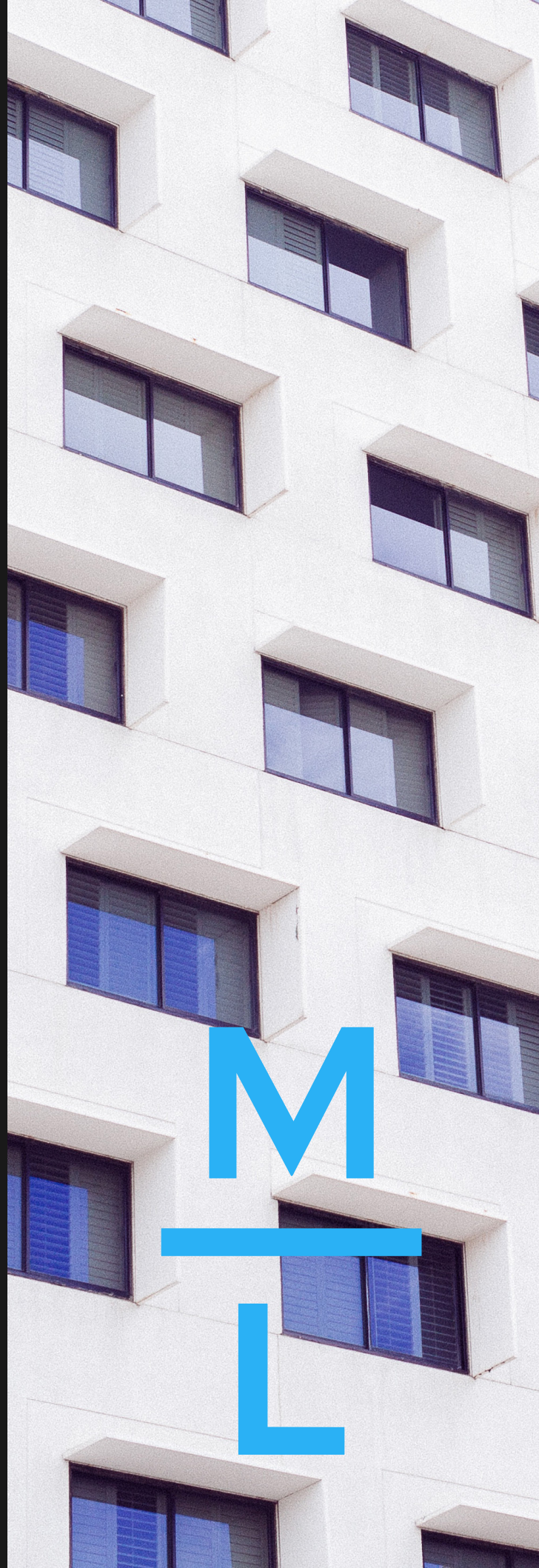


# V. Real Estate

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## Glossary

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### Council of Ministers Resolution 33-A/2020

Council of Ministers Resolution 33-A/2020, of 30 April, which implemented the status of disaster until 17 May 2020

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### Decree no. 2-A/2020

Decree no. 2-A/2020, of 20 March, which implemented the state of emergency declared by Presidential Decree no. 14-A/2020, of 18 March (revoked)

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### Decree no. 2-B/2020

Decree no. 2-B/2020, of 2 April, which regulated the extension of the state of emergency decreed by the President of the Republic (revoked)

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### Decree no. 2-C/2020

Decree no. 2-C/2020, of 17 April, which regulated the second extension of the state of emergency decreed by the President of the Republic (revoked)

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### Decree-Law no. 10-A/2020

Decree-Law no. 10-A/2020, of 13 March, which establishes exceptional and temporary measures regarding the new Coronavirus - COVID-19 situation

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### DCS

Directorate-General for Health

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### IHRU

Institute of Housing and Urban Renovation

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### Law no. 1-A/2020

Law no. 1-A/2020, of 19 March, which approves exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19, as amended by Law no. 14/2020, of 9 May

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### Law no. 4-A/2020

Law no. 4-A/2020, of 6 April, which approves the first amendment to Law 1-A/2020

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### Law no. 4-C/2020

Law no. 4-C/2020, of 6 April, which approves an exceptional regime for rental payments in arrears under the terms of urban residential and non-residential leases in the context of the COVID-19 pandemic

