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# The Legal 500 Country Comparative Guides

# Spain

# FORCE MAJEURE

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This country-specific Q&A provides an overview of force majeure laws and regulations applicable in Spain.

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# SPAIN
# FORCE MAJEURE

## 1. May *force majeure* be relied on by a party to a contract, even if the parties have not included a *force majeure* clause?

In the absence of an express contractual agreement, Spanish legal provisions will apply. Those provisions include the general rules under article 1105 of the Spanish Civil Code and those established for cases involving the loss of the owed object, in particular, (i) article 1182 of the Spanish Civil Code for the obligation to deliver a specific thing ("*the obligation to deliver a specific object will be extinguished if that object is lost or destroyed without fault of the debtor and before it is in default*") and (ii) article 1184 of the Spanish Civil Code for obligations to do a specific thing ("*the obligor will also be discharged from its obligations when performance is legally or physically impossible*").

Special provisions apply for specific types of contracts, which include: (i) the Spanish Civil Code's rules established for specific contracts, such as article 484 for usufructs; 1452 for sale-and-purchases; 1563 and 1575 for leases; 1589 for contracts for specific works; 1602 for secured annuities; 1745 for gratuitous loans; 1777 and 1784 for deposits; 1896 for recovery of undue payments; and (ii) those established for consumers, such as the rules set out in articles 75 and 76 (impossibility of returns) and 160 (impossibility to perform the travel package) of the Consolidated Text of the General Law on the Protection of Consumers and Users ("GLPCU").

## 2. If so, please explain in which circumstances *force majeure* may be relied on.

In principle, parties can always rely on *force majeure*. The Civil Code's provisions on obligations and contracts (both general and specific to each type of contract) apply unless the parties expressly exclude their application (either because they establish an alternative framework or because they merely exclude the application of the rules). As a consequence, unless expressly agreed otherwise by the parties, whenever the requirements and characteristics of *force majeure* are met, it will apply with liberating effects for the party prevented from fulfilling performance.

## 3. Is the concept of *force majeure* enshrined in legislation?

The concept of *force majeure* is enshrined in article 1105 of the Spanish Civil Code, which states that: "*Apart from the cases expressly mentioned in law, and those in which the obligation is so declared, no one shall be responsible for those events that could not have been foreseen, or that, if they were foreseen, were unavoidable*". Numerous articles of the Spanish Civil Code also expressly refer to the concepts of *force majeure* (arts. 457; 1777; 1784; 1905; and 1908.3), fortuitous cases (arts. 1093.3; 1096; 1129.3; 1136.1; 1183; 1488; 1575; 1744; 1745; 1891; and 1896) or both (arts. 1602 and 1625).

## 4. If so, may the parties agree to derogate from the provisions of this legislation?

The legal framework of *force majeure* is supplementary and complementary to the parties' expressly agreed contractually. This means that the parties, in exercise of their freedom to contract, can expressly regulate *force majeure* cases and the consequences resulting from them, including regulations that modify or exclude the debtor's exemption from liability in the event of the non-performance of their obligations. These *force majeure* clauses, which are widely known as assignment-of-liability and allocation-of-risk clauses between the parties, must be interpreted according to the mutual intent of the parties and in the light of business uses and good faith on a case-by-case basis.

Notwithstanding the above, there exist some exceptions in the field of contractual relationships with consumers. For instance, clauses that completely exclude or limit the company's liability in cases of *force majeure* may be considered abusive by courts and therefore declared void vis-à-vis the injured party. This would limit the

 

consumer's right to terminate the contract in cases of *force majeure*.

## 5. What is the approach taken to drafting *force majeure* clauses in your jurisdiction?

In the absence of express regulations, private-law rules will govern *force majeure* and its requirements, scope and effects, as well as the special rules set out for specific types of contracts.

Notwithstanding the above, in deferred-performance contracts, it is always advisable to include *force majeure* clauses aimed at determining, modifying and adapting the legal concept to the specific contractual relationship. This recommendation is particularly important if the contract has an international component.

