid (Section 20) of 10 December 2013, presiding judge Mr. Juan Vicente Gutiérrez Sánchez, ES:APM:2013:21843: "*before the declaration of the **swine flu pandemic**, that the World Health Organization had declared (…) **which was unforeseeable and unavoidable** and which met the necessary requisites to consider that the resulting situation originated because of a **force majeure** event and they cannot be held liable for the damages that may have been occasioned on the appellants here*".
Judgment of the Court of Appeals of Barcelona (Section 14) no. 346/2012 of 8 June, presiding judge Ms. Yolanda López Morales, ES:APB:2012:6133: "*the undeniable events (…) due to a **force majeure** (…) the incident being sudden and unanticipated by the defendant, which has been recognised **as the swine flu**, led to a change in the scheduled trip, although, given the closure of the archaeological area and the recommendations of the Mexican authorities, the defendant did not have any option but to recognise this change as necessary in order to avoid losses.*"

What would be the consequences of not being able to comply with an obligation as a result of a force majeure event?

8. Firstly, the terms and conditions of the parties' contract should be considered, in accordance with a specific liability regime in case of a contractual breach caused by force majeure that the contracting parties may have agreed to (that being that one or neither of the parties assumes the risk of the consequences, that time limits are extended, that the contract is terminated, etc.). This would depend on the will of the parties[9].

9. In the absence of an express agreement by the parties, the general legal regime dealing with cases of force majeure will be of application[10]: if effectively there exists the impossibility of performance [see paragraph 13 *et seq*. for what can be considered impossibility of performance] then the party that does not perform will be released from liability stemming therefrom.

10. Together with this release from liability, and depending on the specific case, the party that breaches will be able to (i) be released temporarily from their obligation to perform and perform the obligation with delay or (ii) be released permanently from performance of the obligation[11].

11. The law permits some exceptions to the general regime of release of liability resulting from a breach caused by force majeure. For example, in order to determine the release of liability because of a sudden impossibility occurring, the debtor must not be in default[12]. That is, the contracting party that, being in default, breaches the obligation to deliver a specific thing, assumes the responsibility resulting from a force majeure event until the delivery of said thing (i.e. they will be responsible for the loss thereof) [13].

---

[9] *Pacta sunt servanta:* Article 1255 CC: "*The contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to morals or to public order*".

[10] Article 1105 CC: "*Outside the cases explicitly mentioned in the law, and those in which the obligation were to require it,* ***no one shall be liable for events which cannot be foreseen or which, if foreseeable, are inevitable***".

[11] Article 1184 CC: "*In obligations to do something,* ***the debtor shall also be released*** *if the undertaking is legally or physically impossible*".
Article 1182 CC: "*An obligation consisting of delivering a specific thing* ***shall be extinguished*** *if the thing were lost or destroyed without fault on the part of the debtor and before the debtor has incurred in default*".

[12] Article 1182 CC y Judgment of the Supreme Court (First Chamber, Civil) no. 318/2014 of 5 June, presiding judge Mr. Xavier O'Callaghan Muñoz, ES:TS:2014:2254.

[13] Artículo 1096 CC: "*If the obliged person* ***were to default on his obligation****, or were to have undertaken to deliver the same thing to two or more different persons, he or she shall be liable for any fortuitous events until delivery thereof*".
Another example is a commodatum (a gratuitous loan in exchange for the use of property). In accordance with articles 1744 and 1745 CC the commodatarius **will be responsible for the loss of the property** including in a case of force majeure, if it used the property in a manner different to what was agreed or if it held on to it for longer than was agreed.
Another exception foreseen in the law is the delivery of a generic thing, as long as this thing is not specified. Supreme Court Judgment (First Chamber, Civil) no. 266/2015 of 19 May, presiding judge Mr. Eduardo Baena Ruiz, ES:TS:2015:2344: "*The release from liability of the debtor by an act of God is not*

What is understood by impossibility of performance? Who has the burden of proving that the impossibility of performance is due to a force majeure event?

12. The COVID-19 Crisis could be considered an unforeseen event outside the control of the contracting parties, and so, in this instance, the party obliged to perform that cannot do so and alleges force majeure will have the burden of proving: (i) that objectively it could not perform the obligation and (ii) that there exists a causal relationship between the breach and the unforeseen event[14].

13. Firstly, the party obliged but unable to perform will have to demonstrate that there was a physical or legal, objective, absolute, and long-lasting impossibility during the time that the contractual obligation was not being performed[15]. Difficulty in performance should not be confused with impossibility[16] nor is it possible to measure the impossibility based on the subjective criteria of the party in breach[17].

