

Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The Portuguese Juridical System Solution

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1. The Question

1. Under Portuguese Law, may a commercial tenant refuse payment of rent during the period business activity was suspended due to Covid-19 lockdown? Does the system allow a tenant to invoke impossibility to use the premises, during confinement periods, as an admissible ground to refuse performance of rental payment obligation?

2. The Solution under Specific Covid-19 Legal Regulation

2. A set of specific provisions was brought into force by Portuguese legislator to mild the economic effects of an emergency public health decision of confinement and suspension of business activities due to SARS-Cov-2 pandemic. The Portuguese legislator's approach was neither to envisage some solutions for contracts in general, nor entrust individual parties to the contracts with a duty to adjust contractual terms. Some specific exceptional and transitional solutions for some specific types of contracts and of a limited scope have been created. With respect to tenancy contracts two basic types of solutions were defined: suspension of eviction procedures and of contract termination by landlords, as one (Arts 7°, 10, and 8° of Law n° 1-A/19 March 2020¹); postponement of rent payment, as other (Law n° 4-C/2020, 6th April 2020).

3. The Law n° 4-C/2020, of 6 April 2020, allowed adjournment of rent payment, both to residential and to non-residential tenants, given some circumstances (see respectively, Arts 3° and 4° to residential tenants, and 7° and 8° to non-residential). Forced suspension of business activity held in rented premises, entitled the

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1 Later extended and clarified by Law n° 4-A/2020, of 6 Apr. 2020. Suspension of termination effects was subsequently extended to the 30 Jun. 2021 (by Law n° 58-A/2020 and again by Law n° 75-A/2020). Suspension of eviction procedures was also propagated several times (see e.g., Art. 3° of Law n° 13-B/2021 5 Apr. 2020) and until the end of Jun. 2021. Suspending evictions was not an automatic solution, it depended on the stated prerequisites - the tenant had to be put on a fragile situation due to the lack of premises to inhabit or for other ponderous social reasons - which needed to be proven by the tenant.

tenant to suspend payment of rent during the state of emergency period and for as long as the suspension of activity was imposed. Tenants were not dismissed from rent payment, but performance of this obligation was deferred. Portuguese legislative answer to a foreseeable liquidity deficit was therefore to preserve the contracts, temporarily transferring the burden of the tenant's business financial crisis to the landlord, but without exempting the tenant from the fulfilment of the obligation. Another possible decision of an equal division of costs between the two parties of the contract (or divided by three, being a third compensated by the state) has not been considered. The tenant bears the risk of the premises usability but can benefit from a moratorium, a deferral of rent payment obligation.

4. A non-residential tenant may benefit from the rent payment postponement legal solution when premises have been closed or business activity has been suspended by governmental decree or administrative authority decision. Maintaining an *on-line* activity or some *take away* provision of goods, provided coerced to «close doors», would not exclude the legal protective solution. A mere reduction of profit, or accrued treasury difficulties, even though created by the pandemic and the lockdown response, was not considered, when commercial tenant was exceptionally allowed to keep running the business (supermarkets, groceries, flowers shops and others).² Neither the specific circumstances of different business activities nor the diverse characteristics of the two parties to the contract (small/medium or big enterprise, individual or collective persons, etc.) were taken into account.³

5. The tenant is obliged to inform the landlord of intention to postpone payment.⁴ A debt settlement period of twenty-four months, starting on 1 January 2021 until 31 December 2022, was created. An instalment of not less than a twenty-fourth of the total amount in debt shall be paid together with the

2 Most of business activities that require contact with the public were suspended; yet some were allowed to continue providing their goods and services since these were considered to satisfy first or essential needs. See Arts 7°, 8° and 9° and Annexes I and II of Decree n° 2-A/2020, of 20 Mar. 2020, and Arts 9°, 10° and 11°, and Annexes I and II, of Decrees n° 2-B/2020, of 2 Apr. 2020, and n° 2-C/2020, of 17 Apr. 2020. State of emergency was declared for the first time on 18 Mar. 2020 (by Decree of the President of the Republic n° 14-A/2020) and then renewed for several more periods.

