

**COVID-19'S IMPACT ON COMMERCIAL CONTRACTS:
FORCE MAJEURE AND REBUS SIC STANTIBUS DOCTRINE**

LEGAL OPTIONS ARISING FROM THE IMPOSSIBILITY TO FULFILL A CONTRACT

a) Interpretation of the clause foreseen in the contract

In general (*or at least in the ones drafted by FONT & YILDIZ*) commercial agreements include clauses regarding the impossibility to fulfill all the obligations as a consequence of force majeure causes. In these cases, it is advisable to firstly identify the causes foreseen as force majeure, attending to the specific cases, that might be, among others, pandemic situations, borders closure, the imposition of State of Alarm or Emergency, and secondly, to identify what the contractual parties had agreed regarding the possible damages to be compensated in case of breach of contract.

b) Application of the "force majeure" concept

The Spanish Civil Code, in its article 1105, foresees an exoneration of responsibility to compensate damages caused by the party that breaches the contract as consequence of a force majeure situation.

Thus, this legal prevision foresees that the party that is unable to fulfill the contract as a result of a force majeure situation will not have to compensate the **damages** that might cause the breach of the contract.

The force majeure does not exonerate the obligation to fulfill the obligation assumed by virtue of the agreement, it just postpones the performance of the obligation and exonerate to compensate for damages arisen for that situation. When the force majeure cause disappears, the obligation will have to be fulfilled. Due to that, it also has to be analyzed if the obligation is likely to be performed afterwards without causing damages for the parties.

Requirements: In order to be able to allege a force majeure cause, this cause must be: (1) unpredictable, or being predictable, not being possible to avoid it; (2) not be



attributable to the responsible of the obligation; (3) preclude the effective fulfillment of the obligation¹ and (4) there must be a causal link.

Therefore, those situations where as a result of the declaration of the State of Alarm the obligations become impossible to be performed, would fulfill the previous requirements. Nevertheless, those situations where as an indirect consequence of the declaration of the State of Alarm obligations become impossible to be performed, will have to be analyzed case by case.

Consequences: The creditor that sees the obligation in his favor unfulfilled will be able to, by virtue of article 1124 of the Spanish Civil Code: (1) opt to terminate the contract, but not being entitled to claim for damages, according to article 1105 of the Spanish Civil Code or (2) wait until the force majeure cause is over and then proceed to request the fulfillment of the obligation, but not being entitled to claim for damages either.

c) **Amendment or termination of the contract due to the application of the “Rebus Sic Stantibus” Doctrine**

This doctrine, created by the jurisprudence, appears to protect the parties of the contract before a sudden, unpredictable and relevant change of the agreed conditions, in a way that one of the parties has a different and much more burdensome situation than the one that had when subscribed the contract.

This doctrine allows the affected party to ask for an amendment or suspension of the contract terms, or, in subsidiary, for the termination of the contract as a protection measure before the change of the circumstances that suffered; or as a cause of an imbalance between the obligations of the parties.

Requirements: This doctrine requires that the change of the circumstances: (1) respond to an unpredictable event and (2) create a breach in the balance that existed previously between the parties, meaning that an obligation becomes extremely burdensome for one of the parties. For example, in case of a lease agreement to run a restaurant, if this is not allowed to be opened under the State of Alarm and therefore not allowed to perform its activity.

Consequences: Against this situation, this legal doctrine would be useful to negotiate and amendment of the terms of the contract (monthly rent reductions, deferral of the payments, and so on), at least temporally, or, subsidiary, to request the termination of the contract.

¹ According to the Supreme Court – being susceptible to be updated due to the current events – the exoneration is only referred to the obligations that consist in doing or giving, not in paying any monetary amount.



The jurisprudence has not ruled regarding these matters, however, it has always been very restrictive in its application. Nevertheless, the Courts are already highlighting, in several doctrinal articles, this solution for a pandemic situation such as the one we are currently at.

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