14. Our Courts emphasise that the impossibility of performance has to be definitive, and therefore exclude the temporal or fleeting events that only have suspensive effect. Nor can impossibility be argued when performance is possible by rationally amending the content of the contracted service, so that it is still adequate in light of the pursued goals[18]. Therefore, it is fundamental that the party affected by the unforeseen event attempts to

---

absolute, there are exceptions, as foreseen by article 1105 CC, one of which is, by application of the principle "genus nunguam perit", being in cases of an obligation to deliver a generic thing."

[14] Supreme Court Judgment (First Chamber, Civil) no. 937/2002 of 10 October, presiding judge Mr. José Manuel Martínez-Pereda Rodríguez, RJ 2002\9978: "*The force majeure or the fault of the one who suffered the damage, must* ***be proven by the party alleging them in their defense***".

[15] Supreme Court Judgment (First Chamber, Civil) no. 318/2014, of 5 June, presiding judge Mr. Xavier O'Callaghan Muñoz, ES:TS:2014:2254; "*demonstration of the principle "ad imposibilia nemo tenetur", which here is specified in the rule that there is no obligation to perform the impossible ("impossibilium nulla obligatio est"), whose application demands a* ***physical or material or legal, objective, absolute, long-lasting impossibility that is not attributable to the debtor****".*
Supreme Court Judgment (First Chamber, Civil) no. 424/2013 of 21 June, presiding judge the Distinguished Mr. Juan Antonio Xiol Ríos, ES:TS:2013:4295: "*The* ***legal impossibility*** *extends to all judicial impossibility, since it encompasses that derived from* ***a legal text, as well as regulatory precepts, orders from competent authorities****, or other legal causes*".

[16] Supreme Court Judgment (First Chamber, Civil) no. 433/1997 of 20 May, presiding judge Mr. José Almagro Nosete, RJ 1997\3890 "***the greater or lesser difficulty in performance of an obligation can never be equivalent to the impossibility*** *established by the legal norm that is denounced as bring infringed*".

[17] Supreme Court Judgment (First Chamber, Civil) no. 881/1994 of 6 October, presiding judge Mr. Jaime Santos Briz, RJ 1994\7458: "*the Court of first instance, and now this Court of appeal, must take care, and they do so,* ***not to examine this difficulty in accordance with the subjective criteria of the debtor****, which in this case would give rise to a notable legal uncertainty.*"

[18] Supreme Court Judgment (First Chamber, Civil) of 11 November 1987, presiding judge Mr. Gumersindo Burgos Pérez de Andrade, RJ 1987\8372: "***the impossibility of performance****, in the precise method agreed upon in the obligations, determines the adjustment of its content, in a manner that the behaviour or the material result to be achieved by the debtor in favour of the creditor, will be the one that is rationally appropriate, taking into account the circumstances of the case and the purpose pursued by the contract (…)* ***the rational modification of the content of the clause is appropriate, so that, as the aforementioned jurisprudence indicates, it is rationally appropriate to the purpose pursued****."*

comply with the service by all means possible, through equivalent compliance, extension of time limits, alternative routes, etc.

15. Secondly, the party that does not perform its contractual obligation must demonstrate that its breach was a direct result of the force majeure event, that is, it will have to demonstrate the existence of a causal relationship between the event and the impossibility of performance[19].

16. In cases where it is evident that (i) the obligor did have the possibility of complying with the contract or (ii) the breach has no relation to the unforeseeable event, we would be faced with a contractual breach for which it will not be possible to seek release from liability for breach under the exemption regime and, in its place, the liability regimes of the CC applicable to a culpable or wilful debtor would apply[20].

Is it necessary to attempt to comply with the obligation in spite of the force majeure event?

17. Yes. As we have already said, in spite of circumstances giving rise to a force majeure, obligors must try to exhaust all means available in order to comply with the contractual commitment, including compliance by way of alternative means (that do not substantially modify the essence of the agreement).

Is the law applicable to the contract relevant?

18. Yes. The definition, interpretation and reach of the concept of force majeure in a contract will differ depending on the applicable law. In order to allege the general regime of release from liability because of force majeure, as analysed in this briefing, the law applicable to the contract must be Spanish law[21].

Will an insurance policy cover the damages deriving from a breach caused by the COVID-19 Crisis?