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### Ordinance no. 91/2020

Ordinance no. 91/2020, of 14 April, which establishes the terms for evidencing the loss of income for the purposes of the application of the exceptional regime for rental payments in arrears under the terms of urban residential leases

## V. REAL ESTATE

### V.A. Background

Regarding the real estate sector, the main exceptional and transitory changes that result from [Law no. 1-A/2020, as amended](#), from Council of Ministers Resolution no. 33-A/2020, from [Law no. 4-C/2020](#) and from [Ordinance no. 91/2020](#) directly refer to lease agreements and indirectly to contracts for the use of stores and to other atypical service provision agreements that include, in their object, the obligation for one of the parties to provide the use of a property in order to exercise a particular retail activity or service provision. As from the initial stage when the state of emergency was implemented, a set of exceptional and temporary measures regarding the new coronavirus SARS-CoV-2 and COVID-19 was enacted, which has been subject to further revision and/or amendments in the two extensions of the referred state of emergency, as well as upon its term and further implementation of the state of disaster.

On this date, the following measures were approved relating to these contracts:

- a) Until 30 September 2020, the following are suspended:
  - (i) The effects of break option notices (“*denúncias*”) served by the landlord for the termination of residential and non-residential lease agreements;
  - (ii) The effects of expiry (“*caducidade*”) of residential and non-residential lease agreements, unless the tenant does not oppose to its termination;

- (iii) The effects of termination by mutual agreement (“*revogação*”) and opposition to renewal (“*oposição à renovação*”) served by the landlord of residential and non-residential lease agreements;
- (iv) The long stop date for handover of the leased premises laid down in article 1053 of the Civil Code, if the time limit for this term expires while these measures are in force;
- (v) Foreclosures on the tenant’s main and permanent residence under enforcement proceedings; and

- b) In turn, although not entirely clear,<sup>(1)</sup> the eviction lawsuits, special eviction proceedings and processes for handing over leased real property, when the tenant, due to a final court ruling to be made, which may place the person in a fragile situation due to lack of housing or for another compelling social reason (the judge in charge of the case is responsible for making a reasoned decision in each case) remain suspended.
- c) Regarding retail and service provision facilities and establishments (i) certain facilities and establishments (for example nightclubs, bars, circuses, theatres, sports facilities, etc.) are locked down and (ii) other retail activities and services rendered in establishments with an area for retail or provision of services superior to 200 square meters, as well those pertaining to a retail complex, unless their area is inferior to 200 square meters and have an autonomous

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<sup>(1)</sup> Pursuant to Article 7, paragraph 11 of Law no. 1-A/2020, as amended by Law no. 4-A/2020, said procedures should be only suspended until the term of the exception for prevention, containment, mitigation and treatment of the epidemic SARS-CoV-2 and the disease COVID-19. Considering that the referred article has not been amended nor revoked yet and that the exceptional measures are still in force, even though the state of emergency has already lapsed, we consider that this suspension is still applicable.

and independent entrance directly through the street<sup>(2)</sup> are suspended (a special regime has been established for restaurants/catering premises), except for those that are specifically listed in schedule II of the Council of Ministers Resolution,<sup>(3)</sup> as well as the book and music shops and those establishments that intend to maintain their activity exclusively for home delivery services or for providing goods at the establishment's entrance; and

- d) The lockdown of the facilities and establishments indicated above in line *b*) cannot be invoked as grounds for termination (*“resolução”*), break option (*“denúncia”*) or other form of termination of non-residential lease agreements or other contractual forms of exploitation of properties, nor as grounds for an obligation to vacate properties in which they are installed.

An exceptional regime was also approved for situations of rental payments in arrears, with specific rules regarding *(i)* residential lease agreements and *(ii)* non-residential lease agreements, as follows:

- a) **Residential leases:** during the months in which the state of emergency was in force and in the month following its term

<sup>(2)</sup> The wording foreseen in Decree no. 2-A/2020, Decree no. 2-B/2020 and Decree no. 2-C/2020, which have enacted the exceptional and temporary measures during the state of emergency period and further extensions, the suspension of the retail and services activities included a specific reference to the ones performed in establishments open to public. Despite the current wording resulting from the Council of Ministers Resolution no. 33-A/2020, we understand that the former requirement remains applicable, otherwise certain retail and services establishment that, during the state of emergency, were allowed to keep operating, could now be subject to a mandatory lockdown (which goes on the opposite direction of the current rationale aiming for a gradual economic recovery).

