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An overview of the colombian contract law, in times
of the Covid-19 pandemic

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ABSTRACT

This paper notes the potential contract law rules applicable in the Colombian legal system to contracts affected by the economic crisis caused by the Covid-19 pandemic. Also, it points out the different temporary Decrees enacted by the Colombian government to mitigate the effects of the pandemic in Contract Law.

KEYWORDS

Covid-19 – contracts – nonperformance – Impossibility – Imprevisión – Hardship – Force majeure – Unforeseeable circumstances – Frustration – Breach of contract – Lease contracts – Home loans – Tourist contracts

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I. Introduction

The governmental measures on social distancing and the cessation or limitation of economic activities to avoid the spread of covid-19 have led to a deep economic crisis where a lot of questions around compliance with contracts are raised. The problem of legal uncertainty is significant in such an unprecedented situation that has affected all types of contracts (including, B2B and B2C contracts).

Because of this situation, there is a need to analyze the different legal rules applicable under the general Colombian contract law to address the breach of contracts due to the covid-19 pandemic. Nevertheless, because of this great crisis the Colombian government has taken exceptional, urgent, general and temporary measures to mitigate the consequences of the Covid-19 pandemic (an exceptional contract law).

In this paper, I will refer *first*, to the general Colombian contract law rules, that can be applicable in times of a pandemic. *Secondly*, I will address the exceptional and temporary measures in the field of civil law that the Colombian government has taken to mitigate the impact of the Covid-19.

II. General contract law rules applicable in times of pandemic

General Colombian contract law rules that would be applicable in case of a nonperformance of a contract due to the pandemic are related to the concepts of *force majeure* and unforeseeable circumstances (articles 64 and 1504 of the Colombian Civil Code), the imprevisión theory (supervening event) (traditionally known as the *rebus sic stantibus*), the frustration doctrine and the subjective causa (well expressed by the Latin term *causa obligationis*). I will refer briefly to each of these rules and theories.

2.1. Force majeure and fortuitous events (unforeseeable circumstances)

These legal concepts are defined and regulated under articles 63 and 1604 of the Colombian Civil Code. The Colombian author, Jorge Oviedo Albán, notes that the current situation caused by the Covid-19 would be considered as a fortuitous event (*unforeseeable circumstances*). According to the Civil Code and decisions of the Colombian Supreme Court, in order to establish fortuitous events, it must be established that: 1) The circumstance is not attributable to the debtor; 2) the situation is irresistible; and 3) the situation is unpredictable.¹

Under the concept of *fortuitous events* the debtor must be in a situation of absolute impossibility of performance. First, the consequences of the application of this concept are a contractual liability release, in other words, the party in breach shall not be accountable for any damages and losses. Second, under this concept the enforceability of performance in case of non-generic (specific) goods or services, could be affected as well.²

2.2. Imprevisión, hardship or *rebus sic stantibus*

The Colombian Commercial Code enacted in 1971 included article 868 which provided for the judicial modification of contractual terms because of *unpredictable* change in the economic circumstances of the contract, after the parties entered into the contract (*impresión, hardship or rebus sic stantibus*) (despite the principle that contracts are binding enshrined in art. 1602 of the Civil Code).

In part, the doctrine in Colombia supports this interpretation of a change in the economic basis of the contract where contracts have been affected by the pandemic.³ Nevertheless, this option does not seem to be a solution for the generalized and systemic problem caused by the pandemic, because, although it is established in the Colombian legal system, Colombian judges have been reticent to apply it.⁴ In addition, this approach is not ef-

¹ Jorge Oviedo Albán, 'El caso fortuito y el incumplimiento de los contratos. A propósito del Covid - 19', (2020) (4) Boletín Estudios de Derecho Comparado, VLEX, 2.

² *Ibid.*, 3-4.

Also, See Maximiliano Aramburo Calle, 'Pandemia y fuerza mayor' (Ámbito jurídico, 27 Mar 2020) <<https://www.ambitojuridico.com/noticias/columnista-impreso/administrativo-y-contratacion/pandemia-y-fuerza-mayor> > accessed 2 June 2020.

³ Maximiliano Aramburo Calle, 'Pandemia y fuerza mayor', cit. Daniel Vázquez Vega, 'Oportunidad de oro para reconsiderar la teoría de la imprevisión' (Ámbito Jurídico, 8 Apr. 2020) <https://www.ambitojuridico.com/noticias/ambito-del-lector/civil-y-familia/oportunidad-de-oro-para-reconsiderar-la-teoria-de-la> accessed 2 June 2020.

