

THE *REBUS SIC STANTIBUS* CLAUSE, THE PANDEMIC AND THE BANK CONTRACT FOR INTERIM CONSTRUCTION LOAN IN PANAMA

BY PUBLIO CORTÉS

Back in the days when I worked as Clerk of a Justice in the Civil Chamber of the Supreme Court of Panama, when we were one for each Justice, it was very common to see the revisions that we, the public officers, gave to the treatment given of civil issues on the decisions of the Supreme Court of Spain, although it was not the kind of almost imitative monitoring that the Supreme Court of Justice of the Argentine Nation sometimes gave to the decisions of the Supreme Court of the United States in the second half of the 19th century.

In the case of Panama and our Court, it was rather a practical and logical interpretative reference, not reverential, but often useful, taking into account that our Civil Code has a very high percentage of norms taken from the Spanish Civil Code, for it was enough to look for the normative correspondence and it was easy to compare not only with what the Supreme Court of Spain had said, but also to benefit from the immense Spanish bibliography, among them the classic comments on the Civil

Code by Albaladejo and Maressa or the works of classic experts on Spanish Civil Law such as Puig Peña or Puig Brutau.



It was good to do this interpretative exercise, for it is obvious that in Spain they had more time interpreting the same rules, in a society with a wider diversity of business relationships, which did not mean that their conclusions always worked and explained the legal conflicts that occurred in Panama.

It was easier then, since there was the best edition that has existed so far of the Civil Code of Panama, made by JORGE FÁBREGA PONCE and CECILIO CASTILLERO, which had the correspondence of each rule with the Civil Code of Spain, of Colombia, from Costa Rica and some other references, which helped the interpreter to understand that Panama is nothing more than a small region of the continental European legal world, in which we apply the same principles that come from Rome and that arrived here, passing through the filter of the Code of Napoleon, disembarking in our coasts in Spanish language. The "modern" codes published today lack these references, which is a bad omen that, perhaps, is indicating to us that the practice of Law has lost some luster in Panama.

What I am trying to do in this issue, is to return to that practice of my years as a public officer in the Court, to reflect on the REBUS SIC STANTIBUS clause, according to the most recent version of its interpretation by the Supreme Court of Spain, outlining a potential application on a hypothetical, but plausible case, of an interim construction bank loan contract, used in Panama to finance developers of real estate developments, in this case residential, when the project has been affected by quarantine measures ordered by the Government and the economic situation, derived from the current pandemic. Immediately afterwards we will review the issue from the perspective of the Civil Code of Panama.

The general concept of the REBUS SIC STANTIBUS clause

Although it is called a "clause", it is actually an interpretive principle that is presumed intrinsic to every contract, derived from the general rules of contract interpretation contained in the Civil Code and which is a direct inheritance of the Roman Law, whose Latin version is translated into Spanish as the phrase: "given the circumstances", that is, every contract is signed and it is understood that it will be fulfilled by the parties, as long as there is not any important change in the conditions in which they were signed. On this same general concept, the WOLTERS KLUWER Legal Guides tell us:

"Rebus sic stantibus" is a Latin expression that can be translated as "given the circumstances". In the legal field, today constitutes that principle of law to which every contract contains an implicit and tacit clause, by virtue of which it is understood that the stipulations established are so taking into account the circumstances concurring at the time, that is, given the circumstances, in such a way that any substantial alteration of them may lead to the modification of those stipulations.

In the past, it was considered that each contract contained a tacit clause which, in the event that the circumstances present at the time of the conclusion of the contract changed, would lead to the dissolution of the contract. Hence, the

rebus sic stantibus clause is sometimes said, although now the majority opinion considers the principle as an objective rule, allowing the contracting party harmed by the change in circumstances to invoke the dissolution of the contract."

Historical-economic framework of the current jurisprudence of the Supreme Court of Spain

In 2008 the great economic crisis of subprime mortgages broke out, symbolized by the bankruptcy of Lehman Brothers and the domino effect that this represented for the world economy. The impact in Spain was devastating: the so-called "real estate bubble" burst. On December 31, 2013, when 5 years had passed since the beginning of the crisis, the newspaper EL PAÍS in Madrid titled a news item "2008-2013: Balance of damages", when the publication said:



2008-2013: Balance de daños

Algunos indicadores saludan ya el final de la crisis después de un lustro atroz. La factura es devastadora: los españoles son más pobres, tienen peor salud mental, hay menos ayudas públicas, la brecha de las desigualdades ha crecido...