<sup>(3)</sup> Which correspond, to a large extent, to those activities that provide basic necessities or services, or other goods or services considered essential under the terms of the former wording foreseen in Decree no. 2-A/2020, Decree no. 2-B/2020 and Decree no. 2-C/2020.

(meaning, until 2 June 2020), the possibility of a suspension on rental payments is laid down in the following cases:

- (i)* If the tenant suffers a loss of household income of 20% or more compared to the previous month or to the same period of the previous year; and
- (ii)* If the household's borrowing power, calculated as a percentage of the income of all members of that household destined to the payment of rent, is or becomes more than 35%.

The beneficiaries of this regime correspond to:

- (i)* Residential tenants, which premises are used their permanent residence;
- (ii)* Students that have entered into a residential lease agreement regarding leased premises located over 50 km away from their household's permanent residence, for the purpose of attending an education establishment; or
- (iii)* Guarantors of students (as residential tenants) without any work income.

In these cases, the tenant will have a 12-month term, counted from the term of aforementioned period (meaning, as of 3 June 2020), to pay back the rents in arrears (and without being applicable the 20% compensation laid down in Article 1041(1) of the Civil Code, applicable to late payment of rent that falls due in this period).

In order to benefit from the suspension, the tenants should inform the landlord in writing at least five days before the first rent payment for which they were intending to benefit falls due (except for the rent due in April, for which the communication should have been sent until 27-04-2020), and evidencing the circumstances referred to in a. and b. above, under the terms foreseen in Ordinance no. 91/2020.

- b) **Non-residential leases and other forms of exploitation of properties:** tenants who have been forced to lockdown their establishments or whose activity has been suspended or restricted, as mentioned in item c) above or by legislative or administrative decisions, as set forth under Decree-Law no. 10-A/2020, in its current wording, or under the Civil Protection Framework Law, approved by Law no. 27/2006 of 3 July, in its current wording, the Health Framework Law, approved by Law no. 95/2019 of 4 September, or by other provisions designed to implement the state of emergency, may defer the payment of rent under the same terms set out above relating to residential leases.

Alongside the suspension for rental payments, an interest-free line of credit was also opened by IHRU for tenants and landlords exclusively for **residential lease agreements**, as follows:

- a) **Tenants:** residential tenants, together with, in the case of non-employed students, the respective guarantors, who have the proven fall in income laid down above and who find themselves unable to pay the rent on the leased premises comprising their permanent residence or, in the case of students, comprising their residence due to the fact that they attend an educational establishment located more than 50 km from their permanent household residence may request an interest-free loan from the IHRU to cover the difference between the monthly rent and the amount resulting from the application to the household income of a maximum borrowing capacity rate of 35%. Residential tenants who, due to a shortfall in household income, have benefited from a reduction of the amount of rent owed under the terms set forth in the special scheme for leases or income cannot benefit from this line of credit; and

- b) **Landlords:** residential landlords (i) who have suffered a loss of household income of 20% or more compared to the previous month or to the same period of the previous year and (ii) this fall in income is caused by the tenants not paying the rent pursuant to Law 4-C/2020 and (iii) whose tenants do not apply for a loan from IHRU, may request an interest-free loan from that institute to compensate for the amount of monthly rent owed and unpaid, whenever the remainder of the household income, for that reason, falls below the Social Support Index.

Regarding **non-residential leases**, failure to pay the rent that falls due in the months in which the state of emergency remains in force and the first subsequent month cannot be used as grounds for termination, break option or other means of termination of the respective agreements, nor as grounds for the obligation to vacate buildings. An apparently different solution is adopted for **residential leases** in which a failure to pay the rent that falls due in the months in which the state of emergency remains in force and the first subsequent month can be used as grounds for termination, if the tenant does not pay the rent within 12 months counted from the end of this period, as referred to above.

Without prejudice to the foregoing, the termination of the lease agreement by the tenant makes enforceable, as of such termination date, the immediate payment of the rents due and not paid, even during the period in which the state of emergency remains in force.