This essentially involves specifying the circumstances that may affect the performance of the parties' obligations, making performance impossible, whether temporarily or permanently. In order to grant such circumstances the status of a *force majeure* event, it is also necessary to regulate the corresponding effects and establish adequate notice obligations.

The following considerations should therefore be considered when drafting a *force majeure* clause:

(i) The requirements that must be met in order for a circumstance that falls within the concept of *force majeure* to exist. A general definition should be established as well as a specific list of situations constituting *force majeure*. It may also be beneficial to specify situations that will not be considered as constituting *force majeure*. In any case, maximum precision should be sought, avoiding generic or ambiguous references.

(ii) The effects that the parties intend to recognize as resulting from *force majeure*. The parties can agree that *force majeure* will excuse performance, releasing the parties from their obligations. If the parties agree that *force majeure* should suspend performance while the specific event exists, it is always advisable to establish a maximum duration of the suspension.

(iii) Proper notice obligations and, where appropriate, proof of *force majeure* by the parties.

## 6. Is it common practice to include *force majeure* clauses in commercial contracts?

It is common in deferred-performance contracts that are diligently and attentively prepared and drafted.

Generally, *force majeure* clauses are set out among the last clauses in the contract.

## 7. Would the courts be willing to imply *force majeure* terms into contracts?

Under Spanish law, unlike in other jurisdictions, the general concept of *force majeure* operates within the field of contract law without the necessity of being expressly regulated by the parties to the contract. In fact, in common-law systems, *force majeure* is not generally applicable as a legal principle and requires an express agreement between the contractual parties. On the contrary, in continental or civil-law systems (e.g. Spain), civil codes regulate the concept as well as its consequences, with *force majeure* being generally applicable in the context of contracts without the necessity of a specific provision. This means that, in Spanish law, it is not particularly relevant for parties to consider the possibility of judges and courts applying *force majeure* to contracts in which there is no explicit provision on the matter, as that is beyond doubt. The same cannot be said of other legal systems.

The assessment of *force majeure* in situations in which a contract is silent on the matter does not require a court decision. Only if the parties are unsatisfied with its occurrence and effects will the relationship be judicially analysed; in that event, whether or not the requirements for concluding the existence of *force majeure* are met and, if so, its potential consequences, will ultimately be subject to the judge's discretion. It must be taken into consideration that the concept of *force majeure* is fundamentally casuistic, subject to interpretation in view of case-law, narrowly interpreted, and with it being more likely that courts will find there *force majeure* to exist the more extraordinary, unavoidable and alien the event that prevents fulfilment is to the obligor's sphere of control and organization.

Nor should it be overlooked that, in any case, the parties' freedom to contract and develop their contractual relationship prevails in contract law, with courts being influenced by the parties' intent. The parties may include contractual clauses excluding the application of *force majeure* and aggravating the obligor's liability, making the obligor liable for non-performance arising from events that are covered by the concept. In this type of situation, when the dispute is brought before the court, it will be significantly challenging for the court to assess the obligor's release in the event of *force majeure*, since this would contravene the parties' intent, to which the Civil Code gives preference.

 

## 8. How do courts approach the exercise of interpretation in relation to *force majeure* clauses?

As indicated, the legal framework of *force majeure* will be supplementary and complementary to what the parties explicitly agreed contractually. This means that, when assessing and evaluating each situation, the starting point for determining the potential consequences of the situation are the specific contractual provisions agreed by the parties.

It is common practice to include contractual provisions designed to allocate risk between the parties and assign liability in cases of *force majeure*. These provisions primarily modify (or completely exclude) the consequences of *force majeure*, thereby exacerbating the obligor's liability in cases of non-performance. Such clauses are generally considered fully valid given the primacy of the parties' intent, with no other limitations other than those generally imposed by the criteria of incorporation and content of contractual clauses. There are, however, some exceptions. For example, in consumer and user contracts, the Law on Consumer Protection establishes that the general release of the offering party from liability (including upon the occurrence of force majeure events) is an unfair term and, consequently, null.