MARÍA R. SAHUQUILLO, J. A. AUNIÓN,
Madrid · 27 DIC. 2013 · 15:28

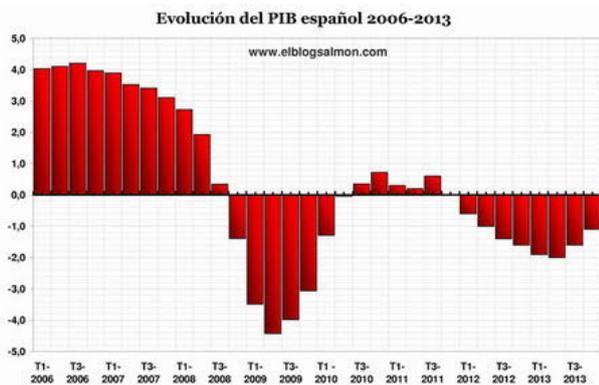
"Since that day when Lehman Brothers fell - the financial services company whose bankruptcy shook world markets - and the real estate bubble burst, Spain has seen unemployment numbers skyrocket while cutting by social spending - unemployment benefits, education, health, social services - in such a way that it will take two decades to regain the level of employment prior to 2008, according to a recent study by the consulting firm PricewaterhouseCoopers, and, in general, the level of well-being according to the NGO Intermón Oxfam, Doctors of the World, Unicef and Cáritas calculated a year ago."

Obviously, any resemblance to the current global economic crisis of the pandemic is not pure coincidence.

Furthermore, it is already clear that this pandemic has affected and will affect the economies of the world much more than the 2008 subprime mortgage crisis. At least in the case of Panama, that is a fact that is more than proven.

Well, as a result of the 2008 economic crisis, all business prospects in Spain were shattered and the premises on which many contracts were agreed upon became unrealistic and unattainable. A litigious movement begins on behalf of the parties who could not fulfill their contractual obligations, to put into practice the REBUS SIC STANTIBUS clause.





With the previous economic and social framework, the Civil Chamber of the Supreme Court of Spain configured the current dominant doctrine around the REBUS SIC STANTIBUS clause, developed mainly in three rulings: STS 2823/2014 (PROMEDIOS); STS 5090/2014 (ACCOR) and STS 1698/2015 (RIOCEREZO), all under the presentation of Mr. FRANCISCO JAVIER ORDUÑA MORENO, currently Professor of Civil Law at the University of Valencia and, moreover, a former student of Díez-Picazo at the Autonomous University of Madrid.

Review of ruling
STS 2823/2014 (PROMEDIOS)

Let's look at this case in more detail, for reference. At the end of the revision we will add some comments from the other rulings.

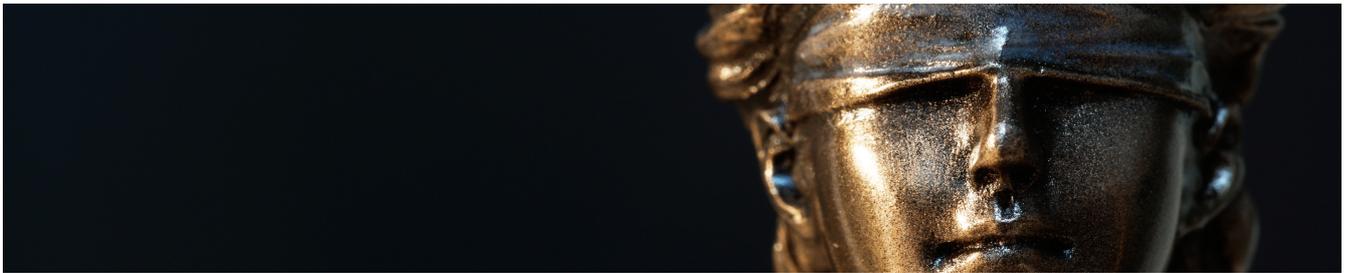
Facts and background: PROMEDIOS is an advertising company that, among other lines of business, exploits advertising on billboards for urban buses in the City of Valencia. EMT is a municipal company in the same city that operates bus transports, despite which, for the purposes of the litigation analyzed here, it is subject to ordinary civil jurisdiction. Both entities signed a

contract in 2006, with an addendum in 2007, by means of which EMT grants PROMEDIOS for several years the exploitation of the advertising business in the EMT bus network in Valencia.

PROMEDIOS has to pay a fee to EMT, based on the monthly net billing for the advertising business.

Due to the global economic crisis that hit Spain in 2008, PROMEDIOS saw its turnover decrease significantly. In November 2008, PROMEDIOS filed a declaratory lawsuit before a Civil Court of Valencia in which they asked for the reduction of the fee to 70% of the agreed amount or alternatively an equivalent amount of money that also represented a decrease in the monthly fee. As an alternative claim, PROMEDIOS requested that the contract be modified, downwards, to pay the new fair fee resulting from the process. In the event that the modification of the contract is not accessed, PROMEDIOS requested that the contract be declared terminated, as of the date of the claim, due to the economic impossibility of its fulfillment derived from the economic crisis.