⁴ So far, there are not Colombian Supreme Court decisions in which it would have readjusted the contract based on this rule. Though, for example, there is an excellent decision which, in its *obiter dictum*, extensively explains and analyzes, with comparative law references, the imprevisión theory established in article 868 of the commercial code, because the plaintiff asks the Court to readjust the contract loan agreement, due to the financial crisis of 1998 in Colombia. Nevertheless, the plaintiff doesn't succeed with its claim because she had already complied with its obligation. So, this discarded the application of the imprevisión theory, which requires the mandatory impossibility to comply because the

fective in times of crisis because of delays in civil proceedings, and the additional burden that applications for judicial modification of contracts would impose on judges.⁵ Indeed, in Germany, where there are significant decisions about the *Rebus*, there is a lack of trust in the application of this concept to deal with the current situation.⁶

2.3. Frustration of purpose and the subjective causa

The Colombian author, Felisa Baena Aramburo, has analyzed the application of the frustration doctrine, inspired by English and U.S Contractual Law by examining the coronation English cases.⁷ Under the frustration doctrine the contractual purpose is frustrated due to unpredictable circumstances that go beyond the scope of control of the parties. This doctrine is not about circumstances that make it an impossibility for parties to comply such as the unforeseeable circumstances concept. But rather, even though it is still possible to comply and even if it is not more onerous (like under the *rebus sic stantibus* term), the purpose of the contract that the parties intended disappears or loses its meaning. As a consequence, there would not be a breach of contract, but rather, the reciprocal obligations are discharged.⁸

Felisa Baena states that the frustration doctrine would be applicable to some contracts affected by the pandemic. However, due to the fact that in Colombia, as in the other civil law countries in general, there is no rule that establishes this doctrine or case law that adopts it, the author tries to support its application under the nullity of the contract for lack of “*causa*”. In civil law systems, “the function of *causa* is now mostly taken over the requirement of the intention to be legally bound”; that usually can be defined as the goal that parties pursue with the contract⁹. For instance, Felisa Baena points out that the lack of *causa* can occur in commercial lease contracts.¹⁰

excessive cost of a party's performance. Supreme Court of Justice (Civil Chamber), February 21, 2012, Opinion of the Court delivered by: William Namén Vargas; ref. 0537.

⁵ Francisco Ternera; Fabricio Mantilla, ‘La crisis y la teoría de la imprevisión’ in *FINANCIACIÓN DE VIVIENDA: perspectiva 20 años después de la crisis hipotecaria* (Universidad del Rosario 2020) 20-27.

⁶ Bruno Rodríguez Rosado; Antonio Ruiz Arranz, ‘Consecuencias de la epidemia: reequilibrio contractual y Covid-19’ (*Almacén de Derecho* Blog, 16 Apr. 2020) <<https://almacendederecho.org/consecuencias-de-la-epidemia-reequilibrio-contractual-y-covid-19/>> accessed 2 June 2020. Juan José Ganuza; Fernando Gómez Pomar, ‘Los instrumentos para intervenir en los contratos en tiempos de COVID-19: guía de uso’, (2020) 2 *InDret*, 561.

⁷ See McKendrick, *Contract Law* (9th edn, Palgrave 2011) 255. Jan Smits, *Contract Law. A Comparative Introduction* (Edward Elgar 2014) 203.

⁸ Felisa Baena Aramburo, ‘Coronavirus y los Coronation Cases: cuando el contrato pierde su razón de ser’ (*IARCE Blog*, 22 Apr. 2020) <<https://www.iarce.com/coronavirus-y-los-coronation-cases-cuando-el-contrato-pierde-su-razon-de-ser/>> accessed 2 June 2020.

⁹ Jan Smits, *Contract Law. A Comparative Introduction* (Edward Elgar 2014) 87.

¹⁰ Felisa Baena Aramburo, ‘Coronavirus y los Coronation Cases: cuando el contrato pierde su razón de ser’ (*IARCE Blog*, 22 Apr. 2020) <<https://www.iarce.com/coronavirus-y-los-coronation-cases-cuando-el-contrato-pierde-su-razon-de-ser/>> accessed 2 June 2020.