3 Deferment of rent payment has also been defined as a protective measure in Spain, but here the Law differentiates between two categories of landlords: the «pequeño tenedor» and the «gran tenedor», enterprise or public entity. When the landlord is included in the first category, adjournment of the rent is not imposed but the parties are obliged to renegotiate the contracts. Other than this, SME are conceded the legal benefit not only when their activities have been suspended but also when revenues have fallen behind 75%. See Arts 3-9 of *Real Decreto Ley* 11/2020, 31 Mar. 2020, and *Real Decreto Ley* 15/2020 of 21 Apr. 2020.

4 Article 8°-A of Law n° 45/2020, 20 Aug. 2020.

monthly corresponding rent.⁵ Alongside the moratorium solution, the Law states landlord is not entitled to demand any indemnification for damages deriving from late payment (20% of the due amount, according to Art. 1041° of the Portuguese Civil Code) or to activate other contractual penalties (liquidated damages clauses).⁶

6. Under the Portuguese Law, a commercial tenant is thus not entitled, neither to refuse payment of rent, nor to reduce its amount during lockdown periods. The only specific legal solution that interferes with tenancy contractual terms is the right to postpone payment of the rent without penalties, when the tenant was forced to suspend business activity held in the let premises.

3. Considering Other Civil Law Elements to Address the Question

7. As explained above, there is a specific legal solution within the set of Portuguese «Covid-19 law» to face the commercial tenant liquidity crisis when the business activity was suspended: tenant is allowed to postpone payment of rent. As wide, inadequate or insufficient as it may be, when the system provides a special legal solution, this is the first step to take to address the juridical issue. Nonetheless, we can analyse which other solutions would be available both to answer the question, in case there would not be a specific norm, in a virtual exercise, and in addition to the given specific provision, being aware that a just decision shall consider the entire system and not only an isolated norm. Therefore, we will subsequently investigate the tenancy contract law and to general civil law instruments on risk distribution between the parties to the contract.

3.1. Tenant Contract Law Special Regulation

8. The tenancy contract legal framework includes two provisions referring to consequences of the impossibility to use and profit from the rented premises. They both are contained in the Portuguese Civil Code: Article 1040°, admitting to a proportional reduction of rent when tenant is prevented from enjoying the premises; Article 1050°, recognizing the tenant's right to terminate the contract when there's an impediment to enjoy the immovable. May we thus conclude that contractual risk of an impediment to use the immovable is placed in the landlord's sphere? Only up to a certain point can we answer affirmatively to this question and that answer is of a very limited interest to address the liquidity deficit situation of

5 See Art. 8° of Law n° 4-C/2020, of 6 Apr. 2020, later modified by Law n° 45/2020, of the 20th Aug. Firstly, the Portuguese legislator created a twelve month period debt settlement starting one month after «state of emergency» had been revoked. Later, the debt settlement period was extended to twenty-four months, starting on 1 Jan. 2021 until 31 Dec. 2022.

6 See Arts 9° and 12° of Law n° 4-C/2020. Regarding application of this rule, consult Évora Court of Appeal decision of the 07 Apr. 2021, Process n° 1514/20.1T8TMR-B.E1, www.dgsi.pt.

the commercial tenant because of the Covid-19 lockdown. To start with, it is not undoubted that these norms are applicable when there's not a physical impossibility to use the premises, but some other kind of impediment as it is the case of a public authority decision of suspension of business activities. The tenant may enter and use the premises, there's no impediment or diminished possibility of this kind; what he is not allowed to do is opening the doors to the public. Nonetheless, the wording option of the legislator - «gozo» (enjoyment) instead of «uso» (use or utilization) - may sustain an interpretation that skirts the mere physical impossibility to access and use the premises. Accepting the applicability of the two mentioned norms, is not, however, of a practical, consistent, interest of the commercial tenant affected by lockdown. Article 1050° recognition of a right to terminate the contract may not be of a real interest to the tenant, facing a liquidity problem but not willing to be exempted from the contractual bond.⁷ As for Article 1040°, the possibility to reduce rent payment proportionally to the impediment to enjoy the premises has a limit: when the impossibility is not attributable neither to the landlord nor to a member of the family, reduction is only allowed from the moment when impossibility surmounts a sixth of the contract duration. Thus, up to a sixth of the contract duration, the risk of deprivation or decreasing of the premises usage falls on the tenant's sphere. Admitting that a commercial tenancy contract was agreed for six years, tenant would not be able to ask for a rent reduction if business activity was suspended for less than a year. For most of business activities lockdown decisions did not exceed a period of more than three or four months.⁸