In turn, EMT files a lawsuit against PROMEDIOS for breach of contract, given that it was not honoring the amount of monthly payments. Both processes are accumulated. In the first instance decision, dated April 28, 2011, the Judge partially granted the claim because, after having recognized that *"there has been an unforeseeable alteration of the circumstances that served as the basis for the formation of the negotiation will"*, it orders the modification of the contract, reducing the payment of the monthly fee so that it remains at 80% of the agreed amount, as of January 2009. EMT's claim against PROMEDIOS is dismissed completely.

The case went on Appeal to the Provincial Court of Valencia, where the decision is reversed in its totality, in the ruling of June 11, 2012. There, the first instance ruling was revoked, the PROMEDIOS claim is rejected, the request by EMT is partially granted and thus, the breach contract of PROMEDIOS is declared terminated and it was condemned to pay the overdue debt and its interests and damages for breach of contract.

The ruling of the Supreme Court

PROMEDIOS takes the case to the Civil Chamber of the Supreme Court where it is admitted. In such Court, PROMEDIOS

found recognition of its petition in a valuable and interesting ruling dated June 30, 2014, where multiple considerations are made about the REBUS SIC STANTIBUS clause. Below, we summarize the considerations that we consider most relevant:

(1) It is mentioned that the traditional jurisprudential doctrine of the REBUS SIC STANTIBUS clause has undergone a *"progressive change"*. Whereas before it was treated as a *"dangerous"* clause and a *"cautious"* admission clause, based on the subjective criterion of fairness, said criterion was subjected to an *"adjustment or adaptation to the social reality of the moment."*

(2) The aforementioned adjustment implies that the application requirements of the clause: *"extraordinary alteration"*, *"exorbitant disproportion"* and *"radically unpredictable circumstances"*, are now appreciated from a *"fully standardized configuration, where its prudent application derives from the requirement of its specific and differentiated technical foundation and of its functional concretion within the framework of the causal effectiveness of the contract"*.

(3) As evidence of this change in trend towards the "normalized" application of the figure, two previous rulings of the same Chamber of the Supreme Court are quoted, dated January 17 and 18,

2013, *"where it is recognized that the current economic crisis [of 2008], with deep and prolonged effects of economic recession, can be openly considered as a phenomenon of the economy capable of generating a serious disorder or mutation of circumstances, it also responds to the new configuration of this figure offered by main harmonization and updating texts regarding the interpretation and effectiveness of contracts (Unidroit Principles, European Contracting Principles or the Preliminary Draft itself regarding the modernization of the Law of Obligations and Contracts of our Civil Code)"*.

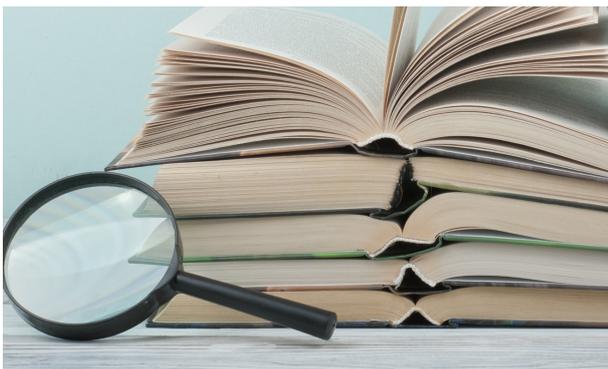
(4) Further on, it specifies that the "normalized" version of the vision of the REBUS SIC STANTIBUS clause, once exposed its departure from the subjectivist interpretation based on the *"rules of equity and justice"*, is oriented towards an objective application *"clearly compatible with the coded system."* From there, the sentence goes on to explain the anchoring of the clause in specific regulations and principles contained in the Spanish Civil Code.

(5) In its supporting arguments of the link with the specific regulations of the Spanish Civil Code, the first thing the sentence does is deny that the application of the REBUS SIC STANTIBUS clause entails a break with respect to the preferential rule of loyalty to the

given word (PACTA SUNT SERVANDA) nor regarding the rule of interpretation aimed at maintaining contracts.

(6) On the contrary, the sentence sustains, the application of the REBUS SIC STANTIBUS clause *"encrypted in a supervening mutation of the circumstances that gave meaning to the business carried out, is based on criteria or rules that can also be defined as keys to our system codified, since from its modern configuration the figure obtains its ultimate foundation from the directives of economic public order, particularly from the rule of commutativity of legal commerce and the principle of good faith"*. This, which for some may sound like "Legal Theology", is not and has a clear logical and practical sense, as explained below.

