

The Coronavirus crisis and commercial contracts. A recent Supreme Court judgment on the *rebus sic stantibus* principle (a sort of *hardship*)

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Spanish Supreme Court (SC) judgments on the effects of *force majeure* or *hardship*¹ on commercial contracts had been rare until 2012, when a number of judicial disputes in the wake of the 2008 economic crisis started to reach the SC.

The aftermath of the current Coronavirus crisis will surely provoke a new wave of judicial disputes based on *force majeure*, *hardship* and *frustration of the contractual basis* and this is why we find interesting to summarize a SC judgment on *hardship* rendered only a few weeks ago². However, the Coronavirus crisis is so radically different from any other crisis to date that it is very difficult to anticipate how the existing case law on *hardship* will be applied by courts to the disputes that will likely arise in the coming months and years.

The dispute decided by the SC relates to a two-year contract entered into in 2006 by a TV channel and ZGM whereby the former granted the latter exclusivity rights to commercialize its advertising spaces. ZGM, in its turn, guaranteed the TV channel a minimum amount of revenues. The contract was extended in 2008 for one year but ZGM did not meet the minimum revenues promised to the TV channel. ZGM submitted it was not liable for this because of the dramatic drop in advertising investment.

The SC found that the *rebus sic stantibus* principle was not applicable to the case at hand because (i) ZGM could have foreseen the drop in advertising before agreeing the extension of the contract in 2008 (given that the effects of the economic crisis had actually started in 2007), (ii) the reduction of advertising investment was not sufficiently material and (iii) the contract was such that ZGM had to bear the risk of an advertising market drop³.

The SC also found that

"according to the case law on rebus sic stantibus, adaptation of the contractual terms or, ultimately, termination of an agreement are only justified when

¹ *Rebus sic stantibus* or *hardship* are not expressly regulated in the Spanish Civil Code; they are Spanish case law principles or doctrines. Outside Spain, most normative systems contemplate them in some way. By way of illustration, article 6.2.2 of the *UNIDROIT Principles of International Commercial Contracts* (16th edition) provide that *"there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party"*.

² Judgment num. 156/2020 of March 6, 2020.

³ The SC refers to previous SC judgments on this matter: num. 455/2019 of July 18, 2019; num. 820/2012 of January 17, 2013; num. 5/2019 of January 9, 2019; num. 333/2014 of June 30, 2014; num. 64/2015 of February 24, 2015 and num. 477/2017 of July 20, 2017.

circumstances change by such a magnitude as to significantly increase the risk that the agreement's purpose is frustrated".

The SC further said that no adaptation of the contractual terms is justified unless

"the subsequent [new] circumstances were completely unpredictable for the parties".

By contrast, a change of circumstances falls within the ordinary risks that each party must bear when

"the parties, either expressly or implicitly, have or should have assumed the risk that a given circumstance occur because that risk was reasonably predictable taking into account the circumstances and/or the nature of the agreement".

Finally, the SC said that

"the application of the rebus sic stantibus doctrine is more likely to happen in a long-term agreement [...] [rather than in a] short term agreement, in which it is difficult that something extraordinary occurs that impacts the basis of the agreement and is not a risk inherent to the very contract"⁴.

⁴ The comments on article 6.2.2 of the *UNIDROIT Principles (hardship)* say that "although this Article does not expressly exclude the possibility of hardship being invoked in respect of other kinds of contract, hardship will normally be of relevance to long-term contracts".