3.2. General Civil Law Instruments: Adjustment of Contractual Terms Upon an Unexpected Change of Circumstances and the Duty to Renegotiate the Contract According to Good Faith Principle

9. Article 437° of the Portuguese Civil Code entitles the aggrieved party to terminate the contract or to obtain a modification of the contract's content

7 From our perspective, Art. 10° of Decree n° 2-A/2020, of 20 Mar. 2020 (later numbered Art. 8°-A and inserted in Law n° 14/2020, of 9 May 2020), that prohibits termination of the tenancy contract grounded on the suspension of activity, is no obstacle to the tenant's right as recognized in Art. 1050° of the Portuguese Civil Code, since we consider the exceptional Covid-19 rule is only applicable to the landlord. In other words, landlord is forbidden to terminate the contract, but the corresponding prohibition is not addressed to the tenant.

8 First lockdown lasted from 22 Mar. 2020 to progressively, 30 Apr. 2020, then from 18 May or 30 May 2020. Several business activities restrictions were again decided during the second half of 2020, and a new lockdown was determined from 15 Jan. 2021, by Decree n° 3-A/2021, of 14 Jan. 2021, until the end of Mar. 2021. Some restrictions remained until the mid-Apr. 2021 (Decree n° 6/2021, 3 Apr. 2021). An exception among the diverse business activities, were bars and discos, coerced to be closed for a very long period: public access restrictions lasted nineteen months, from 14 Mar. 2020 (Art. 12° of Law-Decree n° 10-A/2020, of 13 Mar. 2020) until Oct. 2021; restrictions were again defined during New Year's Eve festivities of 2021.

when, in face of an unexpected and fundamental change in circumstances, obligation to perform, as originally agreed, violates the good faith principle, and is not included in the contractual risks. The Portuguese Civil Code has thus a specific provision to adjust *pacta sunt servanda* to contractual justice demands disrupted by an exceptional supervening event.⁹

10. The governmental response to the Sars-Cov-2 public health emergency corresponds undoubtedly to a non-foreseeable fundamental change in circumstances that surmounts contractual risks. Although the situation was merely temporary, and may have not apported to an existential threat, a forced suspension of business activities, affecting the reasonably expected enterprise profit, compromises the basis of the contractual agreement. Performance of contractual obligations was not exactly rendered impossible (landlord can continue to let the premises, tenant is able to perform payment), yet a general lockdown is an event of such a nature and dimension that unbalances the grounds on which contractual will was built upon, possibly rendering an obligation to perform as initially agreed so burdensome as to violate the good faith commands.

11. The existence of a «Covid-19» set of legislative measures is not an impediment to the application of the solution enshrined in Article 437° of the Portuguese Civil Code or others that may be applicable. The legislator effort to restore the contractual equilibrium distorted by a general lockdown is of a limited range, since it comprises only some specific solutions and for some specific types of contracts. With respect to tenancy contract, one that has been considered by the legislator, many situations were still left out of the legislative umbrella. For example, regarding businesses whose activities have not been suspended, such as a hotel, or a flower shop,¹⁰ no specific measure has been provided in the packet, allowing tenants to defer payment of rent accordingly to the decreased profit. Granting