(7) Commutativity refers to the *"basic equilibrium"* of the onerous contractual relationship, where both parties, in principle, plan to receive benefits in goods or services. The sentence tells us that this *"basic balance ... is also admissible from the causal foundation of the contract, and its corresponding patrimonial powers, when it becomes deeply altered with the consequent disappearance of the business base that gave it meaning and opportunity."* As explained by the Supreme Court, this communal rule is contained in article 1289 of the Spanish Civil Code. We understand that it refers specifically to the part of said rule that says: *"If the contract is onerous, the doubt will be resolved in favor of greater reciprocity of interests."* Regarding this, the ruling adds: *"Therefore, beyond its mere application as an interpretive criterion, article 1289 of the Civil Code, commutativity stands as a rule of the*



contractual economy that justifies, ab initio, the possibility of developing figures such as the rebus sic stantibus clause."

(8) As for the good faith, the Supreme Court relies on article 1258 of the Spanish Civil Code, a rule that provides: *"Contracts are perfected by mere consent, and since then they oblige, not only compliance with what is expressly agreed, but also to all the consequences that, according to their nature, are in accordance to good faith, the use and the Law"*. In this regard, it first discards that said rule is only a general guideline that is totally subject to judicial discretion.

Instead, said guideline reflects a clear technical support of the REBUS SIC STANTIBUS clause, that is reflected in the following brilliant reflection of the Supreme Court:

"...if by virtue of good faith the creditor should not claim more than what his right supports and the debtor cannot claim to give less than what the sense of probity requires, all according to the nature and purpose of the contract; it is also logical, in accordance with the same principle, that when, outside of what was agreed and without fault of the parties and in a sudden manner, the circumstances that gave meaning to the basis or purpose of the contract change profoundly, the claims of the parties, which in accordance with the principle of good faith, it can be expected in this context, it may be subject to adaptation or revision according to the change. This relationship between the principle of good faith and the rebus sic stantibus clause has already been acknowledged by this Chamber, in the case, among others, of the Ruling of May 21, 2009 (No. 1178/2004)."

(9) Continuing with its explanation of the link between the REBUS SIC STANTIBUS



clause with the codified system, the Supreme Court expresses that said compatibility is not altered by the legal consequences of the application of said clause, that is, by the merely modifying effect of the contractual relationship or purely resolutive or termination thereof. In this sense, it cites other legal figures that have similar consequences, without the need to resort to exceptionality for their application.

(10) That same interaction of compatibility and standardization must be established between the REBUS SIC STANTIBUS clause and the principle of conservation of contracts, contained in article 1284 of the Spanish Civil Code, which says: *"If any clause of the contracts admits different senses, it must be understood in the most appropriate way to produce effect"*. That compatibility, we understand, is very clear when the REBUS SIC STANTIBUS clause leads to the modification of the contract: it is better to modify the relationship so that it takes effect than to close the business. However, it is also valid when it results in the termination of the contractual relationship, because the principle contained in the norm must be understood in the sense of leading towards the fulfillment of the contract,

but respecting its commutative essence, based on the anticipated cause of the contract, which could not be achieved as a consequence of an unpredictable economic event, of high magnitude, that eliminates these premises.

(11) The mutation or change of circumstances produced by the unforeseeable economic event determines the disappearance of the business base, when (i) The economic purpose of the contract is frustrated or becomes unattainable; and, (ii) The commutativity of the contract, expressed in the equivalence or proportion of the benefits, *"practically disappears or is destroyed, so that it is no longer possible to speak of the game between benefit and consideration"*.

