

“Rebus Sic Stantibus in the Age of Uncertainty”

Since 2008, Puerto Rico has undergone significant extraordinary events, such as the “Great Recession”, recurring destructive hurricanes, earthquakes and a world-wide pandemic with no clear end in sight. These events have taken a major toll on the daily economic life of individuals and businesses. As cash flow continues to dwindle, contractual obligations begin to strain, pushing borrowers towards to default loans and consequently, request their modification under the doctrine *rebus sic stantibus*.

In Puerto Rico, there are two applicable contractual doctrines at opposite ends of the spectrum regarding perfected agreements. On the one hand, we have *pacta sunt servanda*, codified in Article 1210 of the Puerto Rico Civil Code¹, establishing that once consent is given, the parties are obliged to comply with the dispositions expressly agreed and any other consequence imposed by the principles of good faith, use, and law. On the other hand, we find *rebus sic stantibus*, conjured in extreme instances when mitigating circumstances are so extraordinary that a Court of Law, and only a Court of Law, may modify the terms or even resolve it altogether. While *pacta sunt servanda* operates somewhat automatically, the application of *rebus sic stantibus* is extraordinary, only to be used on the most extreme circumstances after strict judicial scrutiny.

Rebus sic stantibus is the go-to doctrine used by courts when a party requests the revision of a contract.² The doctrine originated in Rome during the middle ages and arises from various principles of contract theory, such as good faith, abuse of rights, and contractual fairness.³ It is considered an implicit clause in any successive track contract and serves to temper the inflexibility and severity of the *pacta sunt servanda* principle in cases where serious, unforeseen, and unpredictable events have occurred that make compliance of the contractual obligations extremely onerous.⁴ The doctrine allows Courts to intervene and modify obligations to prevent any injustice that compliance of the stipulated may cause conditions under specific circumstances.⁵ The possible remedies the Court may afford under *rebus sic stantibus* are the temporary suspension of the effects of the contract, resolution or termination of contract; revision of prices, suspension or moratorium, and/or any other remedy that the court may provide under.⁶

The doctrine was incorporated into our legal system by the PR Supreme Court by in the case *Casera v. ELA*⁷. The Court established seven conditions and requirements (the “Casera Factors”) that must be met in order to grant a contract revision under this legal norm, which are: (1) unforeseeable circumstance arises; (2) as a result thereof, an extraordinary difficulty or aggravation of the conditions surrounding the concession makes it significantly more costly for the debtor to comply with his obligation; (3) the contract is not random in nature and is not based on future unknown events; (4) absence of contractual fraud; (5) the contract is of successive tract or related to a future fulfillment, with a determined duration; (6) the unforeseeable circumstance shows signs of permanence; and (7) the interested party moves the court for relief. In this case, the Court refused to apply the doctrine, arguing that a fruit distribution company should be able to foresee future production shortages.

¹ Cód. Civ. PR art. 1210, 31 L.P.R.A. §3375

² Nicolemarie Peña Cartagena, *Análisis de la doctrina Rebus Sic Stantibus a la luz de las decisiones de los tribunales y la modificación de los contratos en los ciclos económicos*, 88 Rev. Jur. U.P.R. 540, 13 (2019).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Casera v. ELA*, 108 D.P.R. 850 (1979)

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Decades later, in 2008, the P.R. Supreme Court revisited the doctrine in the seminal case of Banco Popular de PR v. Sucesión Talavera⁸ to resolve if a 25 year lease with an option to purchase at a fixed price should be modified due to a disproportional change in property value subsequently. Although as a general rule, inflation over time is a predictable economic condition, the P.R. Supreme Court ruled that in some circumstances, inflation could create an unpredictable situation that could make a contract excessively onerous. This case **was not** directly resolved under the *rebus sic stantibus*, but under principles of equity and good faith. Nevertheless, the PR Supreme Court stated that it should not restrict itself by the seven Casera Factors. This expansive interpretation of *rebus sic stantibus* did not last very long, and the P.R. Supreme Court has since narrowed its application. In 2014, the P.R. Supreme Court held in Oriental Bank & Trust v. Perapi, S.E.⁹, that a predictable economic crisis could never serve as basis for the modification or extinction of contractual obligations.

Recent cases in the U.S. Court for the District of Puerto Rico have also followed this narrow approach. For instance, in Jackie's' Rest., LLC v. Plaza Carolina Mall, L.P.¹⁰ the US District Court for the District of Puerto Rico refused to terminate a commercial lease under *rebus sic stantibus* after the passing of Hurricane Maria, stating that the doctrine applies as an exceptional remedy under extraordinary circumstances. The Court determined that the material facts it did not pass the first of the seven Casera Factors, holding that a hurricane, by itself, is not an unforeseeable circumstance for purposes of applying *rebus sic stantibus*.

The doctrine also made its way into the U.S. Bankruptcy Court for the District of Puerto Rico. In In re Chase Monarch Int'l Inc¹¹, the debtor raised sought *rebus sic stantibus* relief to revive an expired/defaulted lease. The Court declined and the US District Court for the District of Puerto Rico affirmed.

Accordingly, we can reasonably state that Puerto Rico Courts and Federal Courts have remained steadfast in their sparse application of the *rebus sic stantibus* doctrine. Food shortages, economic collapse and hurricanes have not been able to sway Courts to apply the doctrine, disqualifying these kind of events as “extraordinary circumstances”. In the age of COVID-19, however, our entire global economy has been upended by a pernicious natural phenomenon, the likes of which the world has not seen since 1918 with the Spanish Flu. “COVID-19 has become a ‘global pandemic and has been termed a global health emergency by the [World Health Organization].” (citations omitted).¹² Despite the unforeseeable and extraordinary circumstances that a global pandemic represents, how the Courts will apply the rebus sis stantibus doctrine remains to be seen.

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⁸ Banco Popular de PR v. Sucesión Talavera, 174 D.P.R. 686 (2008).

⁹ Oriental Bank & Trust v. Perapi, S.E., 192 D.P.R. 7 (2014).

¹⁰ Jackie's' Rest., LLC v. Plaza Carolina Mall, L.P., 2020 U.S. Dist. LEXIS 100676 (D.P.R. 2020).

¹¹ In re Chase Monarch Int'l Inc., 581 B.R. 715 (Bankr. D.P.R. 2018), reconsideration denied, 2018 Bankr. LEXIS 1712 (Bankr. D.P.R. 2018), aff'd 2020 U.S. Dist. LEXIS 63614 (D.P.R. 2020).

¹² United States v. Harris, 451 F. Supp. 3d 64, 66 (D.D.C. 2020).

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