Notwithstanding the above, when drafting *force majeure* provisions, it must be taken into consideration that courts often interpret them (a) in accordance with the parties' intent and (b) objectively and comprehensively, i.e. in view of standard business practices and good faith. Therefore, when assessing and evaluating the application of these contractual provisions, the analysis will be based on the parties' intent when they were drafting the contract as well as what would have been agreed by ordinary parties in the same business sector under similar circumstances. Courts will also consider, under the general principle of good faith, the actions of the party invoking force majeure to attempt to comply with its obligations and mitigate potential damages.

## 9. Are there any legislative or statutory controls on the use of *force majeure* clauses?

There are no specific controls, beyond the general rules restricting the principle of freedom to contract, such as those established in the field of consumer protection.

## 10. Must an event have been unforeseeable at the time of the contract to permit a party to rely on it as *force majeure*?

As indicated, the concept of *force majeure* is established in article 1105 of the Spanish Civil Code, which states that "*no one shall be responsible for events that could not have been foreseen, or that, if they were foreseen, were unavoidable*". Although the wording appears to suggest that unforeseeability and unavoidability are two sufficient conditions for the exemption of liability in cases of *force majeure*, both legal scholars and case-law have instead interpreted these as necessary conditions that must both be met. In other words, the event must be unforeseeable and unavoidable, although there exists consensus that the predominant, determinative element of *force majeure* is unavoidability. As such, some foreseeability is permitted, thus referring to events that, if foreseen, were nevertheless unavoidable.

These two features, unforeseeability and unavoidability, which must be present in a case of *force majeure*, are not objective and inherent circumstances of an event that can be determined in the same manner in all cases and will instead depend on the specific circumstances of the event and will be measured according to the nature of the obligation and the level of diligence owed by the obligor. This implies that the same event may be considered a case of *force majeure* for one obligor and not for another, given that the latter, due to its particular circumstances, must exercise a higher level of diligence in terms of foreseeing or avoiding harmful events.

## 11. What types of events are generally recognized by courts of your jurisdiction as being *force majeure*?

An array of cases have been submitted to Spanish courts alleging that a specific event constitutes *force majeure*. As indicated, a court's analysis will always take into consideration the circumstances of each case; what is found to constitute *force majeure* in one context may not be so in another. The following are examples of some the most common cases that have been held by case-law as being *force majeure* events:

(i) Natural events or disasters. These include, for example, earthquakes, floods, overflows, forceful winds and heavy rainstorms, frost, lightning and tidal waves. Although these are typically considered events of *force majeure*, as addressed in the following section, not all such events will be considered *force majeure*; this will primarily be the case if it is not corroborated that, in view of the corresponding circumstances, the event was unforeseeable or unavoidable, and not merely

 

unprofitable or making performance more difficult.

(ii) Fires. Fires are considered to be *force majeure* events if, during the course of the event, a third party outside the obligor's control intervened.

(iii) Administrative acts or decisions of public authorities (factum principis). These include, for example, prohibitions, expropriations, rejection of authorizations or legislative changes that make a diligent obligor's performance of the contract impossible.

(iv) Third-party acts. These are cases in which acts of third parties are the cause of performance being deemed impossible and, as result, affected the party. The most typical example is theft, which will be considered *force majeure* upon the affected party demonstrating that it pursued all actions to avoid the event. Another common event is armed robbery. Strikes by workers (a Constitutional right), which are also analysed in this section, will be deemed *force majeure* when they are neither attributable to the employer nor foreseeable or avoidable. As such, general strikes or those affecting an entire sector of activity have been held to constitute *force majeure*.