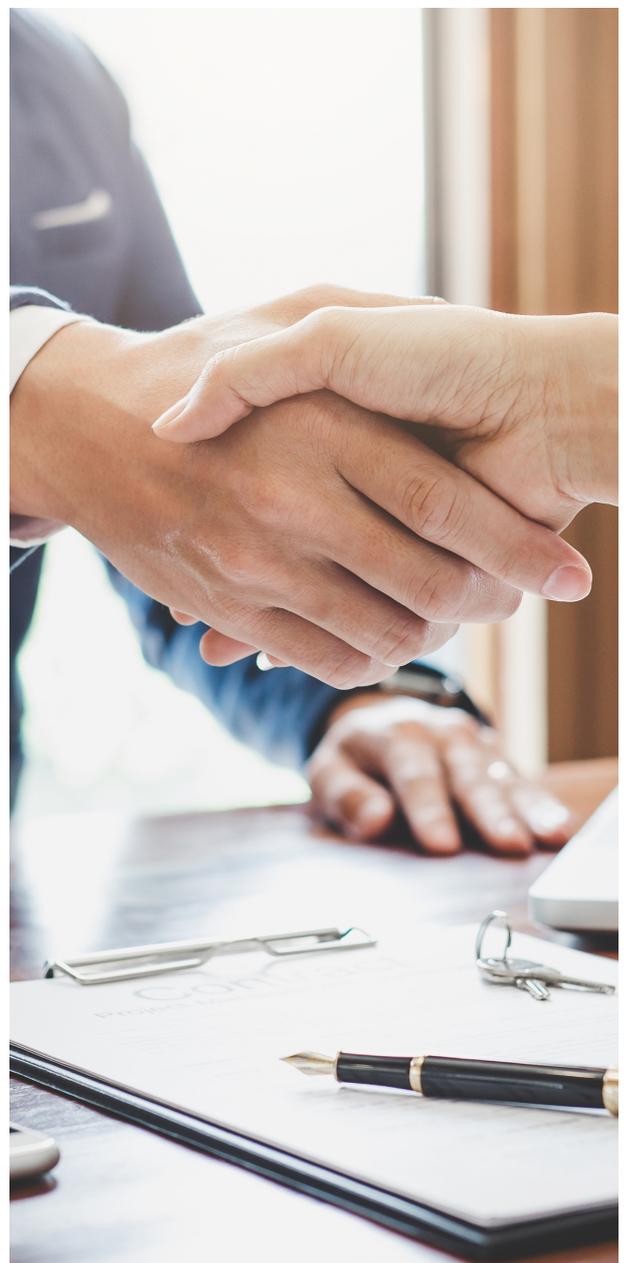
(12) *"Complementarily, the contrast of the so-called subjective basis of the business allows us to reach the same conclusion in those cases where the economic purpose of the business for one of the parties, not expressly reflected, but known and not rejected by the other, it becomes frustrated or becomes unattainable after the mutation or change that has taken place"*.

(13) For the application of the figure of the REBUS SIC STANTIBUS clause *"the change or mutation, configured as a risk, must be excluded from the "normal risk" inherent or derived from the contract."*

(14) We mention in a more specific manner, some other considerations of the sentence:

(a) The 2008 economic crisis is classified as a *"evident fact"*, *"with profound and prolonged effects of economic recession, it can be openly considered as a phenomenon of the economy capable of generating a serious disorder or mutation of*

circumstances and, therefore, alter the bases on which the initiation and development of contractual relationships had been established". However, this simple evident fact is not enough, since *"it is necessary to examine that the change carried out carries a legal significance worthy of attention..., that is, that the economic crisis constitutes in these cases a prior budget, justifying the change does not mean that its real impact on the contractual relationship in question should not be assessed..."*



(b) *"In regards to the excessive onerosity, it should be noted that its incidence must be relevant or significant with respect to the economic base that was initially reported in the contract entered into.*

This fact occurs when the excessive onerosity caused by said change is decisive both for the frustration of the economic purpose of the contract (viability of the contract), and when it represents a significant alteration or rupture of the equivalence relation of the considerations (commutativity of the contract). In this case the hypotheses are basically two; that the excessive onerosity reflects a substantial increase in the cost of the service, or, on the contrary, that the excessive onerosity represents a decrease or debasement of the value of the consideration received."

(15) The ruling then passes to the decision of the specific case. First, it reiterates as already assumed the evident fact of the 2008 economic crisis and its devastating and unpredictable effect, among others, on the advertising market. It then reasons that, despite the fact that the plaintiff, PROMEDIOS, is an expert in the advertising sector, *"nothing was predictable in 2006, the time of hiring, the risk and magnitude of the economic crisis that revealed itself two years later in a devastating way."* The Court insists that it could not reasonably be foreseen that this crisis would curtail *"the principle of financial equilibrium between the parties, reporting an excessive onerosity contrary to the principles of equity and contractual good faith."*

Finally, it confirms that, the excessive cost produced by the 2008 crisis in the specific case, which *"is deferred in a very*

clear way, in the transition from 2008 to 2009, with the negative balance, given the disproportionate drop in invoicing, which not only closes the specific business line in question with substantial losses, but also compromises the viability of the rest of the company's operating areas, in the event of full compliance with the contract as agreed".

(16) RULING: The application of the REBUS SIC STANTIBUS clause was granted and, therefore, the modification of the contract.

Continuity of Jurisprudence

This updated approach to the REBUS SIC STANTIBUS clause, applied in relation to the economic crisis of 2008, has been maintained by the Civil Chamber of the Supreme Court of Spain in other decisions, highlighting STS 5090/2014 (ACCOR), where the application of the clause to modify was confirmed, to lower, the lease of a building dedicated to the hotel business was granted, given that the base of the lease amount initially agreed upon was seriously affected by the economic crisis.