19. This depends. It is necessary to review the contracted insurance policy in order to know if the cover extends to events of force majeure and in what terms it does so, although the usual approach is to exclude by default events of terrorism, epidemics, wars, etc.

---

[19] Supreme Court Judgment (First Chamber, Civil) of 11 June 1990, presiding judge Mr. Alfonso Barcalá Trillo-Figueroa, RJ 1990\5852: "*in order for an event to cause the irresponsibility referred to in article 1105, it is necessary that it be unforeseeable or that, being foreseeable, that it is unavoidable, insurmountable or inescapable, that it is not caused by the will of the alleged debtor, and* ***that there is a causal nexus between the result and the event***".

[20] Article 1107 CC: *"Damages for which the bona fide debtor shall be liable are those which are foreseen or which could have been foreseen at the time of contracting the obligation and which are a necessary consequence of his failure to perform. In the event of malice, the debtor shall be liable for all damages arisen from the failure to perform the obligation*".

[21] See paragraphs 49 *et seq.* of this briefing in order to understand in general terms how a case of force majeure is regulated in international law.

20. In this sense, we can differentiate between three possible scenarios; namely that (i) the policy expressly excludes cover for liability in cases of force majeure; that (ii) the policy does not contemplate nor regulate the insurance cover in these situations; and that (iii) the policy expressly contemplates cover in cases of force majeure.

21. In the first of these cases, and assuming that a breach occasioned by the COVID-19 Crisis is considered a case of force majeure, if the policy were to expressly exclude cover for liability in these events, nothing could be claimed from the insurer.

22. In the second scenario, as force majeure events are not contemplated in the undersigned policy, it cannot be ruled out that the insurers themselves rely on force majeure to release themselves from liability on the basis that it is an unforeseeable and unprecedented event. In this sense, they would follow the general dispositions of the CC in the same terms that have been previously developed[22].

23. If, exceptionally, we were to find ourselves in the third scenario and the policy also insures situations of force majeure, presumably it would be possible to claim the damages deriving from the situation caused by the COVID-19 Crisis from the insurer.

What measures should be taken in the event of a possible breach?

24. Once the force majeure event has been analysed and the impossibility of performing the obligation in the exact terms agreed in the contract has been verified, it is recommended to:

(i) proceed in accordance with the measures adopted in RD 463/2020 and with the other indications and recommendations that are given by the competent authorities;

(ii) examine the contractual clauses in order to check if they contain a specific protocol of action for the parties (alternative performance, manners and time limits of communication, etc.), such as a specific liability regime in cases of force majeure;

(iii) act always in accordance with the principle of good faith[23], transparency and diligence and evaluate if there exists an absolute impossibility of performing the contractual commitment[24] or if, on the contrary, it is possible to perform the contract by rationally amending the contract, which may be by delivering the merchandise at a later date, complying in spite of the difficulty, having a third party perform the service, offer the service online, etc.;

(iv) communicate with the affected party in writing in order to inform them of the current situation (the impossibility of performing the obligation as a result of the COVID-19 Crisis, to what extent and for how long the contractual commitment will

[22] Paragraphs 6 and 16 of this briefing.
[23] Articles 7 and 1258 of the CC.
[24] See paragraphs 13 *et seq.* of this briefing.

be affected, etc.) and, where appropriate, in order to communicate to them the extension of time limits or an alternative means of performing the service; at the same time it would be advisable to keep the counterparty informed of any changes that come about; and

(v) adopt the measures that are necessary in order to minimise the damages deriving from the breach[25].

25. To the extent that the initiation of legal actions deriving from a breach of contract caused by force majeure cannot be ruled out, the aforementioned actions will help to demonstrate that the party acted diligently, transparently, in good faith and, with this, that it is appropriate to apply the release from liability regime for the party that could not perform the service.

26. At the same time, it is important that all of the areas of the business are coordinated and are uniform in the responses that they offer with regard to the breach (justifications, action protocols, solutions, communications, etc.) in order for no contradictions to arise.

What happens with the party that is affected by the breach?

27. The party affected by the breach will also have to evaluate for itself if it was impossible for the breaching party to perform the services. In the event that the affected party is informed of the modification of the performance of the contract (it being temporarily suspended, being carried out on another date or in an alternative manner), the affected party may not, in principle, reject this solution, as long as the substitute performance does not substantially modify the essence of the agreement.

How does all of the above affect the management?

28. The duty of diligence continues in the case of force majeure so the decisions and actions of the management bodies of the company may be subject to examination in different jurisdictions. Therefore, the unexpected breach of obligations cannot affect the duty of diligence demanded of management.