Regarding notarial and registry acts, the measures initially adopted by [Decree-Law no. 10-A/2020](#) laid down the possibility of limiting access to public services and buildings through an order from the Government Minister responsible for Public Health and for the area of the service or building concerned.



Currently, pursuant to Article 17 of the Council of Ministers Resolution no. 33-A/2020, it has been established the reopening of public services as from 4 May 2020 (exception made to specific one-stop services (*lojas do cidadão*), where service by appointment with physical attendance is only maintained at the counters of these public service offices in locations where there are not decentralized services).

In accordance with the perspective of the Society of Notaries, notarial offices can provide services with physical attendance, under the restrictions imposed by the declaration of the state of emergency and provided that the guidelines from the Directorate-General for Health are followed.

In any event, notarial offices may choose: (i) to close (if they cannot ensure the safety conditions necessary for physical attendance); (ii) to limit their opening hours to the public; or (iii) restrict people's access to the notarial office.

The current pandemic caused by the coronavirus SARS-CoV-2 and COVID-19 will necessarily affect the real estate sector, as it will affect other economic sectors, not only due to greater reserve and caution from investors, who await the outcome of this scenario to analyse the impacts resulting therefrom, but also due to the effects which COVID-19 will have on ongoing contractual relationships.

Regarding the execution of contracts in force, various problems can be posed, as referred to in general above in [chapter II](#).

We shall analyse in detail below the following contracts: (i) lease agreements; (ii) contracts for the use of store; (iii) construction works contracts; and (iv) promissory sale and purchase agreements.

## V.B. Lease agreements

Lease agreements can be entered into for diverse purposes. The activity carried out in the leased premises may correspond, for example: (i) to a retail activity with an establishment open to the public; (ii) to an office space in which the activities in question allow the employer to have its employees teleworking; or (iii) a property that is only used for residential purposes.

Such diversity of situations necessarily requires a case-by-case analysis of the effects which the current pandemic may have on the existing contractual relationship. Furthermore, in the context of the exceptional measures which have been adopted in relation to some residential and non-residential lease agreements, and to some landlords and tenants, the respective scope of application cannot be generalised to any and all lease relationship or other means of exploitation of real estate properties.

Without prejudice to the foregoing, and because many situations may not be covered by the exceptional measures approved by Law no. 1-A/2020, in its current wording, by Council of Ministers Resolution no. 33-A/2020 and by Law no. 4-C/2020, identified in more detail above, a general analysis will be required of the legal regime applicable to lease agreements.

Thus, it is important to consider the special rule set forth in Article 1040 (2) of the Civil Code (referring to the general rental regime but applicable to lease agreements), which establishes that, in cases in which the lessee suffers deprivation or reduction of use of the leased premises for a reason not imputable to the lessor or his relations, an eventual reduction in rent proportional to time of deprivation will only occur if the same, or the reduction of use, exceeds one sixth of the contractual term.

The idea underlying this rule is to regulate the sharing of risk. For this purpose, the risk is related to negative situations that may come

about by chance and affect the contracts more than would normally be the case.

In the cases in which the deprivation or reduction of use is imputable to neither the lessor nor the lessee, the law itself determines that, up to a sixth of the contractual term, the lessee bears the whole risk, and after this time both parties do so.

However, it is important to consider there is practically no case law that provides a framework and clarifies the scope of application of this rule. Thus, without prejudice to a special rule in the law for lease agreements, we believe that the same should not lead to the removal *tout court* of the general rules on impossibility of performance for a reason that cannot be imputed to the obligor, analysed prior to this Informational Note in [Chapter II](#).

Likewise, given the lack of case law which deals with the topic consistently, the rule on change in circumstances may not be excluded (Article 437 of the Civil Code), provided that the respective requirements are met in the specific case.

### V.C. Contract for the use of store

Contracts for the use of stores in shopping centres are atypical contracts, characterised by granting of use of a space – a store – to carry out a retail or service provision activity in a shopping centre comprising various stores with diverse and complimentary businesses and services and by common leisure spaces which aim to combine pleasure and consumption.