Likewise, STS 1698/2015 (RIOCEREZO) can be consulted where the Supreme Court ratifies the doctrine of the REBUS SIC STANTIBUS clause, but denies its application to a land sale contract signed in 2006, whose buyer had the objective of dedicating to real estate development, considering that there was no clarity on the relationship between the crisis and the assumption of the risk of the price agreed by the buyer, whose future in the real estate business was not necessarily a condition of the purchase agreement.

In STS 791/2020 (ZETA) the Supreme Court reiterated the doctrine of the REBUS SIC STANTIBUS clause, but introducing the unsustainable nuance that it would only apply to long-term contracts, which do not have a precise definition. In our opinion, this element is quite questionable, because none of the norms of the Civil Code that the Court itself invokes to objectify the codified basis of its reasoning, establishes any difference related to the duration of the contracts.

Panama hypothetical case facts on interim construction loan

Using real-life cases, we have developed the following elements of a hypothetical interim bank construction loan agreement:

- In November 2019, the BANK approves the Interim Construction line of credit, in favor of the DEVELOPER. Up to 600 thousand dollars maximum, at an interest rate of 7.5%, for a renewable year.
- The DEVELOPER is going to build 50 residential units on a piece of land it owns and the loan is granted after a study of the project by the BANK.
- The contract establishes that each disbursement is made, as long as the following conditions are met: (1) The DEVELOPER proves that it has at least 20% progress on the stage of the project it is building (in this case the first 8 houses); And, (2) If the 8 promissory letters already exist from the banks that are financing the home buyers.
- The first disbursement is made in December 2019, for an amount of

150 thousand dollars. This means that by December 2019, there were already 8 buyers with committed credit capacity and construction had exceeded 20% progress. Each disbursement generates the obligation for the DEVELOPER to make a monthly amortization payment, for one year, subject to 7.5% interest.

- The contract is designed so that, when the houses are ready to be delivered, the entity that finances each buyer of the houses, pays directly to the BANK creditor of the Interim Construction Loan, which, in turn, collects the pending your credit and delivery to the DEVELOPER the balance. The faster it is finished, the better for the DEVELOPER.
- In this case, the DEVELOPER made payments in January and February 2020, months in which it continued to build.
- At the end of February 2020, a Sanitary Emergency was decreed due to the pandemic and the Government of Panama decreed a total quarantine and construction was closed for several months.



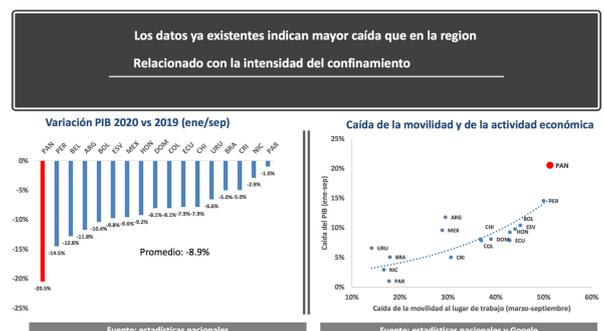
- For a few months in 2020, the construction officially reopens, the project advances in the housing construction stage, exhausting 80% of the amount disbursed in the work. However, there comes a time in November 2020 when, due to economic difficulties of the contractor, the DEVELOPER advances slowly.
- As of April 2020, the DEVELOPER was paying his monthly payment upon disbursement. However, it then takes advantage of the so-called "moratorium", a mechanism applied in a pandemic in Panama, through which the DEVELOPER can stop making monthly payments for a time, but the debt and interest continue to accumulate.
- By October 2020, five home buyers lost their jobs due to the pandemic economic crisis and officially stated that they could not buy. By November 2020 there were no longer any buyers for the houses, due to the crisis. Despite this, the BANK renews the credit line, this time the interest rises to 8%
- On February 2021, the DEVELOPER with a lot of effort, has the 8 houses with a 95% of advance, he is paying guards and private security so that criminals do not rob the houses, he has very little liquidity to even think about continuing with the next stages of the project, he has no buyers or prospects of having them. It is already in the third month since the year in which the first disbursement had to be paid was exceeded, each month that passes interest is added to the debt.

- Within a month the situation will cross the line in which, even if it sells the 8 houses, this will only serve to pay the BANK and the DEVELOPER will close with losses. The BANK has not shown any intention to forgive or reduce interest. You have only postponed payments, but interest is still accruing.