Is there any particular provision dealing with cases of force majeure when the counterparty is a consumer?

29. Royal Legislative Decree 1/2007, of 16 November, approving the consolidated text of the General Law for the Defence of Consumers and Users and other complementary laws

[25] Supreme Court Judgment (First Chamber, Civil) no. 3173/2014, of 9 July, presiding judge Mr. José Ramón Ferrándiz Gabriel, ES:TS:2014:3173]: "*The party that invokes the breach of contract must adopt reasonable measures, in the circumstances, in order to* ***reduce the loss, including loss of profit, resulting from the breach***".

("**GLDCU**") only refers to force majeure in relation to package holidays[26], which coincides with the general regime of force majeure regulated in the CC. Regardless of whether this assumption is expressly contemplated in the GLDCU, in this and in all other cases the general regime of force majeure will be applicable[27].

30. In cases in which a waiver of consumer rights has been agreed in the contract, it must be borne in mind that in contracting with consumers, every waiver of rights recognised by law for consumers will be null[28] and that any waiver in other cases will be subject to the controls of transparency and non-abusiveness[29], so it will depend on the specific circumstances of the case in question.

31. Lastly, the above, in relation to the general regime for consumers, must be understood without prejudice to the provisions of the special laws. Thus, for example, the Royal Decree Law 8/2020, of 17 March, adopting urgent extraordinary measures in order to deal with the economic and social impact of COVID-19[30] contemplates a special provision in the matter of consumption by which the time limit for returning products is interrupted for the duration of the state of alarm[31].

Should I take additional measures if I plan to sign any agreements soon?

32. Insofar as it is of interest to foresee the COVID-19 Crisis as a cause for release from liability for breach of a contract, it would therefore be advisable to include a liability clause addressing force majeure. In the specific case of contracting with consumers, and in order to comply with the regime of transparency and non-abusiveness, it would be advisable to sign this clause independently and ensure the consequences thereof are explained to the average consumer in a clear and understandable manner.

II. *REBUS SIC STANTIBUS* CLAUSE

33. Another legal doctrine of academic and case law origin exists, which differs from force majeure, and that could be invoked in the context of the COVID-19 Crisis: the *rebus sic*

---

[26] Articles 160 and 162 GLDCU: contemplate (i) as a reason for terminating a contract for a package holiday (in which case both parties are permitted to terminate the contract before the commencement of the trip by reimbursing the amounts paid) and (ii) as a reason for compensation during the execution of the package holiday contract (in which case a price reduction can be requested).

[27] See paragraphs 6 *et seq.* of this briefing.

[28] Articles 10 and 86, 87, 89 GLDCU.

[29] Articles 3.1 and 4.2 of the Council Directive 93/13/EEC, of 5 April 1993, on unfair terms in consumer contracts.

[30] BOE. no. 73, of 18 March 2020.

[31] Article 21: "*For the duration of the State of Alarm or its possible extensions, the time limits for returning products purchased by whatever means, whether in person or online, will be interrupted. The calculation of the time limits will be resumed at the moment in which Royal Decree 463/2020, of 14 March, declaring a State of Alarm or, if applicable the extensions thereof, no longer has effect*".

stantibus clause ("*things thus standing*") [32], also known in international contracting as *hardship*.

34. The aim of this doctrine is to modify the terms of the contract or even to terminate the contract when the requirements that are described hereunder are met[33]. We must take into account that our Courts apply such doctrine very exceptionally and with very different criteria. Thus, the viability of using this doctrine is residual and will depend on the specific case.

Which requirements must be met in order to apply the rebus sic stantibus clause?

35. The party that aims to modify the initially agreed-upon provisions or to terminate the contract will have to prove that the following requirements have all been met[34]:

    (i) that an extraordinary alteration of the circumstances has taken place at the time when the contract must be fulfilled in relation to circumstances present at the time when the parties entered into the contract;

    (ii) that an unusual or exorbitant disproportion has occurred between the performances of the contracting parties which upsets the balance between such performances;

    (iii) that all of this has occurred due to radically unforeseeable and unexpected circumstances; and

    (iv) that there is no other remedy to resolve the problem.

36. Thus, the *rebus sic stantibus* clause enables one of the parties of the contract to modify the contractual provisions in order to adapt them to the new circumstances or even to terminate

---

[32] It consists of a legal doctrine commonly known as the "*rebus sic stantibus clause*". It is not necessary for an *ad hoc* clause to exist in the contract for it to be invoked.

