



Rebus sic stantibus

Draft law on procedural and organizational measures to confront the COVID-19 in the Administration of Justice

Due to the Covid-19 unprecedented crisis, many news and articles about the rebus sic stantibus clause have been published. Parliamentary groups at the Spanish Congress have also announced proposals regarding this institution. In this context, we provide below some comments about the current legal framework of this figure and the new proposals to regulate it.

Current legal framework

The rebus sic stantibus is an institution that aims to provide for a rebalance of the contractual benefits between parties when a totally unforeseeable and substantial change of circumstances occurs. This change must be of such nature that makes the compliance with the agreement by any of the parties incredibly burdensome. For the clause to apply, no party must have the contractual obligation to bear the consequences of the change.

In Spain, this mechanism has been created by the case law and it is not specifically contemplated in any regulation apart from the reference to “contractual good faith” foreseen in art. 1258 of the Civil Code: “Contracts are concluded by simple consent, and from that moment they oblige the parties to comply not only with what has been expressly agreed but also with all the consequences arising from them that, according to their nature, are consistent with good faith, usage and the law”.

Case law has admitted the application of the rebus sic stantibus mechanism in a very

restrictive and cautious manner; considering on the one hand the principles of equity and contractual good faith and, on the other hand, the “pacta sunt servanda” principle (i.e. agreements must be kept as per their terms). Precisely because the rebus doctrine constitutes a major exception to this central principle that states that agreements must be kept, courts have been very reluctant to apply it. The difficulties to define when and under which circumstances this doctrine may apply, and the risk to incentivize opportunistic behaviors, have also contributed to its scarce use.

In view of the foregoing, the rebus doctrine has been applied only in such cases where the unforeseeable and substantial change of circumstances is so relevant and extraordinary that entails a total disproportion of contractual benefits between the parties which frustrates the very purpose of the contract.

According to the Supreme Court, the application of the rebus doctrine must take into consideration all the circumstances and facts of the case (including measures adopted by the parties to revert the situation) in order to avoid turning this figure into an incentive for opportunistic breaches of contract.

The Supreme Court has also stressed the importance to assess how the parties have distributed the risks of the contract: the unforeseeable change of circumstances that rebus doctrine requires does not concur when the parties have agreed (explicitly or implicitly) how to handle and assume the consequences of this change.



In practice, the rebus doctrine permits affected parties to seek an amendment of the agreement to rebalance the contractual benefits. Only in very exceptional occasions, the rebus doctrine has permitted the parties to totally terminate an agreement.

New proposals

The Spanish Parliament has recently discussed a proposal to introduce the rebus sic stantibus institution in article 1258 of the Civil Code. This proposal has been included in the draft law on procedural and organizational measures to confront the COVID-19 in the Administration of Justice.

The proposal seeks to expressly foresee in the Civil Code that in the event of a sudden, significant and unforeseeable change of the circumstances that served as the basis for a contract, the aggrieved party should be entitled (unless it has the obligation to bear the consequences of the change) to initiate a voluntary judicial proceeding seeking the renegotiation of the contract. As per the proposal, this change of circumstances must be of such a nature that makes the compliance with the contract incredibly burdensome or substantially alters the economic rationale of the contract.

In the voluntary proceeding initiated by the aggrieved party, the Secretary of the Court would give the parties a reasonable time to renegotiate the contract in view of the new circumstances. The aggrieved party would also be entitled to request the judge to provisionally suspend the

enforcement of the contract or amend it while the negotiations are taking place. The Judge will decide on such request after hearing both parties.

If the parties do not reach an agreement during the voluntary proceeding, the aggrieved party will then be entitled to initiate a declaratory judicial proceeding seeking the amendment or termination of the contract.

Any amendment of the contract resulting from the declaratory proceeding will be provisional and only applicable while the negative effects of the unforeseeable change of circumstances remain. Further, the aggrieved party seeking termination shall not be subject to the payment of damages. #

Take-home message

The benefits of including the rebus sic stantibus institution in a positive law are beyond question. As per the current proposal, it is worth mentioning the quickness of the approval process and the legislative technique used. Given the eminently procedural nature of the proposed changes, it would be more convenient to include them in a procedural law rather than in the Civil Code.

The rebus institution may be a good mechanism to preserve many contracts; however express legislative changes are likely to result in an unclear regime that may incentivize the abuse of law and jeopardize the basic principles of our contract law.