Application to the hypothetical case of Panama of the criteria of the Spanish judgment STS 2823/2014 (PROMEDIOS)

If we apply to our hypothetical case the criteria of the ruling of the PROMEDIOS case of the Supreme Court of Spain, I believe the DEVELOPER could request the modification of the loan contract that it has with the BANK, applying the REBUS SIC STANTIBUS clause.

FITCH RATING has said that for 2020, Panama had a contraction of the Gross Domestic Product (GDP) of 17.7% as a result of the pandemic, which is the fourth worst of the countries valued by said risk rating agency. According to the Inter-American Development Bank (IDB), the drop in GDP in Panama was the worst in Latin America, in relation to the intensity of the confinement. There it is, then, the economic cataclysm



equivalent (or even worse) than the economic crisis of 2008.

Is still left to verify the direct impact of the crisis on the business reality of the Loan Contract: When the contract was negotiated, the commercial bases and premises understood by both parties, were designed in a specific situation of the real estate market that was already affected in Panama, but that it had a reasonable perspective in the market sector to which the DEVELOPER was targeting, proof of this is that it already had the 8 buyers for the first stage of the project on November 2019.

Based on that circumstance and considering the progress of the work, in November 2019 it was impossible for the DEVELOPER to contemplate the total debacle that came later, as a result of the pandemic. It would be unfair for only the DEVELOPER to bear the consequences of the risk. No one could foresee in November 2019 that the eight home buyers would be left without credit capacity and that it would not be possible to get any additional buyers, nor was it expected that the construction industry would be paralyzed for so long. So far we have already proven the assumptions of *"extraordinary alteration"* and *"radically unpredictable circumstances"*

Let us now look at the occurrence of *"exorbitant disproportion"* or *"excessive burdensomeness"*. As we have seen, this occurs when the financial balance between the parties is altered, because the alteration or change of circumstances produced by the pandemic crisis produces a break in the



commutativity of the contract, in such a way that compliance becomes excessively burdensome for the affected part.

In our opinion, *"the excessive onerousness"* would be clearly demonstrated by the fact that, at the time the loan was agreed, it was expected that THE BANK would earn interest and that the DEVELOPER would have profits after investing, selling and discounting all its expenses, including bank interest.

However, through no fault of the DEVELOPER, the economic earthquake produced by COVID 19 has caused for sales to fall, that most of the expenses have been incurred, that the loan payment has a significant delay and that the interests are adding themselves, leading the issue that everything will be loss, starting next month. It is not fair for the BANK to earn interest under the same conditions, as if nothing had happened and for the DEVELOPER to bear all the consequences of such a transcendental and unpredictable risk.



SECTOR PRODUCTIVO

Construcción, otra víctima de la pandemia

Los inversionistas esperan que no vuelva a ocurrir otra paralización y que se establezca la industria de la construcción, sobre todo en temporada seca, que se aprovecha para desarrollar proyectos.

Wilfredo Jordán S.

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TEMAS: [Capac \(Cámara Panameña de la Construcción\)](#) / [economía](#) / [coronavirus](#)

Application to the hypothetical case of Panama of the Civil Code of Panama

The previous reasoning, carried out regarding the application of the commented judgment of the Spanish Supreme Court to the hypothetical Panamanian case, are totally valid according to the Civil Code of Panama.

This is not always the case, but in this case it is. All the valuable analysis of the Spanish Supreme Court regarding good faith, equity, commutativity and other contractual principles are the same in the Civil Law of Panama. This is so because all the concepts and principles analyzed are also included in Panamanian Law. Take for example the following 3 rules:

(1) The commutativity of onerous contracts contained in article 1289 of the Civil Code of Spain is exactly the

same in the second paragraph of article 1140 of the Civil Code of Panama, which establishes: *"If the contract is onerous, the doubt will be resolved in favor of the greater reciprocity of interests"*.

(2) The contractual good faith that the Spanish Supreme Court extracts from article 1258 of the Spanish Civil Code, is drafted in exactly the same way in the first paragraph of article 1109 of the Civil Code of Panama, which establishes: *"Contracts are perfected by mere consent, and since then they oblige, not only compliance with what is expressly agreed, but also all the consequences that, according to their nature, are in accordance with good faith, use and the law."*

(3) The principle of conservation of contracts commented by the Spanish Supreme Court from article 1284 of the Spanish Civil Code, is collected with the same wording in article 1135 of the Civil Code of Panama, which establishes: *"If any clause of the contracts admits various senses, it must be understood in the most appropriate for it to take effect."*

Now, in the case of Panama, unlike Spain, the application to the hypothetical Panamanian case of the REBUS SIC STANTIBUS clause is even more categorical and direct, since Panama has an express rule in the Civil Code that Spain does not have and that perhaps they would do well to include.