[33] Supreme Court Judment (First Chamber, Ciivl) no. 452/2019, 18 July, presiding judge Ms. Mª Ángeles Parra Lucán, ES:TS:2019:2556: *"although the Civil Code does not regulate a mechanism that expressly allows to extinguish or modify the content of the obligations by unpredictable changes, doctrine and case law resort to the "rebus sic stantibus" clause [things thus standing], close in its lawful basis to articles 7 and 1258 of the Spanish Civil Code (CC), in order to solve the problems derived from an occurred alteration of the existing situation or the circumstances present at the time the contract was signed. According to this doctrine, the alteration of the circumstances, which could lead to the modification or, ultimately, the termination of the contract, has to be of such a magnitude that it increases in a significant way the risk of frustrating the contract's purpose. And of course, the circumstances that occurred must have been completely unpredictable for the contracting parties"*.

[34] Supreme Court Judgments (First Chamber, Civil) no. 591/2014 of 15 October, presiding judge Mr. Francisco Javier Orduña Moreno, RJ 2014\6129; no. 64/2015 of 24 February, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS: 2015:1698; and no. 333/2014 of 30 June 2014, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS: 2014:2823.
Supreme Court Judgment (First Chamber, Civil) no. 333/2014 of 20 June, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS:2014:2823: "*The contrast of the so-called objective base of the business allows us to conclude that the mutation or the change of the circumstances determines the extinguishment of the business base when the essential economical purpose of the contract, already expressly provided or derived from its nature or sense,* ***is frustrated or becomes unattainable***".

such contract. This is based on the occurrence of unpredictable circumstances, which have made compliance with the contract's obligations excessively onerous, generating a clear disproportion with regards to the obligations that the parties accepted.

In which situations have our Courts applied the rebus sic stantibus clause?

37. Spanish courts are very restrictive when it comes to applying the *rebus sic stantibus* clause and, thus, terminating the contract or modifying its provisions. This is because the basic premise is that the parties (i) must comply with what has been agreed in the contract[35] and (ii) must assume the risks derived from the nature and sense of the contract (the risk or uncertainty inherent to or derived from a contract)[36].

38. One of the most recent cases in which the *rebus sic stantibus* clause has occasionally been applied, was in the context of the 2008 economic crisis. The main discussion that our Courts have had regarding whether to apply this doctrine related to whether the economic crisis could be considered (i) as an unpredictable event or (ii) as a materialisation of a risk inherent to the contract, which is therefore predictable.

39. Thus, on the one hand, there are judgments that have applied the *rebus sic stantibus* doctrine based on considering the financial crisis to be an unpredictable and extraordinary event which was in no way foreseeable, and which enables the parties to update the contract's terms to the current situation or to terminate such contract[37]. On the other hand,

---

[35] Article 1091 CC: "*Obligations arising from contracts have the force of law between the contracting parties and must be complied with in accordance with the provisions thereof.*"
Article 1255 CC: "*The contracting parties may establish any covenants, clauses and conditions they deem appropriate, provided that they are not contrary to the laws, to morals or to public order.*"
Article 1278 CC: "*Contracts shall be binding, whatever the form in which they have been entered into, provided that they meet the essential conditions for their validity.*"
Article 9.3 of the Spanish Constitution.

[36] Supreme Court Judgment (First Chamber, Civil) no. 64/2015 of 24 February, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS:2015:1698: "*from the unforeseeable events that serve to support the application of the rebus sic stantibus clause, **the risks that derive from the nature and meaning of the obligatory relationship contemplated in the contract, that is, the "normal risk" inherent to or derived from the contract, must be excluded** (…) for this manner of contract termination or revision to be applicable it is required that, amongst other conditions, as indicated in the judgment of 23 April 1991, the change in the circumstances be unforeseeable, which does not occur **when uncertainty constitutes the determining basis for the contractual regulation***".
Supreme Court Judgment (First Chamber, Civil) no. 452/2019 of 18 June, presiding judge Ms. Ángeles Parra Lucán, ES:TS:2019:2556: "*If the parties have expressly or implicitly assumed the risk of a circumstance occurring or should have assumed it because, given the circumstances and/or the nature of the contract, **such risk was reasonably foreseeable, it is not possible to predict the unexpected alteration that**, by definition, implies the non-assumption of the risk. **It is not possible to speak of an unforeseen alteration when this was one of the normal risks of the contract**."*