9 The supervening change in circumstances must be anomalous or exceptional (though not necessarily unforeseeable, as is being stated by a relevant part of the Portuguese legal literature and is also our understanding), must not be included in the contractual risks and shall damage the aggrieved party at a level that asking for performance as initially agreed upon would be a violation of good faith. For further and more profound considerations on the legal requirements of Art. 437°, see within Portuguese literature on the theme, Menezes CORDEIRO, *Da boa fé no Direito Civil*, vol. II (Coimbra, Almedina 1984), p 903 ff, specially 1106 ff, «A crise e a alteração das circunstâncias», *RDC*, I (2016), p 1, pp 7-63; Luís Carvalho FERNANDES, *A teoria da imprevisão no Direito Civil português* (Lisboa, Quid Iuris 2001), pp 281-294; PEDRO PAIS DE VASCONCELOS, *Teoria Geral do Direito Civil* (Coimbra, Almedina 2005), pp 744-753; Almeida COSTA, *Direito das Obrigações* (Coimbra, Almedina 2006), pp 330-348; Mariana Fontes COSTA, *Da alteração superveniente das circunstâncias - em especial à luz dos contratos bilateralmente comerciais* (Coimbra, Almedina 2017), pp 329-470; Henrique Sousa ANTUNES, «Anotação ao Art. 437°», in AAVV. *Comentário ao Código Civil - Direito das Obrigações - Das Obrigações em geral* (Universidade Católica Editora, Lisboa 2018), pp 154-159.

10 See Annex II of Decree n° 2-A/2020, 20 Mar. 2020.

nonetheless the landlord's right to full payment of rent in the due time does not appear to be a fair solution according to Civil Law system principles. Where a specific «Covid-19» provision has not reached, or has not sufficiently reached, a general instrument to restore contractual justice such as the one enshrined in Article 437° is applicable.¹¹

12. However, before turning to a unilateral decision of termination or modification of the contract, we consider parties are bound to cooperate to ascertain a fair solution in face of the hardship situation. Uncertain or inefficient as it may be, we find the most adequate solution to approach this kind of situations - left out the specific provision of the Covid-19 legal regulation - is, indeed, to consider the parties bound to renegotiate the contractual terms, adjusting them to the contract crisis.¹² The duty to renegotiate the contract is founded on the good faith principle, as enshrined on Article 762°, n° 2, of the Portuguese Civil Code.¹³ If the parties fail to reach an agreement, intervention of the Court may be demanded to adjust equitably the contract terms, but prioritizing renegotiation of the contract to a judge intervention upon Article 437°, and asserting it as an obligation instead of just a possibility, appears to be more adequate and flexible - better than anyone else, the parties

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- 11 Regarding a hotel, consult the decision of the Guimarães Court of Appeal, on the 07 Dec. 2021, Process n. 46168/20.0YIPRT.G1. Art. 437° was the legal basis to a contractual adjustment.
 - 12 See also ours «The juridical impact of Covid-19 in Portuguese Tenancy contract Law», in AAVV, HONDIUS, SANTOS SILVA, NICOLUSSI, CODERCH, WENDEHORST & ZOLL (eds), *Coronavirus and the Law in Europe* (Intersentia, Cambridge 2021), p 933 ff.
 - 13 Recognizing this possibility in Portuguese legal literature, A. Pinto MONTEIRO & Júlio GOMES, «A «hardship clause» e o problema da alteração das circunstâncias (breve apontamento)», in AAVV. *Juris et de Iure - nos vinte anos da Faculdade de Direito da Universidade Católica Portuguesa - Porto* (1998), p 39. Considering that a fundamental change in contractual circumstances entitles the aggrieved party to require the other one to cooperate in a modification of the contract, see N. Pinto DE OLIVEIRA, «Em tema de alteração das circunstâncias: A prioridade da adaptação/modificação sobre a resolução do contrato», in AAVV. Edição comemorativa do cinquentenário do Código Civil (coord. E. SEQUEIRA & F. SÁ) (Universidade Católica Editora Lisboa 2017), p 265. Refusing a general recognition of a legal duty to renegotiate the contract, exceptionally admitting to it as a concrete densification of the duty to perform under good faith, cf. Mariana Fontes COSTA, *Da alteração superveniente das circunstâncias*, pp 473-486. H. SOUSA ANTUNES, *Comentário ao Código Civil*, p 159, sustains that Art. 762°, n° 2, gives (only) rise to an encumbrance to renegotiate. Catarina Monteiro PIRES, «Efeitos da alteração das circunstâncias», *O Direito*, 145 (2013), p 204, upholds the duty to negotiate under good faith, sustained in Art. 762°, n° 2. On the same path, see also DIOGO COSTA GONÇALVES, «Anotação ao Art. 762° of the Portuguese Civil Code», in Catarina Monteiro PIRES (coord.), *Novo coronavírus e crise contratual - Anotação ao Código Civil* (Lisboa, AAFDL 2020), p (74) at 78. Consult further MENEZES CORDEIRO, «O princípio da boa fé e o dever de renegociação em situação económica difícil», *RDS V* (2013), p (3), at 487-535.