Indeed, after being introduced by Law 18 of 1992, Article 1161-A of the Civil Code of Panama establishes:

"CHAPTER VI
ON THE TERMINATION OF
THE CONTRACT FOR
EXCESSIVE ONEROSITY

Article 1161-A. *In bilateral contracts of continuous or periodic execution or deferred execution, if the provision of one of the parties becomes excessively onerous due to extraordinary and unforeseeable events, the party that owes such provision may request the termination of the contract.*

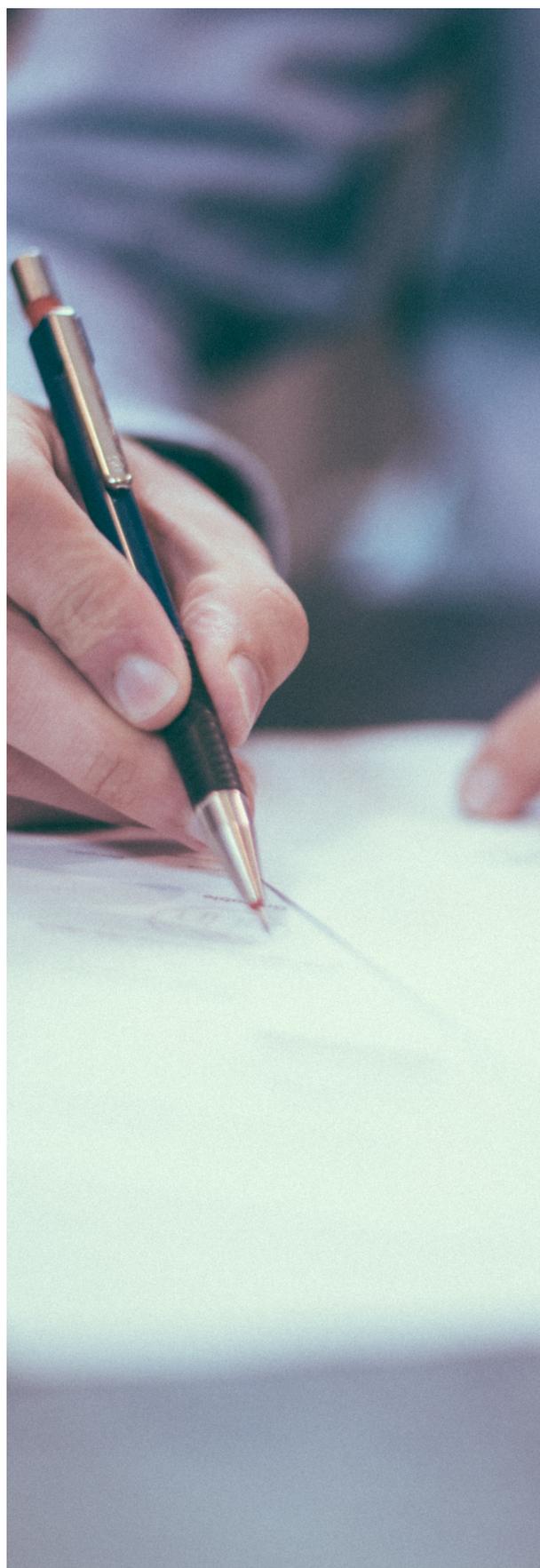
Termination may not be requested, if the supervening onerosity enters the normal area of the contract.

The party against whom the termination has been claimed may avoid it by offering to equitably modify the conditions of the contract."

In addition to its foundation on the rules of contractual principles such as good faith, the commutativity of onerous contracts and all those reasonings masterfully explained by the Supreme Court of Spain, in Panama article 1161-A of the Civil Code, strengthens the existence of the clause REBUS SIC STANTIBUS in our contractual system.

The aforementioned is applicable to the hypothetical case presented, since it is a bilateral contract, of continuous execution and on which, as has been exposed, there has been an alteration in its business base, producing an excessive onerosity for the DEVELOPER, originated in the extraordinary and unpredictable event of the pandemic, which is not within the normal area of

the contract. In such a case, in our opinion the modification is necessary.



Final Comments

The pandemic shook Panama's economy. The functioning of the economy is made up of a huge network of obligation relationships. In an important significant percentage, these obligations are sourced from contracts designed with a vision prior to the storm of the pandemic.

Before thinking about business reorganizations or parallel to them, merchants, with the hopefully diligent support of the justice system, should also use the mechanisms that the Civil Code already has to find balances, make adjustments and adapt contracts to circumstances. One of these instruments is the REBUS SIC STANTIBUS clause that we already have in Panama and was invented precisely for situations like the current ones. It only remains to be applied in those cases that qualify.

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