[37] Supreme Court Judgment (First Chamber, Civil) no. 820/2013 of 17 January, presiding judge Mr. Francisco Marín Castán, ES:TS:2013:1013: "*The previously mentioned arguments do not entail, however, that the rebus sic stantibus rule must be ruled out in all cases where it has been impossible for the purchasers of the properties to obtain financing. Rather, **an economic recession like the current one, of profound and prolonged effects, may be described, if the contract was entered into before the external appearance of the crisis, as an extraordinary alteration of the circumstances**, capable of creating, subject to meeting, in each specific case, other requirements such as those that will be referred to*

judgments have also been issued that have not accepted such doctrine based on the fact that the financial crisis is understood to be an event that occurs in the cycle of business activities that cannot be considered unpredictable. Thus, such event does not authorise the parties to modify the contractual provisions or to terminate the legal transaction[38].

40. In our opinion, the COVID-19 Crisis is a circumstance that the parties could not foresee when they entered into a contract. However, meeting this requirement of unpredictability is not enough to constitute on its own the basis to apply the *rebus sic stantibus* doctrine, *i.e.* it does not entail on its own the widespread or automatic application of the *rebus sic stantibus* clause.

41. It will be necessary to prove, moreover, that the COVID-19 Crisis has had a real and direct impact on the framework of the contractual relationship, causing an exorbitant disproportion between the parties' performances[39]. We will analyse this hereunder.

---

hereunder, an exorbitant and unforeseeable disproportion among the parties' respective performances, elements that the case law considers essential in order to apply such rule."
Supreme Court Judgment (First Chamber, Civil) no. 644/2012 of 8 November, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS:2012:9188: *"although the* ***economic crisis****, in itself, does not entitle the buyer to desist from the contract, we cannot rule out, in general terms,* ***its possible interpretation through the application of the "rebus sic stantibus" rule*** *when from the combined assessment of the circumstances that have arisen, and the rule's own legal configuration, we can infer its possible and correct application to the purchase of dwellings truly affected by the legal typicality that is derived from the economic crisis."*

[38] Judgment of the Supreme Court (First Chamber, Civil) no. 214/2019 of 5 April, presiding judge Ms. Maria Ángeles Parra Lucán, ES:TS:2019:1148: "*regarding the financial crisis as a determining fact for the application of the clause (…) is an event that occurs within the sphere of its business activities, which* ***cannot be considered unpredictable or unavoidable***."
Judgment of the Court of Appeals of Álava (Section 1) no. 91/2012 of 1 march, presiding judge Ms. Mercedes Guerrero Romeo, ES:APVI:2012:31: "*The alteration alleged by the appellant cannot be considered extraordinary or unpredictable, the defendant is a company dedicated to the acquisition of urban and rustic land and so* ***it could well have foreseen the decrease in sales and the drops in prices in the sector,*** *as a consequence of the slowdown in the real estate market.*". Judgment of the Court of Appeals of Lleida (Section 2) no. 119/2012 of 20 March [JUR 2012\154060]: "The crisis in the construction sector **cannot be a generic justification** *for the breach of obligations by all those who are part of this sector, knowing full well the* ***enormous legal insecurity*** *which would be generated should said position be admitted*".

[39] Judgment of the Court of Appeals of Barcelona (Section 4) no. 95/2019 of 12 February, presiding judge Mr. Jordi Lluis Forgas Folch, ES:APB:2019:1187: "*the* ***two indications*** *that characterise the application of such clause are, on the one hand, the* ***unpredictability*** *of the circumstances that alter the content of the obligations and second, the* ***burdensome and onerous result*** *of the impact of such circumstances on the economic base that regulated the contract."*
Supreme Court Judgment (First Chamber, Civil) no. 214/2019 of 5 April, presiding judge Ms. Mª Ángeles Parra Lucán, ES:TS:2019:1148: "*the economic crisis of 2008* ***does not entail, in itself, a generalised or automatic application*** *of the "rebus sic stantibus" clause from the occurrence of such circumstance, but rather it is completely necessary that we assess its* ***causal or real impact on the framework of the contractual relationship*** *(…)* ***risk of converting such possibility into an incentive for merely opportunistic breaches of contracts.*** *"*

What constitutes an imbalance in a contract?

42. Once the requirement of unpredictability of the COVID-19 Crisis is met, the discussion on whether to apply, on a case-by-case basis, the *rebus sic stantibus* doctrine will be mainly focused on proving that the event has caused an exorbitant disproportion among the contracting parties' performances that upsets the balance between such performances.