(v) Overcoming the obligor's subsequent incapacity when the positive contractual obligations are personal and non-transferable (denominated intuitu personae obligations). These involve cases of death, permanent physical or mental incapacity and any other type of incapacity of the obligor not attributable to the same, that frustrates the obligor's personal performance.

## 12. What types of events have been dismissed by courts of your jurisdiction as not being *force majeure*?

The fundamentally case-based nature of the concept of *force majeure* under Spanish law is evident from the fact that many of the cases analysed above have not been considered as constituting *force majeure* as a result of a wide array of specific circumstances:

(i) Natural events or causes are not always unforeseeable or unavoidable for the obligor; many are in fact statistically measurable and therefore foreseeable, which will normally imply that the obligor cannot assert the unforeseeable nature of the event in continuing-performance contracts. Nor can bad weather be considered *force majeure* in specific geographical areas where the contract is to be performed if bad weather is common. *Force majeure* will also not be considered to exist if the obligor is a professional who is accustomed to working in adverse weather conditions.

(ii) Fires that start in the goods or facilities under the internal control of the defaulting party have not been considered to be *force majeure*.

(iii) Administrative acts and other decisions of public authorities that frustrate performance of the contract are not considered *force majeure* if the party claiming *force majeure* acts negligently or fails to avoid the effects of the event. This is the case, for example, of a obligor who requests an administrative authorization without fulfilling the requirements or who has not used all administrative and judicial channels to avoid the harmful effects of the act or resolution issued.

(iv) Failures by third parties that result in damage to a party are not always considered *force majeure* events. In the case of the theft of the object of the contract, the obligor must have taken all reasonable measures to avoid the consequences of the event in order to be entitled to invoke *force majeure* to be excused from the corresponding contractual obligations. On the other hand, it is highly common for the non-performing party to assert that it is not be liable for the acts of third parties under its internal control. In most situations, however, there is no evidence of force majeure. This is the case, for example, of acts committed by the obligor's auxiliaries, employees or persons in the obligor's custody, strikes by workers for reasons attributable to the obligor's company or the failure of the obligor's suppliers to comply with their obligations.

## 13. Have courts recognized the COVID-19 pandemic as *force majeure* in your jurisdiction?

In principle, the supervening nature of an unavoidable or unforeseeable event such as the current health crisis caused by COVID-19 does not excuse the parties from their corresponding contractual obligations. It is also necessary that compliance be impossible for the obligor, whether a physical or legal impossibility; objective; absolute; lasting; and not attributable to the debtor.

Specifically, with regard to payment obligations, it is considered that they cannot be covered by the impossibility framework linked to *force majeure* given that delivery of money is never impossible.

In fact, the impact of the health crisis on contracts is better suited to the application of the doctrine of *rebus sic stantibus*. This allows, in the case of long-term contracts or continuing performance contracts, the review of the contractual conditions when, due to extraordinary and radically unforeseeable circumstances (e.g. the health crisis) that were not taken into account

 

by the parties at the time of contracting, there is a disruption of the contract's balance resulting in hardship to a party. Only in cases in which modification of the conditions is impossible may the contract be terminated.

### 14. Would a governmental decision or announcement that an event is a *force majeure* influence courts of your jurisdiction (e.g. *force majeure* certificates provided by the Chinese Government to Chinese companies during the covid19 pandemic)?

Not necessarily. According to the concept of *force majeure* (fundamentally case-based) in the Spanish legal system, the same situation does not automatically constitute *force majeure* in all cases.

As such, a governmental decision may be considered a *force majeure* event in one context but not in another, depending on the specific circumstances of the case and, in particular, on how that event affects performance of the contract. The courts' analysis of the existence of the requirements for finding *force majeure* will be determinative, which may be influenced by statements by public authorities on the subject (recall the *factum principis*) but not necessarily conclusive for the assessment. Were it to be otherwise, judicial decisions would be subject to those of the executive branch, in contravention to the Constitutional principle of the separation of powers. This is ostensibly the reason why, in Spain, the public authorities have chosen to not expressly assert the existence of *force majeure* events when preparing specific measures to combat the harmful effects of the Covid-19 health crisis.

