Stav Healthy

Your own health, that of your family and employees is the most important.

Communicate

Contact your business partners and try to find a mutually satisfactory solution.

Monitor

Monitor legislation and news regarding COVID-19 related aids, tax exemptions and subsidies through lawyers.

Take Inventory

Take inventory of your existing business commitments, particularly existing contracts.

Review existing contracts

Check if your contracts contain force majeure clauses: explicitly, or under "delivery duties", "delay" etc. Also, screen general terms and conditions. Fixed and variable rent. Expenses arising from the activity attributable to the owner/tenant.

If the contract contains a force majeure clause...

- Has a definition for force majeure been agreed upon?
 Does it include natural disasters, plagues, epidemics, governmental measures?
- How has it been regulated? Renegotiation obligations?
 Suspension of obligations?
- Analyse whether the existing provisions allow contract termination.

If the contract <u>does not</u> contain a *force majeure* clause...

- Current and real situation: alarm status
- Legal underpinning by virtue of exceptional governmental, State, Autonomous Communities or Municipal measures: activity suspension, reduction of business hours, lack of supply, etc.
- Applicability of other conventions or special rules?
- Verify predominant caselaw applicable to the specific situation

Regulation in legal terms LAU (Spanish urban tenancy law), Civil Code

- The situation caused by COVID-19 affecting your business may constitute a serious impediment to the activity, beyond the control of the owner and the tenant.
- There is no express regulation in the LAU (Spanish Urban Tenancy Law) or the Civil Code
- Article 1105 of the Civil Code provides an exemption from liability for unforeseeable and unavoidable events but does not list them.
- No specific measures had been adopted, as a result of the alarm status regarding activity suspension in commercial premises – retail, initially under RD 463/2020 of 14 March
- Royal Decree-law 15/2020, of 21 April adopts extraordinary measures for rent payment as regards commercial and industrial premises by self-employed persons, professionals and SMEs whose economic activity has been suspended or drastically reduced.

Regulation in caselaw terms

The alarm status decreed by the Government as a consequence of COVID-19 is a *force majeure* event:

- Unforeseeable and supervened
- The events are not attributable to any of the parties
- The change in circumstances entails serious and unavoidable consequences for the performance of the rental/lease agreement
- Temporary closure and activity suspension are not contained within the assumable risk of the business – retail
- Imbalance of contractual obligations between owner and tenant
- Inexistence of wilful misconduct or bad faith by the parties
- Applicable doctrine to long-term contracts providing for continuing obligations—Supreme Court decision STS 156/2020 of 6 March

OBJECTIVE: restore the balance between the parties OPTIONS

JUDICIAL

EXTRAJUDICIAL

Tenant

- Use of the premises as provided under the contracted conditions is not permitted
- Imbalance in performance: rent payment
- Is it possible to stop paying rent unilaterally? No, risk of claim for payment and eviction by the owner.
- Possible contestation: alleging the alarm status.
- You will have to bear the costly and timely risk associated with legal proceedings, which are currently 9-12 months behind schedule.

Owner

- Claim for payment and eviction by the owner upon rent default
- Risk of contestation on the grounds of the exceptional situation and force majeure
- Bearing the temporary and economic cost of legal proceedings
- Loss of income and inability or difficulty to collect rent in the future
- Execution of bank guarantee: yes, it is possible, but it may condition the contract and future relations with the tenant.

Tenant / Owner

- **Tenant:** Written communication to the owner containing specific requests: suspension, moratorium or reduction of monthly rent, expense review, contractual term ...
- Owner: Response to the new situation and assurance of the activity's continuity by both parties. The owner bears fixed costs derived from the tenant's possession of the premises, though without activity.
- Owner and Tenant: Negotiating a new contract or modifying certain clauses – Rebus sic stantibus principle or redressing the balance between the parties
 - ✓ Rent revision based on current market terms and options for future adaptation
 - ✓ Agreeing on fixed and variable rent
 - ✓ Extension of the mandatory contract time limit
 - ✓ Revision, possible reduction of common fixed costs such as cleaning, surveillance, etc.
 - ✓ Not applying the CPI during mandatory closure period
 - ✓ Applying an increased CPI in the future
 - ✓ Taking out compulsory insurance to cover force majeure events
 - ✓ Include force majeure wording expressly mentioning COVID-19 and clarifying that any further development worsening the situation which leads to an impossibility of performance after certain day shall constitute a force majeure event.
 - ✓ Include clauses allowing for the adjustment of opening dates or subsequent re-negotiation, or which incorporate a reservation of a right of withdrawal due to COVID-19 issues.
- Avoid assuming that "back to normal" will be back soon.

The rebus sic stantibus principle shall not be applicable if:

If the parties have expressly or implicitly assumed the risk that a circumstance would occur or should have occurred because, by virtue of the circumstances and/or nature of the contract, such a risk was reasonably foreseeable, it is not possible to determine the existence of a circumstance alteration since, by definition, it implies the non-assumption of risk (recently decision 5/2019 of 9 January). There can be no question of unforeseeable alteration when it is within the normal risks associated with the contract (decisions 333/2014 of 30 June, 64/2015 of 24 February and 477/2017 of 20 July, among others).

OTHER SITUATIONS

OFFICES

If the activity has not been prohibited, force majeure cannot be invoked.

INDUSTRIAL FACILITIES

The activity has not been prohibited. *Force majeure* cannot be invoked. Evaluate whether 15-day "hibernation" applies – RD 10/2020

Provided that no prior agreement has been reached before the publication of Royal Decree-law 15/2020:

