



Rebus Sic Stantibus

a contract or a treaty to become inapplicable because of a fundamental
change of circumstances

18th of June of 2020

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Introduction

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Pragma connects independent law, tax and consultancy firms with a high level of experience in their areas of expertise. This allows us to have a global vision of the business environment as well as a thorough knowledge of local issues.

This has allowed us to gather from our firms a summary of the main measures regarding Ric Sic Stantibus options.

Which are the requirements for the correct application of the Rebus Sic Stantibus principle in your country?

Portugal

- a) that the change considered relevant relates to circumstances on which the decision to hire was based, that is, to circumstances which, although not determinant for both parties, are presented as evident, according to the typical end of the contract, ie, which are at the base of the business, with awareness of both contracting parties or reasonable notoriety
- b) that these fundamental circumstances have undergone an abnormal change, that is, unpredictable or, although predictable, affecting the balance of the contract;
- c) that the stability of the contract involves injury to one of the parties, either because it has become too costly, in an economic perspective, to provide one of the parties, or because the change in circumstances involves, for the injured party, great personal or excessive risks non-patrimonial sacrifices;
- d) that the maintenance of the contract or its terms seriously affects the principles of good faith in business;
- e) that the situation is not covered by the risks inherent in the contract, that is, that the anomalous change in circumstances is not included in the specific section of the contract, that is, in its normal fluctuations or purpose or in the risks specifically contemplated by the parties in what was agreed.

Argentina

The part of a commutative contract of deferred or permanent execution has the right to raise judicially or extrajudicially the total or partial resolution of the contract, or its adequacy, when the provision at its expense becomes excessively onerous due to an extraordinary alteration of the circumstances existing at the time of its celebration, caused by reasons beyond the parties and the risk assumed by that one who is affected.

Spain

Traditionally, Spanish courts have been very restrictive and cautious regarding its application. The Spanish Supreme Court has defined the exceptional circumstances that must occur in order for it to be applied as “*circumstantial and extraordinary incidences, deep and substantial alterations, unforeseen events of notorious magnitude or exorbitant*”

disproportions of the claims of the parties which are in direct conflict with the harmony and balance of the covenants."

Consequently, the requirements that the courts have been requesting for the application of this mechanism in Spain are the following:

- a. An extraordinary alteration of the circumstances that exist at the moment in which the parties have to carry out their performances by virtue of the contract, in contrast with the circumstances that existed when the parties executed that contract;
- b. An exorbitant disproportion, beyond any calculation, between the claims of the contracting parties; one that genuinely makes the contract collapse because of the destruction of the balance between the benefits that the parties would obtain from it; and
- c. That it is all due to the sudden concurrence of radically unforeseeable circumstances.

France

In French law, the Rebus Sic Stantibus principle, called the theory of unpredictability, has become the rule of principle since 2016 in private law.

Since October 1, 2016, each party to a contract can request the revision to its contractual partner provided that the conditions listed by article 1195 of the French Civil Code are met, namely: an unforeseeable change in circumstances upon conclusion of the agreement (1 °), making its execution excessively expensive (2 °) for a party which had not agreed to assume the risk (3 °).

Mexico

Currently in Mexico the jurisprudence is in force: I.8o.C. J / 14, which the federal courts established since May 2002, under the heading **CONTRACTS. THE LEGALLY CELEBRATED MUST BE FAITHFULLY FULFILLED, HOWEVER THAT UNFORGETTABLE FUTURE EVENTS OCCUR WHICH MAY ALTER THE COMPLIANCE OF THE OBLIGATION, ACCORDING TO THE CONDITIONS THAT DEPRIVED BY CONCERTING THAT:**

According to the content of articles 1796 and 1797 of the Civil Code for the Federal District, which come to complement the system of effectiveness of contracts from their perfection, they do not adopt the theory of unpredictability or rebus sic stantibus clause derived from the events contingencies that could modify the original conditions in which a contract was established but, in any case, the system followed in the aforementioned Civil Code adopts in a generic way the thesis pacta sunt servanda, which means that it must be as agreed between the

parties, that is to say, that the legally concluded contracts must be faithfully fulfilled, notwithstanding that unforeseeable future events occur that could alter the fulfillment of the obligation according to the conditions that prevailed when concluding it, without it being the judge's responsibility to modify the conditions of the contracts .

Ninth Epoch, Collegiate Circuit Courts, Jurisprudence, Judicial Weekly of the Federation and its Gazette, Volume XV, May 2002, Civil Matters, Thesis: I.8o.C. J / 14, Page: 951

In conclusion, the pacta sunt servanda prevails over the rebus sic stantibus, or theory of unpredictability as doctrinally handled.

Italy

In a nutshell, the Rebus Sic Stantibus in Italy is a cause for termination of a contract that can be exercised when one of the services of the contract, due to extraordinary and unforeseeable events, has become very difficult to perform.

In such cases, the party "affected" by the excessive onerousness of its performance may request the termination of the contract (according to the art. 1467 of the Italian Civil Code).

The termination of the contract due to excessive onerousness can only be requested on the contracts whose activity lasts over time.

The very concept of Rebus Sic Stantibus, in fact, presupposes a change that has occurred over time, which could not exist in the presence of a contract whose effectiveness is immediately extinguished.

In a nutshell, the resolution for excessive costs can be requested under certain conditions:

- (i) if the performance of one of the parties has become excessively onerous due to the occurrence of extraordinary and unforeseeable events.
- (ii) if the occurrence of a charge is outside the normal scope of the contract.

What is the difference or relationship between Rebus Sic Stantibus and Pacta Sunt Servanda?

Portugal

Pacta Sunt Servanda is to preserve the autonomy of the will, the freedom to contract and the legal certainty that the instruments provided for in our law are reliable.

Rebus Sic Stantibus is to protect the common good, contractual balance, equality between the parties and the certainty that the private interest will not prevail over the social.

Fundamental principle of autonomy vs fundamental principle of justice and respect for the link really assumed.

Argentina

The legal idea is the same one of Roman (Latin) law. The contracts are concluded to be fulfilled, as long as the conditions at the time of fulfillment are the same as at the time of contracting or those ones in accordance with the own risk assumed by each party.

Spain

Pacta Sunt Servanda is one of the principles that preside over the general theory of contracts and that expresses that contracts are binding on the parties. Contracts are obligatory, have the force of law between the contracting parties, and must be complied with in accordance with them (art. 1091 Spanish Civil Code).

Pacta sunt servanda is the general rule of the Spanish contract law, while *Rebus Sic Stantibus* is the exception, as allows the review or termination of a contract if there has been an unforeseen and extraordinary sudden alteration of the circumstances that surround it. It constitutes a mechanism to re-establish the balance between the parties' performances.

France

In The Sunt Servanda Pact is translated into French private law by article 1103, the terms of which are as follows: "Legally formed contracts take the place of the law for those who made them".

However, since 2016, the theory of unpredictability has been adopted.

This is a real change in the concept of the binding force of contracts, because the parties can now modify the contract following the occurrence of an unforeseeable event at the conclusion of the contract which occurred during its execution and making it extremely difficult to execute.

This new principle allows a party, within the framework of a successive contract, to request the other to renegotiate the contract.

However, the application of the Rebus Sic Stantibus principle is not mandatory and can be excluded by the parties, which practitioners most often do in contracts.

Mexico

The **rebus sic stantibus** contemplates that the substantial change in post-employment situations justifies the adjustment of the signed contract.

The **pacta sunt servanda**, obliges the contracting parties to comply with the provisions without the change in the situation justifying the change.

However, the criterion that governs today in Mexico is the **pacta sunt servanda**, that is, to comply without any objection.

Italy

These are two completely different principles. The Pacta Sunt Servanda principle is a general principle that applies to all contracts (and implies that the parties to a contract must comply with the agreements made), while Rebus Sic Stantibus is a principle that allows for the dissolution of the contractual relationship, but only under certain conditions.

In fact, it could also be said that the second confirms the first, as it provides for a special situation (the possibility to terminate the contract), compared to the general rule (Pacta Sunt Servanda)

Which are the main solutions or remedies that the legal system provides to mitigate the economic effects on leases?

Portugal

Financial support for housing tenants who, due to falling income, are unable to pay their rent. These tenants can access a loan without interest for the payment of rents due. The terms of remuneration for this loan are significantly more favorable, both in terms of payment terms and the amount of monthly installments to be paid, than the minimum conditions stipulated in the law for the settlement of unpaid rents with landlords.

Flexibility of rent payments and decriminalization of arrears for housing tenants who, due to the drop in their income, are unable to pay the rent - Impossibility of canceling lease contracts for delays in rent payments during the state of emergency, provided that lessees pay the rents in debt during the following twelve months, in monthly installments (not less than one-twelfth of the amount due), paid together with the rent for each month. The landlord can only terminate the contract if the settlement of the outstanding rents is not made, at least, in the stipulated time and amounts. If, during this period, the lessee wants to terminate the contract, he has the duty to make the immediate payment of unpaid rents;

It cannot be required to pay compensation for delay in rent payments (which, under normal circumstances, would be equal to 20% of what is due) in case of delays in the payment of rent under the present regime and regularized in the terms established the same;

Financial support for low-income housing landlords who have proven to have a significant drop in income due to non-payment of rents under this scheme - These landlords, whose tenants do not use the loan to pay the rent, may they themselves have access to an interest-free loan to offset the amount of the monthly rent due and unpaid, with very favorable remuneration conditions, which allow the State to bear the extraordinary delay allowed by this regime.

Argentina

Ordinary law gives the affected part the right to raise judicially or extrajudicially the total or partial resolution of the contract, or its adecuación. New legislation related to COVID 19 consequences, established specific solutions for different commercial situations and economic sectors.

Spain

With the entry into force of Royal Decree Law 11/2020 of 31 March, which adopts urgent complementary measures in the social and economic sphere to deal with COVID-19, it is intended to support families and the most vulnerable groups, which have been affected by the paralysis of a large part of economic activity as a result of COVID-19.

To that end, it provides for measures such as the extension of contracts, the postponement or remission of rent, the suspension of judicial eviction proceedings and even aid to meet the payment obligations of tenants.

Moreover, the entry into force of Royal Decree Law 15/2020 of 2 April, on urgent complementary measures to support the economy and employment, has established some measures to reduce the main operating costs for SMEs and the self-employed to meet all or part of the obligations to pay rent for premises rented which seriously jeopardise the continuity of their activities.

With this regulation, in the absence of agreement between the parties, a mechanism is established to address this situation and to regulate a procedure for the parties to reach an agreement for the modulation of the payment of rent for premises.

France

The main solutions are as follows:

- Rents are always indexed to indices published at the national level and therefore vary according to the development of economic activity, construction or purchasing power;
- In commercial matters, in a certain number of cases, the lessor can request that the rent be modified and fixed at the economic value, with the intervention of an expert;
- Finally, the theory of improvisation (Rebus Sic Stantibus) applies, unless the parties have excluded it.

Mexico

The Federal Civil Code regarding leasing establishes in its article 2431 the following:

Article 2431.- If, by fortuitous event or force majeure, the lessee is totally prevented from using the leased thing, no rent will be caused while the impediment lasts, and if it lasts more than two months, he may request the termination of the contract.

In other words, in a situation of force majeure that prevents the full use of the leased property, the lessee may stop paying the rent and if this is extended for more than two months, he may request the termination of the contract.

As established in the preamble, due to the declaration of a health emergency due to force majeure, all activities are suspended, except for a few, focused on managing the pandemic.

In this sense it is evident that the total use of the leased assets has been impeded.

Italy

In general terms, the Italian legal system does not provide for any particular measures to mitigate the economic effects on leases.

It is necessary to examine each situation on a case-by-case basis in order to assess the possible means of doing so.

Which are the main steps to modify leases right now?

Portugal

The leases must be changed with the prior acceptance of all parties.

Argentina

A decree was issued by the President, of a public order (that is, obligatory for the parties), which freezes the price of certain rental contracts, provides the financing that landlords must give to tenants, prohibits evictions, and establishes the compulsory mediation process as a prerequisite to the start of any lawsuit.

Spain

The "ideal" solution would be an agreement between landlord and tenant that would allow a proportional reduction of the rent, with both parties assuming equally the heavy burden that the coronavirus is causing, being aware that if the situation is judged, this is the solution that is most likely to be imposed in the decisions issued by the Courts.

However, we are well aware that this will be very difficult to achieve, so right now we must be cautious, wait for events (aids, legislative changes...etc.) and carefully analyze case by case to achieve an out-of-court solution to the problem.

France

The tenant must ask his landlord to request a drop in rent due to economic circumstances.

If the lessor refuses:

- the parties may agree to the termination of the contract or,
- by mutual agreement, ask the judge to adjust the contract.
- Failing agreement, within a reasonable time, a party may ask the judge to revise the contract or to terminate it on the date and under the conditions it sets.

Mexico

From a legal point of view, the lessor must be notified of the decision to terminate the contract or to seek alternative options to termination.

Notwithstanding the foregoing, since the Courts are closed and only a few Public Notaries are working, trying to make any notification becomes cumbersome.

Italy

A lease agreement may only be amended with the agreement of the parties.

Therefore, in order to possibly allow the tenant to reduce the rent, it will be necessary to negotiate with the landlord.

What is your advice to landlords and tenants who are concerned about the long-term economic forecast?

Portugal

The financial support for tenants and landlords are provisional, but financial aid is expected to continue as long as this situation lasts

Argentina

It is necessary to analyze each case. The situations have changed and it is always better to find a solution of shared effort between the parties than to add to the economic problem, a legal problem. The parties, sufficiently advised, must negotiate until a new balance is found. Worth the effort.

Spain

As indicated above, it would be desirable to reach a balanced agreement between landlords and tenants, in order to avoid going to Court and generating further costs and expenses for both parties. It should be borne in mind that this situation is temporary and transitory.

France

Renters have every interest in agreeing, in the short term, to rent cancellation to their tenant for the duration of the confinement period in order to allow their tenant to pass this difficult period.

Renters who have to repay a loan can easily obtain a deferral of their repayment for the same duration, which means that they have no impact in terms of cash.

More generally, it is preferable to make efforts on the rent and that the tenant is able to reimburse it.

Regarding the tenant, efforts must be made to the landlord and, if the landlord refuses and the theory of unforeseen circumstances (Rebus Sic Stantibus) applies to the lease, the judge must be asked to revise the rent if the economic context remains difficult.

Mexico

At this time it is preferable to analyze case by case, since there may be situations such as the following:

- a) The lessor who prefers to assign the payment and / or amount of the rent and keep the lessee.
- b) The lessor who is dissatisfied with the lessee, could use the situation to force the termination.
- c) The tenant who is comfortable with the lease, will seek to reach an agreement while the force majeure situation lasts.
- d) The tenant who took advantage of the moment to end a contract that he was probably no longer interested in continuing.

Italy

My advice is to assess, not immediately, but from a long-term perspective, the possible economic effects of the current situation. The question that I think a landlord should answer is: is it better to have a tenant who pays a reduced rent or risk not having a tenant and/or risk not recovering the full rent due to me?

Corollary

Mexico

However, the situation that prevails at the moment in Mexico derived from the invoked Jurisprudence, as soon as the Courts reopen this criterion will be tested, since when it was issued in 2002, the Federal Constitution did not contemplate anything regarding the Prevalence of Human Rights.

However, due to a reform to the First Article of the Federal Constitution dated June 10, 2011, today human rights are part of it.

What happens today? The Supreme Court has established that under the concept of Control of Conventionality Ministers, Magistrates, Judges and in general terms any authority is obliged to protect the Human Rights of the governed, even when they do not invoke them.

To this, it should be added that the Supreme Court has indicated that Human Rights must even be protected over existing laws, which opens a new era where the principle of legality that governs the Mexican system, that is, the observance of the law on the application of justice, it has changed and the Judges will be able to go further and seek the protection of Human Rights.

Thus, surely in the coming months and after the pertinent judicial process, we will begin to see criteria and jurisprudence that, under the obligation of the protection of human rights that today is an obligation in Mexico, change the criterion of the prevalence of the covenant. sunt servanda on the rebus sic stantibus.

With the collaboration of

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Filipe Consciência has more than eight years of legal experience. Deals with contracts, consumer law and immigration.

- Has experience with consumer, labour and commercial law, and also with real estate.
- In the last five years successfully handled and delivered thousands requests of portuguese citizenship.

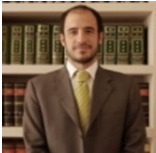
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- Reconstruction of financial assets through the analysis of bank transactions and securities deposits
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I graduated in Law from ESADE Business & Law School (Barcelona), after completing part of my studies at Trinity College Dublin. I obtained a Double Master in International Business Law and Legal Practice also at ESADE Business & Law School.

My experience is focused on advising both national and international clients in the development of Real Estate projects (houses, business premises, hotels, shopping centres among others).

Lately, as a result of the Covid-19 socio-economic crisis, I have carried out several renegotiations of different types of lease contracts.

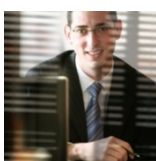
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