Following the measures approved by the Council of Ministers, on 12-03-2020, which had set limits on the number of visitors to shopping centres and supermarkets, Decree no. 2-A/2020 (and then Decree no. 2-B/2020 and Decree no. 2-C/2020) determined the suspension of the activities and establishments open to the public listed in that decree (even if part of shopping

centres). Despite the Council of Ministers Resolution no. 33-A/2020 has established some amendments so as to expand the scope of activities and establishments that could reopen to public and restart their activity under the new state of disaster (by means of the imposition of a area threshold of 200 square meters), these rules remain not applicable to those establishments pertaining to retail complexes (exception made to those that have an area inferior than 200 square meters and an autonomous and independent entrance through the street, as well as the book and music shops and those establishments that intend to maintain their activity exclusively for home delivery services or for providing goods at the establishment's entrance).

**Thus, there will be activities which may continue to be carried out at commercial establishments located in shopping centres, albeit subject to certain restrictions, and others which cannot be carried out at all.**

In our analysis below on the effects of the pandemic on contracts for the use of stores, we did not consider the situations in which the managing entity of the shopping centre, on its own initiative and at its discretion, decides to close the shopping centre. Without prejudice to the foregoing, there may be situations which require a separate analysis that attends to the specific circumstances, especially in cases: (i) in which the managing entity, due to a significant reduction in commercial establishments open and because it has become impossible to keep the shopping centre open as normal, decides to close the shopping centre; or (ii) in which the shopkeeper, because the managing entity is unable to ensure the integrated operation of the diverse retail and service provision activities at the shopping centres, decides to close the commercial establishment.

**TEMPORARY IMPOSSIBILITY OF PERFORMANCE**

The main dividing line to be drawn corresponds to the difference between impossibility imputable to the obligor and impossibility not imputable to the obligor – *i.e.* between the impossibility of performance at the discretion of the obligor (“the obligor does not comply because it does not want it”) and the impossibility of performance for circumstances totally or partially beyond the obligor’s control (“the obligor does not comply because it cannot”).

The main consequence of the impossibility not imputable to the obligor is that, in principle, this party cannot be held liable for the damages caused by the non-performance, and is also relieved from paying rent while the impossibility remains.

Within the scope of activities carried out in commercial establishments located in shopping centres, it is important to begin by distinguishing the situations: (i) in which activities that may continue to be carried out, albeit subject to certain limitations; and (ii) the activities that were suspended by virtue of Council of Ministers Resolution no. 33-A/2020.

In situations of closure, one should analyse whether the impossibility at hand can be classified as objective, total and temporary: objective due to circumstances beyond the control of the obligor, total because it prevents the obligor from fulfilling all its obligations and temporary because it is momentary (during the period of the closure of the premises or the suspension of activity). In these situations, the said impossibility for reasons not imputable to the obligor will not, in principle, extinguish the obligations incumbent on the obligor, only releasing this party from their performance for as long as the impossibility continues. When the impossibility ends, the obligor is again obliged to fulfil the obligations under consideration.

Naturally, other circumstances of the specific case that may lead to cessation of the contract should be considered.

Unlike the closure of the establishment or total suspension of the activity performed, in cases where the commercial establishment remains open it is possible that the parties will be able to fulfil their contractual obligations, even if, due to government orders, with limited numbers and, in some cases, such as for example, restaurants, without the possibility of eating on the premises.

If the activity is possible but in limited terms, the parties should comply as far as possible. One can argue, in these situations, if the obligor can claim for an adjustment of the contractual terms and conditions to the new circumstances created by these limitations and whether, while these remain in place, there is a partial impossibility of performance or, purely and simply, the agreement is maintained. A decision in this respect depends on analysis of the specific case, the type of contract and the set of contractual stipulations.

**CHANGE IN CIRCUMSTANCES**

The change in circumstances precept presupposes an abnormal change, not covered by the risks inherent to the contract, of the circumstances on which the parties founded the decision to enter into the contract and which seriously affects one of the parties, *i.e.* that requiring the performance of the obligations by one of the parties seriously affects the principle of good faith.

Considering the analysis carried out above on the applicability of the change in circumstances regime with regard to commercial contracts, we refer to the considerations made in [Chapter II](#).

**V.D. Construction works contracts**

Construction works contracts are contracts in which one of the parties undertakes to the other to carry out a certain construction work for a price.



