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THE COVID-19 PANDEMIC – POSSIBLE CASE OF HARDSHIP IN CONTRACTS

In the economic environment there is great, destabilizing panic. Only natural, when the stock exchange mind-blowingly fluctuates, the offices move into homes, the imports and exports become complicated equations, the restaurants and hotels are empty, not to mention the planes and so on.

In this context, solutions are sought to reduce losses. One of the options that could become applicable – a concrete analysis, from case to case, being necessary–, is the institution of hardship, regulated by art. 1271 of the Civil code, whose purpose is precisely to restore the balance in contracts manifestly and unfairly unbalanced by the unpredictable change (at the time of the conclusion of the contract) of the economical context. In other words, you failed to predict what the future holds for you when you entered the contract? If it's not your fault, the contract can be sweetened, recalibrated.

The principle – the contract is the law of the parties, you reap what you sow

In matters relating to contracts, the parties are free to conclude any deal, as long as it is not against the mandatory provisions of the law, the moral and the public order, and the court cannot intervene in the contract to modify the will of the parties that was validly expressed, except for rare situations, expressly provided by law. Once obliged, the parties are required to perform their obligations, even if their execution becomes more onerous, more burdensome, either by increasing the costs of execution or by decreasing the value of the consideration.

And yet...

If during the execution of the contract, validly concluded and balanced at the time of its conclusion, exceptional changes of circumstances occur, as a result of which the execution of the debtor's obligation becomes excessively burdensome, changes that make the execution of the obligation manifestly unfair, the court may order, under certain conditions expressly provided by law, the adjustment of the contract in order to fairly share out the losses and benefits arising from the change of circumstances, or even the termination of the contract, at the time and under the conditions established by the court.

The conditions of hardship



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From the analysis of the legal provisions in the matter, it comes that the court may intervene in the contract, based on art. 1271 of the Civil code, modifying the will of the parties at the moment of contracting, only if the following conditions are cumulatively met:

1. Exceptional changes of the existing circumstances at the moment of the conclusion of the contract occur, as a result of which the execution of the debtor's performance becomes excessively burdensome, changes which make it manifestly unfair to oblige him to perform the obligation.

The legislator does not define the notion of „exceptional changes of circumstances” – triggering of the legal mechanisms related to hardship, which would allow the revision of the contracts. The doctrine considers that any exceptional change of circumstances can trigger the application of the rules in the matter of hardship, if it has a direct impact on the contractual balance.

Based on these criteria, the doctrine establishes that the following can represent the premise of hardship, for example: monetary fluctuations, various forms of legal intervention that generate the increase of costs of executing a benefit, radical change in economic conditions, certain exceptional events or situations that lead to supply difficulties, decrease of purchasing power, overgrowth of prices, as well as wars, crises, revolutions etc.

It is essential for the change of circumstances to be exterior to the will of the parties and not due to the potential poor management of funds or the financial difficulties of the debtor. The analysis of the exceptional character is carried out concretely, from case to case, including by reference to the economic framework existing at the date of the conclusion of the contract.

It is also necessary for the change of circumstances to make the execution of the contract excessively burdensome for one of the parties, being manifestly unfair to oblige the debtor to the execution. We stress that the hardship domain is not represented by the obligations that have become impossible to execute (in which case the incidence of force majeure could be analyzed), but by those where the execution is still possible, but it became much more onerous, excessively onerous, due to the exceptional change of circumstances, compared to the moment when the parties contracted and it would, therefore, be manifestly unfair to oblige the debtor to execute.



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2. The change of circumstances occurred after the conclusion of the contract.

3. The change of circumstances and the extent of the change were not and could not be reasonably foreseen by the debtor at the time of the conclusion of the contract.

The court can intervene in the contract on the basis of art. 1271 of the Civil code only if the change of circumstances and its extent were not and could not be reasonably foreseen by the debtor at the time of the conclusion of the contract. The analysis of the forecasting capacity of the parties is performed in the abstract, taking as standard an average man, who has average intelligence and diligence, who could not reasonably foresee the change. In other words, it is judged *in abstracto*, if a man of average intelligence and diligence had anticipated, at the time of the conclusion of the contract, the change of the respective circumstances and its size. For this reason, only the circumstances that exceed the economic forecasts made by professional analysts can be a prerequisite for the forecast, existing at the moment of the conclusion of the contract. Because of these forecasts, the change within the predicted limits is no longer unpredictable.

In this regard, the Constitutional Court shows, by decision no. 623/2016, the fact that any contract „implies an inherent risk voluntarily assumed by both parties of the contract, based on the autonomy of will, principle that characterizes the matter of contracts, and an added one which could not be foreseen *in concreto* by any of the two parties of the contract, risk that goes beyond the foreseeability of the contracting parties and which involves the intervention of elements that could not be considered at the a quo moment”, indicating that hardship can only refer to the added risk. Through the same decision, the Court shows the fact that “the assessment of the intervention of this risk must be looked at and carried out as a whole, by analyzing at least the capacity and the economic / legal training of the contracting parties [professional / consumer dichotomy], the value of the benefits established by the contract, the risk already materialized and borne during the contract performance [...], as well as the new economic conditions that distort both the will of the parties and the social utility of the contract”.

4. The debtor did not assume the risk of the change of circumstances and could not reasonably be considered to have assumed this risk.



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Hardship cannot be applied if the debtor has expressly assumed the production of the risk or if, by interpretation, the judge concludes from the terms of the contract that the debtor understood to assume the consequences of such an event.

5. The debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and fair adjustment of the contract.

Prior condition or procedure, it is certain that, before the court is notified, the debtor must try, within a reasonable time and in good faith, to negotiate the reasonable and fair adjustment of the contract.

This is only natural since communication, discussions, negotiations are the ways to go when it comes to resolving conflict situations, especially in the economic environment, where many relations are long-term and involve a higher level of trust and empathy between contractors. Often the one you do business with is not a stranger, but the business partner, and the problem involved affects both sides of the contract, not only the debtor of the obligation that has become too burdensome. Their economic difficulties can, over time, affect the seemingly privileged partner, who will not gain profit from the potential economic ruin of his business partner.

Effects of hardship

The mechanism of the judicial review of the contract for unpredictability aims to re-balance the contract. The law provides, in a limited way, the possibilities of the court if the conditions of the hardship are fulfilled. The court may order the contract to be adjusted, in order to fairly share out the losses and benefits that result from the change of circumstances, or even terminated, at the time and under the conditions it establishes.

** This material presents the general legal framework in the matter of hardship, without claims of exhaustiveness on the subject. The ideas presented are strictly informative and do not eliminate the need to analyze the legal provisions set out, nor the legal advice offered by a lawyer, being no substitute for them in a specific case.*