know where their interests lie; imposing them a duty to cooperate more efficiently leads them to actively arrange necessary adjustments.¹⁴

13. Termination or modification of the contract, because of an unexpected change of circumstances, alongside a duty to renegotiate the contract, are therefore general instruments of the Portuguese Civil Law eligible to restore contractual equilibrium unfairly distorted by the Covid-19 pandemic. However, for the situations envisaged by the legislator for which a specific solution has been created, directly aimed at facing the need to restore the lost balance, we find it very difficult that a judge will derive from the certainty of the legal solution in search of a more equitable solution.¹⁵ Other than this, we think the specific legislative measure prevails over the consideration of a general range equitable solution. Up to a certain point, Article 437° has the nature of a subsidiary solution¹⁶: when both contractual and legal regulation fail, a just solution still must be found, accordingly to the prerequisites of the norm. The «*rebus sic stantibus*» norm is an expression of a principle of Justice that goes beyond a contractual or even a legal solution.

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- 14 We do not consider that renegotiation of the contract is a prerequisite for a judicial remedy under Art. 437°. Normally, the aggrieved party will turn to the contractual partner to solve matters before deciding to take it to court or will have a grounded, legitimate, reason for not doing it and going directly to Court. In case this constitutes an illegitimate, opportunistic, behaviour of the demandant, it should be sanctioned for that and that only. Accordingly, Mariana Fontes COSTA, *Da alteração superveniente*, p 484. Stating that the before asking for adjustment or termination, renegotiation of the contract must be complied with, see Horst EIDENMÜLLER, «Neuverhandlungspflichten bei Wegfall der Geschäftsgrundlage», *ZIP (Zeitschrift für Wirtschaftsrecht)*, 13, 1995, p 1071. We are certainly aware of all the difficulties imposing a duty to renegotiate a contract may bring along (such as namely stressed by Ewoud HONDIUS & Hans Christoph GRIGOLEIT, *Unexpected circumstances in European Contract Law* (Cambridge University Press 2011), pp 9-10) and have no intention of embarking on a «Neuverhandlungseuphorie» as referred by Horst EIDENMÜLLER, *ibid*. Nonetheless, we are prone to consider the PECL solution (Art. 6:111 (2)) was, on this matter, better than the one contained in DCFR (Book III, Art. 1:110 (3) (d)), since the latter converts renegotiation in a requirement for a remedy.
- 15 Consult, e.g., the decision of the Lisbon Court of Appeal, of the 18 Nov. 2021 (Process n. 14917/21.5T8LSB.L1-8), *www.dgsi.pt*, where decision of rent payment deferment has been sustained, though the commercial tenant refused to pay any rent for the period of time business activity had been suspended, based on the unexpected change of circumstances. However, this was not the main legal issue, being thus the court decision of a very limited relevance to the question exposed. Strictly applying rent moratorium rule, see Évora Court of Appeal decision of the 10 Feb. 2022, Process n. 464/21.9T8FAR.E1, *www.dgsi.pt*.
- 16 See in Portuguese legal literature, Mariana Fontes COSTA, *Da alteração superveniente*, pp 386-387. Subsidiarity does not mean *rebus sic stantibus* institute is only applicable when there's an omission, a contractual or a legal provision gap. Art. 437° is not meant to be an instrument to fulfil a lacuna, but more precisely a mechanism to correct an allocation of risks that reveals itself to be inadequate because of the unexpected change in circumstances. This means that Art. 437° may still be applicable to correct an existing solution. However, it is no longer applicable when there is a specific provision weighing potential damages, meanwhile occurred.

