

A Spanish Court of Appeal confirms for the first time an interim injunction on the grounds of the *rebus sic stantibus* doctrine and the COVID-19

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The Court of Appeal of Valencia (“**CAV**”) has confirmed a first instance court interim relief granted on the grounds of the *rebus sic stantibus* doctrine (a sort of *hardship*) and the COVID-19¹.

The CAV’s order refers to a hotel management lease agreement signed on 4 July 2011 by Iberstreet, S.L. (“**IS**”) and Atom Hoteles Iberia, S.L. (“**AH**”) and amended on 26 October 2017 (the “**Agreement**”), pursuant to which AH, the owner of a hotel located in the Balearic Islands, leased the hotel’s premises and business to IS for a monthly variable rent linked to IS’s revenue, with a floor of € 1 million.

Given the effects of the COVID-19, IS wanted a reduction of the rent but, prior to filing the main claim against AH, it requested an interim injunction consisting in a deferral of 50% of the rent. AH opposed the adoption of the interim measure.

The first instance court granted the interim injunction and ordered the rent’s deferral from June 2020 until, at least, March 2021 (when the court foresaw that the new tourism season would start). However, if legal restrictions relating to the hotel’s capacity and the access of European tourists were still in place then, the deferral would be extended until a judgement on the merits was handed down.

AH then filed an appeal against the order on two grounds: (i) lack of *fumus boni iuris*, since the Agreement provided for a variable rent based on IS’s revenue that mitigated the risk of an unexpected decrease of the revenue and hence the *rebus sic stantibus* doctrine was not applicable, and (ii) lack of proportionality, since the measure was ordered to last, at least, until March 2021, despite the fact that the state of alarm and lockdown were lifted in June 2020 and the royal decree law 15/2020, dated 21 April, only allowed deferrals of payment of rent (if applicable) until 21 October 2020.

The CAV finally dismissed the appeal. In particular, it rejected the first ground of appeal due to the following reasons:

- (i) The COVID-19 is “*such an exceptional, unforeseeable and extraordinarily serious circumstance (catastrophic, it could be added)*” that justifies, at least *prima facie*, the application of the *rebus sic stantibus* doctrine to the case at hand, especially bearing in mind that its effects have been “*so widespread, so negative and so devastating for the economy*” that have given rise to a “*historic an lethal*” crisis, “*particularly for the hotel and tourism sectors*”. Therefore, the restrictive approach traditionally followed by the Supreme Court when applying the *rebus sic stantibus* doctrine (in particular, regarding economic crises) does not apply to this case.

¹ Order (*auto*) of the Court of Appeal of Valencia 43/2021 dated 10 February 2021.

- (ii) A clause providing for a variable rent based on IS's revenue does not mean that (a) the parties, when entering into the Agreement, actually foresaw a situation such as the current one, (b) the purpose of that provision "*was to mitigate the effects of a pandemic that nobody could have imagined*", or (c) one of the parties should assume all types of risks, even the "*most severe, extreme, or catastrophic*".
- (iii) The interim injunction seems appropriate since some royal decree laws passed within the context of the COVID-19 provide for similar measures for companies facing financial difficulties. In addition, these legal provisions do not prevent parties from requesting analogous measures before a court based on the *rebus sic stantibus* doctrine.

The CAV also dismissed the second ground of appeal. It considered that the interim injunction was proportionate, given that a new state of alarm was declared on 25 October 2021 and eventually extended until 9 May 2021 and because, regardless of the specific legal rules in force, the situation is still extremely unfavorable for the tourism industry due to people's fear of infection, the emergence of new variants of the virus and the restrictions on (i) people's freedom of movement within Spain, (ii) arrival of tourists from outside Spain (*e.g.* mandatory PCRs and quarantines), (iii) businesses' opening hours, (iv) curfews, etc.

The CAV's order is a highly relevant decision because it is the first ruling issued by a Spanish Court of Appeal endorsing (even by way of an interim injunction) the application of the *rebus sic stantibus* doctrine as a result of the COVID-19.