Also, based in the lack (or the termination) of the *causa* (according to the art. 1524 of the Civil Code), professor Arturo Solarte also finds a solution to the cases where, due to the pandemic, an impossibility to comply with the obligation to do something and with the obligation to abstain from doing something, have arisen.¹¹

III. The exceptional colombian measures to mitigate the effects of Covid-19, in contract law

Having declared the State of emergency in March 17 (Decree no. 417), the Colombian government enacted several decrees ordering temporary and urgent measures to mitigate the potential effects of the pandemic on issues related to contract law. However, these measures are not sufficient and only address civil and commercial lease contracts, home loan contracts, tourist contracts and contracts related to the provision of essential services (telecommunication services).

3.1. Housing and commercial leases contracts

With regard to lease contracts, the Colombian government has enacted two Decrees. The first is the *Decree 579 of April 15, 2020*¹², about Housing and commercial leases contracts. Regrettably, this decree regulates both kinds of contracts equally. Also, the government enacted the *Decree 797 of June 4, 2020*¹³, about the temporary and exceptional regulation of the termination of lease contracts of commercial property.

Concerning the Decree 579, the measures are neutral and protect both parties to the contract because their purpose is to facilitate the parties reaching an agreement. The measures protect the tenants, as well as the lessors. It is important to note that rent is the main income of a significant part of our population. The elderly are overrepresented in this group and receiverent as an alternative for the retirement pension.

The decree is applicable to tenants who are individuals or companies that fall within the categories of micro-, small or medium-size enterprises (Decree 579 of 2020 art. 6). On the other hand, it doesn't say which lessors are covered by the measure, so it is applied to all. The main measures taken by the government under this decree are:

¹¹ See Arturo Solarte Rodríguez, 'Imposibilidad sobrevenida de cumplimiento y asignación del riesgo en los contratos bilaterales. El caso de las obligaciones diferentes a las de dar cosas de cuerpo cierto. Apuntes para un debate' (IARCE Blog, 6 May. 2020) <https://www.iarce.com/imposibilidad-sobrevenida-de-cumplimiento-y-asignacion-del-riesgo-en-los-contratos-bilaterales-el-caso-de-las-obligaciones-diferentes-a-las-de-dar-cosas-de-cuerpo-cierto-apuntes-para-un-debate/#_edn3> accessed 2 June 2020.

¹² Legislative Decree 579 (2020) <<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20579%20DEL%2015%20DE%20ABRIL%20DE%202020.pdf>> accessed 2 June 2020.

¹³ Legislative Decree 797 (2020) <<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20797%20DEL%204%20DE%20JUNIO%20DE%202020.pdf>>.

a) The suspension of eviction procedures for restitution of the property during the period between the date of entry into force of the Decree (April 15, 2020) and June 30, 2020. On the other hand, the decree doesn't establish the suspension of the termination of the contract (article 22 of the 820 act of 2003 and article 1546 of the Civil Code). This issue raises a lot of questions: Could the contract be terminated and hence, would the eviction be suspended? Could the securities given to lessors, such as guarantees be enforced? Would it be possible to file a case against the co-debtor?

b) On the payment of the rent, *article three* of the decree 579 establishes that the parties shall reach an agreement on the *specials conditions for payment* between April 15 and June 30 of 2020. Neither legal sanctions, nor default interest provisions, penalty clauses, compensation provisions and contractual sanctions agreed between the parties in those special agreements, will have an effect. In case the parties don't reach an agreement, the tenant will have to continue paying the rent. However, in case he/she fails to fulfill his/her obligations the tenant will not have to pay default interests, penalties, compensations, legal or contractual sanctions, during the period between April 15 and June 30 of 2020. Nonetheless, interest shall be paid at the current rate, reduced by 50%.

c) Article 2 of the Decree 579 extends the adjustment on the rent that would be effective between April 15 and June 30 of 2020. In order to do that, the Decree establishes a temporary suspension on the payment of those amounts. The tenant shall pay the difference between the current value of the rent and the adjustment in the months following the grace period given by the government.

d) The Decree establishes that the termination or commencement date of lease contracts, as well as the restitution or delivery of the property, *is extended to June 30 of 2020* (articles 4 and 5 of Decree 579 of 2020).