In conclusion, in light of the underlying principles of the Spanish legal system, it is unlikely that the Government would declare, through a rule of general application, the fulfilment of the necessary requirements to assess the existence of a *force majeure* event exempting a particular obligation from mandatory performance. Notwithstanding the above, as will addressed in our answer to question 27, the Government has approved an array of measures without expressly relying on the concept of *force majeure* to facilitate greater flexibility in connection with compliance of contractual obligations in the wake of the negative impact of the COVID-19 health crisis.

### 15. Does *force majeure* allow a party to suspend its obligations? If yes, for how long?

It must be assumed that the various effects that *force majeure* can have and their magnitude will depend on the specific circumstances of the case, i.e. the nature of the obligations undertaken, what is established in the contract, and the impact that *force majeure* has on the contract as well as on the fulfilment of the obligations. Moreover, these effects are not imperative; they will not apply if the parties have agreed —or a law has established— otherwise.

As a general rule, the obligor may be released from its obligations or entitled to suspend performance when *force majeure* makes it permanently or temporarily impossible to fulfil its obligations. Spanish case-law has established that the event must imply a physical, legal, objective and absolute impossibility not attributable to the obligor and that the impossibility cannot consist merely of an increase in the cost of the service. It is also necessary that the obligor exercised the utmost diligence in attempting to comply with the contractual obligations by all means available to the obligor, and that those means became unusable or ineffective.

In particular, the remedy of suspending performance will be allowed when the impossibility caused by *force majeure* is not permanent but merely temporary, the time for performance has not been agreed as essential in the contract and, in general, the person to whom the obligation is owed ("obligee") can be made whole by the late performance of the obligation. The suspension will remain in force for the duration of the impossibility of performance due to *force majeure*. When the impossibility ceases, non-performance is no longer justified and the obligor must make every effort to comply with its obligations.

In any case, as indicated, the effects of *force majeure* will depend on, among other variables, the nature of the contractual obligations. For example, in relation to an obligation to give an object, performance cannot become impossible when the object is generic. *Force majeure* is therefore not intended to have extinctive or suspensive effects in connection with monetary obligations. As for obligations that involve performing an action, performance is impossible in cases of the obligor's death, permanent physical or mental incapacity or any impediment of any nature not attributable to the obligor, in cases where the obligation is personal and performance by the contracting party is essential.

### 16. Does *force majeure* allow a party to totally or partially avoid liability for failure

 

### or delay in performing its obligations?

The general rule is that, when a *force majeure* event occurs, the obligor is excused from liability for damages caused due to the failure to perform the obligation or the delay in performance. Nor will the obligor be liable for any contractually agreed penalty or surcharges.

This rule, as previously indicated, is neither imperative nor absolute, but rather subsidiary to what is contractually agreed or established in any legal rule establishing otherwise.

As such, on the one hand, the parties, by virtue of the principle of freedom of contract, may include contractual terms to excuse or limit the obligor's exemption from liability in the event of non-performance resulting from *force majeure*. There are also situations set out in law in which the obligor is liable for damages caused as a result of a failure to perform an obligation even in cases of *force majeure*. These cases usually have in common situations in which that the obligor has placed itself in an unlawful position prior to the occurrence of the event making performance of the obligation impossible; it is precisely that unlawfulness that justifies the assumption of liability. These cases include, for instance, a possessor in bad faith who intentionally delays delivery of the object (art. 457 of the Spanish Civil Code); an obligor in a situation of default or who has committed to deliver the same thing to multiple persons (art. 1096.3 of the Spanish Civil Code); a person whose obligation to deliver a determined object was caused by a crime (art. 1185 of the Spanish Civil Code); a bailee who at the end of the stipulated period does not return the thing or who instead uses it for a purpose other than that agreed (art. 1744 of the Spanish Civil Code); and a person who accepts an undue payment in bad faith (art. 1896.2 of the Spanish Civil Code).