43. In this task, we must take into account that not any negative result that is obtained by the business because of the alteration of circumstances caused by the COVID-19 Crisis will enable the revision of the contract. Likewise, not all imbalances among the performances are sufficient to invoke the clause. Rather, it is necessary for the alteration of the circumstances to have had a highly significant impact on the parties' business and for it to have caused an exorbitant disproportion among the corresponding performances of the parties[40].

44. In other words, the concept of extraordinary alteration of the circumstances must not be confused with that of business risk, since all entrepreneurs assume risk to a greater or lesser extent when contracting, however remote. The entrepreneur must assume the risk of loss derived from both the business' valuation when entering into the contract (expectations, estimations made by the entrepreneur) as well as from the evolution of the contract in the market[41]. Thus, the materialisation of the risk is not considered in itself an imbalance in the contract that enables its revision.

45. Lastly, we must also assess the temporary impact that the COVID-19 Crisis has on the contractual relationship and on the performances that the parties must comply with, since the relevance will not be the same if the imbalance among the parties is generated, for instance, only during the COVID-19 Crisis, or if its effects are extended in an irreparable and

---

[40] Supreme Court Judgment (First Chamber, Civil) no. 333/2014 of 30 June, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS:2014:2823: "*the figure requires, moreover, that such alteration or change of circumstances cause a rupture of the reason for the commutativity of the contract translated into an* ***excessive hardship in the compliance of the performance*** *of the affected party. (…) we must point out that such excessive hardship is deduced, in a clear way, in the transit of the year 2008 to 2009, with the negative balance, with the excessive fall in billing, that not only limits with substantial losses the specific line of business in question, but rather compromises the viability of the rest of the operating areas of the company, if the contract is entirely complied with in accordance with what has been agreed upon."*

[41] Supreme Court Judgment (First Chamber, Civil) no. 64/2015 of 24 February, presiding judge Mr. Francisco Javier Orduña Moreno, ES:TS:2015:1698: "*to sustain the application of rebus sic stantibus* ***we must exclude the risks that derive from the nature and sense of the compulsory relationship contemplated in the contract, that is, the "normal risk" inherent to or derived from the contract.***
Supreme Court Judgment (First Chamber, Civil) no. 447/2017 of 13 July, presiding judge Ms. Dª María de los Ángeles. Parra Lucán, *ES:TS:2017:2848: "with the possibility of a quick and substantial gain, which was the consequence of a quick rise in the prices of the dwellings,* ***logically there was a high risk*** *that an inverse movement could take place. Having such risk become reality, the contracting party cannot expect to be immune through the application of the rebus sic stantibus doctrine and to* ***transfer the negative consequences of the occurrence of such risk to the other contracting party****. If the rebus sic stantibus doctrine is applied in such terms, it would be contrary to good faith, which is precisely one of the pillars which such doctrine must take into consideration."*

long-lasting manner. Likewise, the contract's duration will be decisive when assessing the impact of the extraordinary circumstance on the business' base.

Can I request the revision or termination of the contract because of the COVID-19 Crisis?

46. To the extent that the previously mentioned requirements are met, the COVID-19 Crisis could serve as a basis for requesting a revision of the provisions agreed by the parties or the termination of the legal transaction.

47. Taking into account that the Courts apply the *rebus sic stantibus* clause very exceptionally and that the impact that the COVID-19 Crisis will have is still unknown, it is too soon to assess how the Courts will possibly apply the *rebus sic stantibus* doctrine and the assessment must be made on a case-by-case basis.

Does the rebus sic stantibus clause apply in the same cases as force majeure?

48. Not necessarily. Although in both cases an unpredictable event takes place, in the case of force majeure, such event makes it impossible to comply with the obligation, while in the case of *rebus sic stantibus* performance does not need to be impossible, but rather circumstances need to have caused a serious alteration in the contract's balance.

III. FORCE MAJEURE AND *REBUS SIC STANTIBUS* IN THE INTERNATIONAL SPHERE

How are the cases of force majeure and rebus sic stantibus regulated in international law?

49. In international law, mechanisms exist that are applied to contracts, which serve to interpret such contracts or that complement the national law that is applicable to the contractual relationships. The clauses of these mechanisms contemplate equivalents to force majeure and to the *rebus sin stantibus* clause analysed in this briefing.

50. First, Spain is part of the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**")[42] and, thus, this is the applicable law. Its provisions are applicable to any purchase-sale transaction carried out between parties that are established in any of the contracting states and when the rules of private international law lead to the application of the law of a contracting state, unless the parties have expressly excluded its application.