In my opinion, these measures are not sufficient in cases where it is impossible to pay the rent and the parties don't reach an agreement. For example, this situation may arise in the context of leases for commercial properties where the tenant is not allowed to work because of the State of emergency. It is possible that such circumstances would have resulted in the termination of a lot of contracts because of the effect of Covid-19 on the economy as a result of the measures implemented by the government in response to Covid-19.¹⁴ Therefore, I think the Colombian government should enact more measures that allocates the risks among the parties in times of crisis. For instance, government could introduce measures to suspend the termination of contracts, with an exception in favor of

¹⁴ See Juan José Ganuza; Fernando Gómez Pomar, 'Los instrumentos para intervenir en los contratos en tiempos de COVID-19: guía de uso', (2020) 2 InDret, 576-579.

the lessor when their economic stability lies on this income. This is the approach taken in the German Decree¹⁵.

In relation to the second Decree, number 797, the Government has introduced specific regulation to address the termination of certain lease contracts of commercial properties (bars, nightclubs, cinemas, restaurants, massive events and accommodation properties), in cases where the parties don't reach an agreement. The Decree establishes that the tenants are allowed to terminate the contract until August 31 of 2020. In this case, the lessor has the right only to a third of the amount provided for in the penalty clause. If there is no penalty clause in the contract, the lessor has the right to a sum equivalent to the rent of one month as compensation (article 3 of the Decree 797).

3.2. Home loans

In order to mitigate the economic effects of Covid-19, article 1 of the *Decree 493 of March 29 of 2020*¹⁶, gave grace periods for the payment of *capital and interests* in home loans. The Decree suspends the application of the anticipated termination of the loan.

3.3. Tourist contracts

To mitigate the great impact on travel agencies, article 4 of the *Decree 557 of April 15 of 2020*¹⁷ introduced temporary regulation of the right of withdrawal and other measures related to the reimbursement of money. The decree allows that during the emergency declared by the government, the companies that provide tourist services can reimburse to the clients *services they provide themselves*, instead of money.

3.4. Contracts on telecommunication services

To guarantee the provision of minimum essential services such as telecommunication services, the Colombian government enacted the Decree 555 of April 15 of 2020¹⁸. In its article 2, the Decree suspends the right of service providers to terminate contracts and to interrupt the service, based on the non-payment of the consumer during the emergency.

¹⁵ Article 240 *Einführungsgesetz zum Bürgerliches Gesetzbuch*.

In Australia, the Prime Minister wanted the parties to agree to the terms of the leases so that the lease could continue and for the banks to support the agreements. They said it would be of greater benefit to the economy if both businesses of the tenant and the lessor did not go bankrupt. <<https://www.pm.gov.au/media/update-coronavirus-measures-070420>> accessed 8 June.

¹⁶ Legislative Decree 493 (2020) <<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20493%20DEL%2029%20DE%20MARZO%20DE%202020.pdf>> accessed 2 June 2020.

¹⁷ Legislative Decree 557 (2020) <<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20557%20DEL%2015%20DE%20ABRIL%20DE%202020.pdf>>

¹⁸ Legislative Decree 555 (2020) <<https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20555%20DEL%2015%20DE%20ABRIL%20DE%202020.pdf>>

IV. Concluding remarks

The application of established Contract Law concepts, such as *force majeure*, *imprevisión* and *frustration* are useful for contracts affected by the covid-19 pandemic. Nonetheless, as explained above, these principles would not be applicable in most cases. Additionally, in some cases, legal proceedings must be initiated to enliven the application and interpretation of these concepts. This is not practical or efficient in a crisis, such as the one we are facing right now, where due to the pandemic, there have been breaches of countless contracts. This is the reason why, as noted by professor Morales Moreno, it is necessary to think on “Exceptional Contract Law”, on the basis of distributive justice, not on commutative justice, which underlies the “ordinary” Contract Law.¹⁹

Consequently, the measures established by the Colombian government are not sufficient to address breaches of even the contracts specifically identified in the regulation. There is a need for more specific regulation that allocates ex-ante the risks of massive and systematic breach of contracts. These regulations must take into account the situation and vulnerability of the parties, their main interests and the different types of contracts.

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¹⁹ ‘La Real Academia de Jurisprudencia y Legislación de España analiza el efecto del coronavirus en el Derechos’ (La Razón, 20 May. 2020) <<https://www.larazon.es/espana/20200520/3amuejhr7nc45evpqvx7p2njwu.html>> accessed 2 June 2020.

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