### 17. Does *force majeure* give a party the potential right to terminate the contract?

For contracts with reciprocal obligations, *force majeure* entitles the obligee to terminate the contract, provided that the breach is serious or material or when, not necessarily objectively serious or material, *force majeure* has been contractually agreed as a specific cause for termination. This remedy is asserted in cases in which the unexpected impossibility of performance caused by *force majeure* is final and irreparable and has, in any case, frustrated the contract's purpose and utility.

The principle of good faith requires that a obligee who has fulfilled its obligation, or is willing to fulfil its obligations, cannot be forced to remain bound to a contract indefinitely until the obligor's performance can be corroborated. Therefore, as a rule, and unless otherwise contractually agreed, the termination of the contract does not imply any liability for the obligor that may result from non-performance.

Where the contract is silent, it is advisable that the obligee who decides to terminate the contract justifies and proves that the obligor's non-performance actually frustrates the contractual purpose and that there are no other ways to "save" the contract from unviability, with the risk that, in a potential judicial dispute, the judge or court may consider that the right to termination was exercised abusively or contrary to the requirements of good faith.

### 18. On whom would the burden of proof lie when attempting to rely on *force majeure*?

The burden of proof lies within the party alleging *force majeure*. Article 1183 of the Spanish Civil Code states that "*whenever the object has been lost in the possession of the obligor, it will be presumed that the loss occurred through the obligor's fault and not through an act of God, unless there is proof to the contrary*". However, if the obligor was in default when the *force majeure* occurred, the *force majeure* will not discharge the obligor of its obligation.

### 19. What would a party seeking to rely on *force majeure* be required to show?

The party alleging *force majeure* must prove the existence of its requirements or assumptions. As a general rule, this includes the requirements and assumptions set out in law and, if the contract established any additional or special requirement, those established contractually.

It must be taken into consideration that the contract may establish an obligation to notify the counterparty within a certain period, in which case the party asserting *force majeure* must comply with that obligation. However, even if the parties have not established any provision on providing notice, it is always advisable to notify the counterparty of the occurrence of *force majeure*. Moreover, the principle of good faith, which governs all contractual relationships, requires that notification occur before the corresponding obligee reports a potential breach.

### 20. To what extent is a party required to

 

### mitigate its position/losses before seeking to rely on *force majeure*?

In the field of Spanish tort law, the duty to mitigate damages is formulated as a limit on the general rule of full compensation. The principle is based on case-law and establishes that the obligor or tortfeasor will not be liable for the damage that the obligee or the injured party could have avoided or mitigated by adopting measures that are reasonable or required by the principle of good faith governing all legal relationships.

To the extent that *force majeure* excuses performance and, thus, the obligation to indemnify damages linked to a potential breach, it is difficult to establish a relationship between the duty to mitigate the damage and the *force majeure* event.

### 21. Are there any applicable notice requirements which an affected party would be required to comply with before invoking *force majeure*?

Spanish law does not establish any notification obligation. Nevertheless, the party asserting *force majeure* must give notice, on the basis of the principle of good faith, and it is advisable that this be done before the counterparty gives notice of its non-performance.

It is precisely for this reason that, if the contract includes a *force majeure* clause, it is advisable to expressly require the party seeking exemption to comply with notification provisions.

### 22. What is the consequence of failing to comply with such notice requirements?

This could be interpreted as a failure to act in good faith. It seems reasonable to require the party seeking the recognition of *force majeure* with liberating effects to act in accordance with the rules of contractual good faith. Therefore, where possible, the *force majeure* situation must be notified as soon as possible.

Furthermore, in terms of civil liability, the principle of mitigation of damages applies. If it is proven in civil proceedings that the lack of notification caused greater damage to the creditor, *force majeure* may not have a liberating effect in connection with the corresponding damages.

