

THE “REBUS SIC STANTIBUS” DOCTRINE: FIRST INSTANCE COURT NUMBER 20 OF BARCELONA REDUCES THE RENT OF TOURIST ACCOMMODATION TO 50% AS A RESULT OF THE COVID-19 HEALTH CRISIS

On 8 January 2021, First Instance Court number 20 of Barcelona (the “FIC”) handed down Judgment No. 1/2021 (the “Judgment”) in which it declared that the doctrine of “*rebus sic stantibus*” was applicable, and considered a 50% reduction in the rent agreed in the framework of various industrial leases on properties intended for tourist accommodation to be necessary due to the COVID-19 health crisis (the “Health Crisis”).

In particular, the lessee's business was affected by the Health Crisis insofar as it was completely suspended from March to May 2020 and has only resumed to a very limited extent to date. The FIC carried out an analysis of the aforementioned situation and considered that the requirements to apply the “*rebus sic stantibus*” doctrine and to alter the amount agreed by the parties as rent were met in this case, in particular because:

- (i) there existed an extraordinary and unforeseeable alteration of the elements that were taken into account when signing the contract and the new situation led to an alteration of the foundation of the business;
- (ii) as a consequence of the aforementioned alteration there arose: (i) either frustration of the purpose of the contract, or; (ii) serious and unduly onerous detriment to one of the parties;
- (iii) the parties attempted to negotiate the amendment of the contract and no agreement had been reached in this regard, and
- (iv) the solution sought was to terminate the contract or modify it so that the profits and losses resulting from the change were distributed between the parties in an equitable and fair manner.

The FIC argued that the Health Crisis represented an extraordinary alteration of the contract that could not have been foreseen when it was signed, since the business that the lessee intended to engage in has been, to a large extent, prevented by the measures adopted by the Government. This led to the conclusion that the purpose of the contract was frustrated in said case, resulting in excessively burdensome detriment to the lessee, who would have had to undergo insolvency proceedings if the rent had not been reduced.

The FIC did not consider it sufficient that the holder had accepted a moratorium on the payment of rent¹ and considered that when, as in this case, such a measure does not make it possible to maintain the contractual balance between the parties, the amendment of the contract is a viable

¹ See Article 3.2 of Royal Decree-law 15/2020, of 21 April, adopting additional urgent measures to support the economy and employment

solution in application of the “*rebus sic stantibus*” doctrine. In addition, the FIC took special account of the good faith of the lessee during the negotiations, who in this case continued to pay 50% of the rent at all times, this being the amount the lessee could pay due to the change in circumstances. On the other hand, the FIC also considered it relevant that the lessee was able to prove the damage suffered due to the suspension of the business by means of an expert's report.

The Judgment also concluded that the doctrine applied independently of the lessor being a great property holder (*gran tenedor de inmuebles*), mentioning, however, that this condition reinforced the need to apply it.

Therefore, we have seen a certain tendency in the first judgments of the First Instance Courts to apply the “*rebus sic stantibus*” doctrine in order to re-establish contractual balance for leases affected by the Health Crisis.

Even though this ruling focused on the effects on the tourism sector, it is worth noting, for example, a judgment issued on 11 August 2020 by the First Instance Court of Cáceres (judgment No. 94/2020) which analysed the effects on the commercial sector (the “**Cáceres Judgment**”). In the Cáceres Judgment, the Court also considered the “*rebus sic stantibus*” doctrine to be applicable. The difference is that in this case a 25% reduction in rent was applied, taking into account that the impact on the lessee's business was not so significant and there was not the collaborative and good faith attitude seen in the case discussed above.

In any case, it is too soon to reach a definitive conclusion, as very few judgments have been handed down so far and it remains to be seen whether they will be confirmed by higher courts. However, it seems that the elements that the courts will consider when applying the “*rebus sic stantibus*” doctrine in the context of the Health Crisis are as follows: (i) the good faith attitude of the lessee; (ii) the total impact on the lessee's business in the particular case; and (iii) whether the lessor is an individual or a great property holder (although this status is not decisive).

This Legal Briefing was prepared by Jordi Gras and Clàudia Valdés, Partner and Associate of the Litigation and Arbitration practice.

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