Nonetheless, when a specific legal provision has been set to assert, uniformly and equally, a general solution to a generic problem it must be obeyed by the judge, for it corresponds to the legislator political option. Unless justice is significantly compromised in a concrete decision, the judge shall refrain from creating an ad hoc divergent solution.¹⁷ With respect to tenants whose business activities were closed to the public, not only did the legislator stated that obligation to pay rent was suspended and could not lead to contract termination by the landlord, but also, in a quite detailed manner, defined when and how rent payment had to be subsequently completed. Later, this solution was confirmed and adjusted to further business activities restrictions. Additionally, a state aid was created to support business activities: above a certain percentage of revenues decrease, tenant could receive from the state an amount of the rent due.¹⁸ This was, thus, the Portuguese legislator option: liquidity deficit is temporarily transferred to the landlord, but the risk of payment remains on the tenant's sphere. Diverse prior or ulterior agreements between landlord and tenant will not be held admissible to the detriment of the tenant. Diverse agreements more favourable to the tenant rely on the landlord's good will.

14. In sum, it appears to us that modification or adaptation of the contract consistent in a rent reduction will not be held admissible by Portuguese Courts to restore lost balance for commercial tenants whose business activities have been suspended and for that period. A further question needs, however, to be asked. Alongside modification of the contractual terms, Article 437° of the Portuguese Civil Code also recognizes the aggrieved party the right to terminate the contract when the corresponding prerequisites are fulfilled. May the commercial tenant terminate the lease contract upon claiming an unbearable difficulty to pay rents on a nearby future due to the decreased profit created by the pandemic? Lisbon Court of Appeal has already answered affirmatively to this question, on the 08 Apr. 2021, considering it is unreasonable to demand the maintenance of a contractual bond when performance means the financial ruin of one party.¹⁹ Admitting to a contract termination was in the case the most balanced solution since the tenant could put an end to an unbearable debt accumulation and the landlord would

17 On this problem, read Manuel Carneiro DA FRADA considerations, «A alteração das circunstâncias à luz do Covid-19 - Teses e reflexões para um diálogo, I/II. *Revista da Ordem dos Advogados* 2020, pp 159-160. For Mariana Fontes COSTA, «Covid-19 e alteração superveniente de circunstâncias», I/II. *Revista da Ordem dos Advogados* 2021, p 366, the rent moratorium was just an immediate relieve response to the tenant's difficulties but not an effective distribution of performance risk; therefore, the aggrieved tenant may invoke the unexpected change of circumstances legal provision as a subsidiary and complementary measure to restore contractual equilibrium. However, the author suggests, p 371, as a general criterion, the judge shall prioritize moratoria of contractual performances over an interference on the contractual content.

18 Consult Art. 8°-C of Law n° 75-A/2020, 30th Dec. and Decree 15-B/2021, 15th Jan.

19 Process n° 19222/20.1T8LSB.L1-6, *www.dgsi.pt*.

regain its real estate asset and could lease it again to some other partner. The existence of Covid-19 specific legislation was not considered an impediment to recognize termination of contract under Article 437°. The support created by the exceptional legislative measures, and mainly the moratoriums, is an option that enterprises may or not choose to take, they are not forced to follow that path up to a financial ruin level. We subscribe to this understanding: tenant should not be forced to keep performing for the entire contractual agreed duration when it becomes excessively burdensome, eventually, risking insolvency. We consider, nonetheless, that a legal basis for contract termination can be set upon Article 1050° of the Portuguese Civil Code, since tenant was deprived from premises enjoyment due to a *«factum principis»*.