None of the emergency measures recently approved refer directly to construction works contracts; however, since they are, in cases of works on real estate properties, continuously executed contracts, it is important to assess the effects that the current pandemic may have on the fulfilment of each party's obligations. Some contracts may contain force majeure provisions, and in these cases such contracts must be analysed in light of these contractual provisions.

#### **IMPOSSIBILITY OF PERFORMANCE**

Without prejudice to the contractual regime agreed between the developer and the contractor, if there is a causal link between the failure to perform the contractor's obligations (*e.g.* delays in meeting the partial deadlines set in the works plan) and the COVID-19 situation (*e.g.* due to the same obliging the quarantine of the contractor's employees who are thus prevented from working), it will be necessary to assess whether the contractor's impossibility is objective, partial (or perhaps total) and temporary.

Regarding the temporary nature of the impossibility, it is important to stress that in this case the contractor will be exonerated from performance while the impossibility continues. After the impossible situation comes to an end, the contractor will be obliged to perform/resume its contractual obligations.

It should also be noted that, in cases in which we conclude that we are faced with impossibility of performance not imputable to the obligor, this will also have consequences in relation to the payment of the price.

In any event, temporary impossibility may become permanent impossibility, in certain cases, especially if, in view of the circumstances of the specific case, it is possible to conclude that the developer has lost interest in the performance.

Regarding its total or partial character, the impossibility will be (i) partial if the fulfilment of contractual obligations is possible, even if not to their full extent, in which case the contractor should comply with what it can to the extent possible; and (ii) total, at least for a certain period, if the fulfilment of the contractor's contractual obligations is not possible.

#### **CHANGE IN CIRCUMSTANCES**

If the prices of construction materials and the cost of labour which the contractor has to rely on in order to carry out the development (*e.g.* subcontractors and tradesmen) increase significantly and abnormally due to the effects of COVID-19 on the construction market, one should analyse if, in each case, such changes are covered by the risks inherent to the works contract or by the circumstances in which the parties (and the contractor especially) based their willingness to contract, and in this respect to consider if, in light of the principle of good faith, the contractor can be required to bear the additional costs arising from the construction works contract.

Considering the analysis carried out above on the applicability of the change in circumstances regime with regard to commercial contracts, we refer to the considerations made in [Chapter II](#).

#### **V.E. Promissory sale and purchase agreements of real estate properties**

Promissory sale and purchase agreements of real estate properties correspond to a promise made by both parties to enter into a final and definitive contract, in this case a sale and purchase agreement of real estate properties.

It is important to consider that, as a rule, promissory agreements include conditions precedent, the occurrence of which determines the timing and completion of the definitive contract.

**IMPOSSIBILITY OF PERFORMANCE**

For the purpose of analysing potential situations of breach, we note that the existence of a pandemic and declaration of a state of emergency do not by themselves lead to the existence of impossibility of performance for reasons not imputable to the obligor. In fact, for the regime for impossibility of performance for reasons not imputable to the obligor to be applicable, the obligor must prove the existence of a case of force majeure arising from the unpredictability, abnormality and exceptionality of the existing pandemic and the causal link between the breach of its contractual obligations and the facts relating to that situation of force majeure (COVID-19).

Objective impossibility of performance must not be confused with difficulty of performance, under which the performance remains possible to carry out but requires an additional effort.

On the other hand, in situations where the performance to which the promissory seller was obliged under the terms of the promissory agreement (e.g. the promise to buy and sell a future asset, whereby the conclusion of the definitive contract is subject to completing the construction works and obtaining a use permit) becomes impossible, the promissory seller can invoke the temporary impossibility of fulfilling the referred promissory agreement and, in this case, will not be liable for the losses caused by the delay. In these situations, it will also naturally be necessary to prove the causal link between the force majeure event (COVID-19), the impossibility of fulfilling the contractor's obligation under the construction works contract entered into between the promissory seller and the contractor and, lastly, the impossibility of the promissory seller fulfilling its obligations to conclude the works and to obtain the respective licence set forth in the promissory agreement.

One will also have to consider if there are reasons which justify the conversion of the temporary impossibility into permanent impossibility.

**CHANGE IN CIRCUMSTANCES**

The change in circumstances precept linked to the COVID-19 pandemic can likewise not be used by itself as a justification for non-performance of obligations arising from a promissory sale and purchase agreement concluded by either party. We refer you to the considerations on this topic in [Chapter II](#).

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