The reinterpretation of the *rebus sic stantibus* clause by the
Spanish Supreme Court

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The Spanish Supreme Court has shown signs that it is thinking about making more flexible the application of the legal concept of the *rebus sic stantibus clause* (*rebus clause*) in order to adapt it to the situation of economic crisis. It is a change which will take time, like any case-law evolution, but it has already begun to take its initial steps and has sufficient acceptance among the legal community. One of the reasons for undertaking it which is also shown by the reasoning of the Court is to bring the *rebus clause* closer to the trends which are being followed by comparative law in similar concepts, such as that of hardship. So, there is every sign that this evolution is going to occur and become consolidated with time.

The *rebus clause* is the remedy specifically envisaged in Spanish law to reestablish the contractual balance when this has been broken as a result of an unforeseeable supervening alteration, making the obligation of one of the parties excessively onerous. The application of this clause by the Courts has been extremely restrictive, they have always emphasized its exceptional nature and have adopted it in very limited cases. In principle it can only be applied to restore the balance of the obligations of contracts of an ongoing nature, but not to terminate them, and at all times under the following main conditions:

a) An extraordinary alteration of the circumstances at the time of performance of the contract compared with those existing at the time it was entered into. They must be supervening circumstances, which occur after the establishment of the obligation and before it is performed.

b) That completely unforeseeable circumstances arise. It is not assessed whether the parties had foreseen them, but rather whether they could foresee them, and they must be extraordinary circumstances.

c) Those circumstances must cause an exorbitant disproportion, of such intensity as to make the obligation excessively onerous, causing an abnormal alteration which destroys the contractual balance.

d) That the supervening risk or circumstance has not been accepted by the parties or is not inherent in the nature of the contract chosen by the parties.

e) That there are no other means to remedy the harm.

The strict application of these conditions has led to the *rebus clause* being a concept which is almost impossible to apply. Thus, the softening of these criteria may involve a major change in the resolution of contractual disputes.

The Supreme Court has pointed out some new features in its line of case law regarding the *rebus clause* in its judgment of January 17, 2013, resolving a claim for performance of a contract of sale of real estate, which the defendant purchaser
opposed alleging the impossibility of obtaining finance to pay the portion of the price which had been deferred, due to the severe financial crisis. Although it did not ultimately accept the termination of the contract which the purchaser had sought, for evidentiary reasons and because the contract was entered into in 2008 when the crisis had already commenced, the Court made a series of comments which open a window to a more flexible application of the *rebus clause* to other cases.

The principal new feature of the judgment is the recognition, unheard of up to now in the case law of the Supreme Court, of the possibility of applying the *rebus clause* in cases in which it is impossible for purchasers of real estate to obtain finance. The judgment points out that an economic recession like the current one, with profound and prolonged effects, can be classified, if the contract had been entered into before the external manifestation of the crisis, as an extraordinary change of circumstances, capable of giving rise, together with other factors, to an exorbitant disproportion between the parties’ obligations. It also refers to the inclusion of the concept of the *rebus* clause in international legislative projects (Unidroit principles) and in those of the European Union (Principles of European Contract Law), in a sign of a trend towards converging to the same criteria. However, the Court also makes clear that the application of the *rebus clause* cannot be based only on the fact of the crisis, but rather it will also require an assessment of all the other specific circumstances of the case.

Another Supreme Court judgment, of January 18, 2013, also included certain similar comments on this issue; and a third judgment, of April 26, 2013, accepted the termination of a sale also in a case in which it was impossible to obtain finance, although based on the “basis of the bargain” principle.

The opinion of the legal community is that by making these comments the Supreme Court is opening a path to a more flexible application of the *rebus clause*, which it will treat with great caution, but it may be envisaged that in a few years it will allow a more effective remedy to be available to resolve this type of disputes.