51. The CISG regulates force majeure in terms that are very similar to Spanish law, both in its definition ("impediment beyond the parties' control that could not be avoided or that the parties could not overcome") as well as in the regime of exemption from liability foreseen due to a breach ("the party is exempt from liability") [43].

[42] Mechanism of Adherence of Spain to the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna on 11 April 1980, published in the BOE. no. 26, of 30 January 1991, Section I.

[43] Article 79.1 of the International convention of goods: "*A party is not liable for failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could*

52. Moreover, the Principles of European Contract Law ("**PECL**"), repeatedly recognised by our Supreme Court as an essential mechanism for the interpretation of our legal system, include a very similar figure to the *rebus sic stantibus* clause as it is being applied by our Courts.

53. Specifically, pursuant to the PECL, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it if the contract's compliance is excessively onerous due to a change of circumstances, provided that: (i) such change of circumstances occurred after the time of conclusion of the contract; (ii) in reasonable terms, the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and (iii) the risk of the change of circumstances is not one which, according to the contract, the affected party should be required to bear[44].

54. As a consequence of this unexpected situation, the PECL add that, if the parties fail to reach an agreement within a reasonable period, the Courts may: (i) terminate the contract on a date and under the terms determined by the court or (ii) adapt the contract in order to distribute the losses and gains resulting from the change of circumstances between the parties in a just and equitable manner[45]. In either case, the Courts may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

55. Lastly, the Unidroit Principles of international commercial contracts ("**UNIDROIT**") also contemplate a similar solution. The UNIDROIT principles are binding rules between the contracting parties when the parties have agreed that their contract be governed by them, when the parties have agreed that their contract be governed by general principles of law, when the contract is governed by laws that refer to such principles and such principles can also be applied when the parties have not chosen any law to govern their contract.

56. The UNIDROIT principles address the *rebus sic stantibus* doctrine in a similar way to Spanish courts, establishing that when the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the provisions expressly foreseen in relation to hardship[46].

57. There is hardship where the occurrence of events fundamentally alters the balance of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. Such events (i) must occur or

---

not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences."

44 Sections 2 and 3 of article 6.111 PECL. Supreme Court Judgments (First Chamber, Civil) no. 416/2016, of 20 June, presiding judge Mr. Francisco Javier Arroyo Fiestas, ES:TS:2016:2893; no. 511/2013 of 18 July, presiding judge Mr. Rafael Saraza Jimena, ES:TS:2013:4245; and no. 649/2016, of 3 November, presiding judge Mr. Francisco Javier Orduña Moreno, RJ 2016\5203.

45 Section 3 of article 6.111 PECL.

46 Article 6.2.1 UNIDROIT.

become known to the disadvantaged party after the conclusion of the contract; (ii) could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (iii) are beyond the control of the disadvantaged party; and (iv) the risk of the events was not assumed by the disadvantaged party[47].

58. In these circumstances, the disadvantaged party is entitled to request the renegotiation of the contract. The request shall be made without undue delay and shall indicate the grounds on which it is based[48]. If an agreement cannot be reached within a reasonable period, either party may resort to the Courts. If the Courts consider there to be hardship, they may, if reasonable, (i) terminate the contract on a date and under the terms to be established or (ii) adapt the contract with a view to restoring its balance.

IV. MAC CLAUSES

Are MAC ('material adverse change') clauses applicable to this situation?

59. MAC clauses are clauses that are frequently used in mergers and acquisitions contracts or in the context of the acquisition of companies, in syndicated loan agreements and in investment contracts.

60. The aim of MAC clauses is to manage and distribute the risk that is inherent to the legal transaction among the contracting parties. The use of such clauses normally favours the investor or the purchaser as it entitles them to terminate the contract and to desist from the transaction –or, as the case may be, to renegotiate its terms- when between the time of signing the contract and the closing of the transaction, certain circumstances, events, changes or effects occur that could reasonably affect the transaction in an adverse and relevant manner. The party that invokes the application of this clause and terminates the agreement or renegotiates its terms is released from liability, unless otherwise agreed (i.e. reduced penalty).

61. To know whether a MAC clause applies to the situation caused by the COVID-19 Crisis, we will have to adhere to what has been stipulated in the MAC clause in each specific case, as well as to the other clauses of the contract.

47 Article 6.2.2 UNIDROIT.
48 Article 6.2.3 UNIDROIT.