

Spain: The “rebus sic stantibus” or “material adverse effect” clause in contracts



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Problems arising from the performance of contracts due to the occurrence of extraordinary or unforeseen adverse circumstances

M&A activity, Distress M&A, restructuring, venture capital, private equity and corporate investments in general are capital-intensive and require returns in line with the volume and risk taken. To avoid or mitigate these risks, the so-called *rebus sic stantibus* clause or *material adverse change*, in the English-speaking world, is included in contracts or brought up before the courts.

The inclusion or use of such clauses normally allows one of the parties to discharge or “adjust” its obligations assumed by virtue of the contract, provided that adverse, relevant, unforeseeable circumstances occur after signing the contract that make performance of the obligation an exorbitant sacrifice or extraordinarily onerous. The invocation of such clauses is spreading before the Spanish courts and is affected by timid but progressive legislative modification at the supranational European level and also in some neighbouring countries (mainly Germany and Italy).

Common situations and recent cases

Hotel leases

In respect of the lease of a hotel building by an operator in the sector, the Supreme Court (STS 15/10/2014) once again upheld a more standardised application of this legal concept in our law and recognised that the global economic crisis (2007-2014), due to its depth and duration, could be considered as a phenomenon giving rise to an unforeseeable change in

circumstances and, together with other requirements, justify the application of this doctrine.

Leases of shopping centre business premises

More recently, the Court of Álava upheld a modification of the contract between CBRE, owner of the “El Boulevard” shopping centre, and one of its tenants to share the hardship in the fall in sales during Covid, recognizing the right to modify the obligations of a contract in the event of a substantial and totally unforeseeable alteration, providing for a 50% reduction in the minimum guaranteed income during periods when the premises or shopping centre where it is located is closed to the public and 25% during periods when, without being obliged to close to the public, it is necessarily affected by direct limitations.

Understanding related concepts: material impossibility of performance, unforeseeable circumstances and force majeure

Material impossibility of performance

Material impossibility of performance is regulated in the Civil Code under Articles 1.182 to 1.184, which stipulate that: “An obligation to deliver a specific item shall be extinguished if it is lost or destroyed through no fault of the obligor and before the obligor has defaulted” and “The obligor shall also be discharged in the case of obligations to perform when the performance is legally or physically impossible”.

Unforeseeable circumstances and force majeure

The Civil Code provides in Article 1.105: “Apart from the cases expressly mentioned by law, and

those in which the obligation so declares, no one shall be liable for such events that could not have been foreseen, or which, foreseen, were unavoidable”.

Case law construction in the absence of a general regulation in our legal system regarding the concept of the “rebus sic stantibus” clause

As noted above, “unforeseeable circumstances” and “*force majeure*” imply exoneration and/or release from liability arising from a breach of contract. By contrast, the supervening alteration of circumstances, better known as the *rebus sic stantibus* clause, has the purpose of modifying the contract. In other words, the purpose of this clause is a mandate to renegotiate the contract and compensate for the inequality of performance caused by the supervening alteration of the initial contracting circumstances. It may be argued that the current trend of Spanish courts and tribunals is towards typifying or objectifying the clause, thus avoiding its “automatic application” and in any case taking into account the uniqueness of specific circumstances.

Projected regulations: towards a new contract renegotiation law

Proposals for codification in Spain

As revealed by the caselaw above, even before the outbreak of the “Covid” pandemic, the *rebus sic stantibus* doctrine is not a new issue. In fact, at the beginning of 2009, the first section, Civil Law, of the General Codification Commission proposed a preliminary draft bill. Among the proposed amendments was the inclusion of Chapter VIII, which in turn consisted of a single

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Article 1.213, which would provide that: “Article 1.213: *If the circumstances which formed the basis of the contract have changed in an extraordinary and unforeseeable manner during its performance in such a measure that it has become excessively onerous for one of the parties or the purpose of the contract has been thwarted, the contracting party who, having regard to the circumstances of the case and especially to the contractual or legal distribution of risks, cannot reasonably be required to remain bound by the contract, may request its review, and if this is not possible or cannot be imposed on one of the parties, the contracting party may request its termination. The request for termination may only be upheld if it is not possible to obtain from the proposal or proposals for review offered by each of the parties a solution that restores the contract’s reciprocity of interests*”.

A similar rule was suggested by the Association of Civil Law Professors in 2018 and the Council of

Ministers in 2014 (draft Commercial Code).

Unidroit Principles and the Principles of European Contracting

The Unidroit Principles and the Principles of European Contract Law consist of the materialisation and admission of the *rebus sic stantibus* clause in comparative law and in international law, as witness Article 6.2.2 of the Unidroit Principles and Article 6.111 Principles of European Contract Law.

Specific regulation regarding the leasing of industrial and business premises through COVID-19

The main measures adopted consisted of a temporary reduction in rent and a moratorium. Regulations provided for their application both to leases of real estate for use other than as a dwelling and to industrial leases.

Conclusions and recommendations

In the Spanish legal system, companies may raise the occurrence of legally established grounds to terminate a contract or an acquisition transaction under the circumstances of (i) material impossibility of performance, (ii) unforeseeable circumstances, or (iii) *force majeure*. However, in most cases in the Private Equity sector (including the distress M&A) the most desirable solution is to renegotiate the terms and conditions of the transaction.

In that light, the advice must be that resorting to the *rebus sic stantibus* clause before the Courts and Tribunals or Arbitrators is not to be undertaken, but that parties should promote recourse to appropriate contractual clauses and formulas to re-establish the contractual equilibrium between them. ■



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