### 23. What would be the impact of *force majeure* on any prepayments made under contractual arrangements?

According to article 1126 of the Civil Code, the advance payment is unrepeatable. An obligor who ignores the existence of the time limit can claim the fruits or interests of the object; however this does not preclude the payment's liberating effect.

This generally implies that *force majeure* consequences applicable after payment, whether or not made in advance, should have no effect. However, as addressed below, there exist some exceptions to this principle in connection with consumers and users.

### 24. What contractual remedies are available to affected parties, other than *force majeure*?

In the case of long-term contracts or contracts with deferred performance, when an extraordinary circumstance occurs that was not foreseen by the parties at the time of entering into the contract and that, without frustrating compliance, makes it extremely burdensome, the parties may resort to the doctrinal and case-law interpretation of the rebus sic stantibus doctrine. According to this doctrine, a contracting party may request contractual modification in order to re-establish the balance of the contract and, subsidiarily, when rebalancing is not possible, the contract's termination.

In the current health crisis, *rebus sic stantibus* has been applied to review the conditions of long-term contracts when the existence of its requirements has been proven. These conditions require a supervening and unforeseeable alteration of the circumstances, considered at the contracting time, that does not form part of the legal or contractual risks contractually undertaken by the affected party. Also, it must imply a disruption of the contract's balance that causes the contractual purpose to be unachievable.

### 25. What effect does *force majeure* have on consumer contracts? When can a producer or retailer effectively rely on this concept?

There are two specific provisions under Spanish law on consumers regulating the effects of *force majeure*:

(i) Article 75 of the GLPCU establishes that the impossibility of returning the goods that are the object of the contract by the consumer or user does not prevent

 

the consumer or user from exercising its right to terminate the contract. Only if the impossibility of returning the good is attributable to the consumer or user —and therefore falls outside the scope of *force majeure*—will the consumer or user be responsible for the market value or, where appropriate, the purchase price of the underlying good.

(ii) Article 160 of the GLPCU governs the early cancellation of a travel contract and establishes that, when there are unavoidable and extraordinary circumstances in the place of the destination or its immediate vicinity that may significantly affect the enjoyment of the package or the transport of passengers to the destination, the potential traveller has the right to terminate the contract without any penalty and will be entitled to a full refund of any payment made.

These two rules govern *force majeure* events as a cause for excusing performance by the consumer or user. The professional, in turn, is subject to the general provisions of private law, although the specific framework governing the field must also be taken into consideration, such as the nullity of the waiver of rights by the consumer or user or the specific regulation of unfair terms. It is precisely this regulation that could lead to the nullity of the contractual provision establishing the release from liability of the producer or seller in the event of *force majeure*, without establishing the same release for the consumer or user.

## 26. What type of insurance policy could cover *force majeure* events in your jurisdiction?

Under Spanish insurance law, as a general rule, claims based on *force majeure* are expressly excluded from coverage precisely due to the nature of *force majeure* as events that are either not foreseeable or avoidable by known measures.

Notwithstanding the above, coverage does exist for specific extraordinary risks; that coverage is provided by the Insurance Compensation Consortium, a public business entity under the authority of the Ministry of Economy. Coverage requires that specific insurance policies were previously taken out as well as the payment of the insurance premium, which includes a surcharge in favour of the Consortium. The areas included under the coverage for extraordinary risks are in: (i) insurance against damage: fires and natural disasters, land-based vehicles, railway vehicles, other damage to property, various pecuniary losses and combinations of the same; and (ii) insurance of persons, including both life and accident insurance.

The covered events are natural phenomena such as extraordinary floods, earthquakes, tidal waves, volcanic eruptions, atypical cyclonic storms and fallen iron and steel bodies and airplanes; damage caused violently as a consequence of terrorism, rebellion, sedition, mutiny and popular tumult; and those derived from events or actions of the security forces or organs in times of peace.

## 27. Are there any plans for reform in your jurisdiction, in terms of enacting new legislation or amending existing legislation (both for the short-term and long-term), to assist parties with *force majeure*, given the recent COVID-19 pandemic?

As indicated, the extraordinary nature of the COVID-19 health crisis and the specific measures taken to address the pandemic have justified, in specific situations, the fulfilment of the conditions or requirements that result in the existence of *force majeure*. In those situations, it is possible to justify the suspension of the obligor's obligations, or even the exemption from liability in the event of non-performance of its obligations, although always taking into account the specific circumstances of each case.

In particular, in recent months, a number of extraordinary regulations have been incorporated into our legal system that, while not easing the traditional requirements for assessing the existence of *force majeure*, are based on the exceptional nature of the current circumstances and consequently affect their assessment.

Apart from regional and local regulations enacted in direct response to the COVID-19 health crisis, the following legislative innovations at the national level are notable: (i) Royal Decree-Law 25/2020 of 3 July on urgent measures to support economic recovery and employment ("RDL 25/2020"); (ii) Royal Decree-Law 26/2020 of 7 July on economic recovery measures in face of the impact of COVID-19 in the fields of transport and housing ("RDL 26/2020"); (iii) Royal Decree-Law 35/2020 of 22 December on urgent measures to support the tourism and hotel industries and trade and in relation to tax matters ("RDL 35/2020"); and (iv) Royal Decree-Law 8/2021 of 4 May adopting urgent health, social and jurisdictional measures, to be applied after expiry of the state of alarm ("RDL 8/2021").

With respect to contracts, the primary underlying goal of the adoption of these legislative innovations was to adjust performance of contractual obligations assumed by the parties in order to support the recovery of the various affected business sectors in Spain. Despite the

 

existence of a wide array of provisions adopted in a large number of fields of activity under the COVID-19 situation, the following measures in specific sectors are noteworthy:

(i) Tourism. RDL 25/2020 establishes a moratorium on the payment of the principal of mortgage loans granted to finance properties used to operate businesses in the tourism sector and certain funding facilities to mitigate the financial difficulties caused by COVID-19 in this sector and stimulate business competition as well as sustain the jobs generated.

(ii) Road transport. RDL 26/2020 grants moratoriums on the payment of the principal of the contracts for loans and the leasing and renting of vehicles dedicated to public transport of passengers by bus and public transport of goods for which financial difficulties have arisen as a result of a substantial decrease in revenue or turnover. Likewise, it establishes an economic rebalancing of public-service-management contracts for regular passenger transport by road.

(iii) Real estate. For property intended for use other than as a residence, RDL 35/2020 establishes a 50% reduction in rent or a moratorium on rent payments for tenants who are self-employed or small and medium-sized enterprises whose activity has been suspended as a result of the state of alarm or whose turnover has been significantly reduced. RDL 8/2021 also extended the suspension of eviction proceedings of vulnerable households without a housing alternative and allowed the request of extraordinary extensions of the term of the lease of habitual residences (established in Royal Decree-Law 11/2020 of 31 March adopting urgent complementary measures in the social and economic sphere to deal with COVID-19).

The flurry of legislative activity over the last few months is far from over. This is evidenced by the multiple draft bills related to the effects of the COVID-19 health crisis currently pending in Parliament. The potential legislative measures focus on the following aspects:

(i) The extension of the term for requesting the extraordinary extension of the habitual residence of lease contracts and the extraordinary moratorium on rent payments for tenants specified in RDL 8/2021.

(ii) The extension of the effects of the moratoriums established in RDL 25/2020 in connection with mortgage debts on real estate used for hotel, tourism or travel-agency activities.

(iii) A positive proposal for the rebus sic stantibus doctrine has been put forward (i.e. a potential adjustment of the performance of contractual obligations if they would be excessively onerous as a result of the consequences of the COVID-19 health crisis). The objective is to facilitate the flexibility of the assessment of the requirements as well as encourage the parties to use negotiation mechanisms before initiating the corresponding legal proceedings.

## Contributors

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