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Maria DUMITRU[1]

Abstract

The present article proposes a brief analysis of hardship given the amendments brought by Law no. 52/2020 to article 4 from Law no. 77/2016, taking into account the considerations of the Constitutional Court pointed out in two relevant decisions in this matter: Decision no. 623 of October 25, 2016 and Decision no. 731 of November 6, 2019. In the legislative context created by Law no. 77/2016 and made explicit by the Constitutional Court, the institution of hardship provoked numerous debates and dilemmas, especially the ones of a practical nature, which do not seem to be eradicated by the amendments brought by Law no. 52/2020, but on the contrary. The answer to the question whether by amending art. 4, two special cases of hardship were consecrated or two absolute presumptions were established, is the key to the interpretation and application of Law no. 77/2006 and even to the verification of its concordance with the constitutional provisions.The difficulty of identifying the unique answer urges a careful and prudent reading of the text of the law, in order to avoid possible hasty and possibly erroneous conclusions.

Keywords:

Hardship; giving in payment; absolute presumptions; cases of hardship; the active role of the judge; good faith; equity; contractual balance; proportionality; binding force of the contract.

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1. The issue of hardship has received a lot of attention lately from the actors of the legal scene: litigants and legal professionals and even more. And we write [1], again, about hardship; this time, in the context created by the adoption of the Law no. 52/2020 for amending and supplementing the Law no. 77/2016 on the giving in payment of immovable assets to discharge obligations undertaken by credit (further *Law no. 52/2020*) [2].

In the form resulting from the changes that have taken place, the Law no. 77/2016 [3] is very tender in terms of the possibility of interpretation and it will create major difficulties for the courts in its application. Nor should it be neglected that it provides fertile ground for invoking exceptions of unconstitutionality. In fact, the draft law, that was the basis of the current form of Law no. 52/2020, was the subject of a verification before the court of constitutional contentious, on which occasion Decision no. 731 of November 6, 2019 [4] was pronounced (further *Decision no. 731/2019*). Despite this aspect, the provisions of Law no. 52/2020, especially those aimed to amend Article 4 and Article 8 of Law no. 77/2016, have a content that makes you think of the Constitutional Court.

The form in which Law no. 52/2020 came into force- somehow different from the one that „failed" the constitutionality test- does not seem to put a stop to controversies but, on the contrary, increases them.There are considerations that recommend a careful and prudent reading of the text of Law no. 52/2020 and Law no. 77/2016, in order to protect legal professionals, regardless of the area in which they work, from any superficial conclusions, possibly erroneous.

2. Aspects regarding the application in time of the provisions of article 4, in its new form, in the existing trials pending before the courts, but also aspects regarding the new notifications formulated by the debtors, based on the current form of Law no. 77/2016, will be the object of another research, especially in the context in which, in the absence of transitional norms in the Law no. 52/2020, we suspect that it could be investigated, in the not too distant future, by the Constitutional Court. Let's not forget that the application in time of Law no. 77/2016, in the initial version, was a matter of great sensitivity, which generated a problem of constitutionality, removed by the Constitutional Court through Decision no. 623 of October 25, 2016 [5] (further *Decision no. 623/2016*).

3. Prior to 2011, in Romania, there was no institution of **hardship**. One could speak, at most, of a theory of hardship sporadically embraced by practice, the courts constantly showing reluctance to change the architecture of the contract.

The constitutional judge had, however, another opinion in the Decision no. 623/2016, stating that: „under the rule of the Civil Code of 1864, both doctrine and practice recognized the possibility of applying the theory of hardship if an exceptional event, outside the will of the parties, which could not reasonably have been foreseen by them at the time of the conclusion of the contract, would make it excessively onerous to perform the debtor's obligation" and pointed out, in recital no. 95, that „even if it was not consecrated *in terminis*, it was justified by the elements of good faith and fairness which characterize the performance of contracts". The same point of view is expressed in Decision no. 62/2017 of the Constitutional Court[6].

With the entry into force of the current Civil Code, the institution of hardship was regulated by the provisions of art. 1.271 of the Civil Code [7], a text that took over a large part of the conditions and effects recognized by the theory of hardship, transforming the theory of hardship into the institution of hardship.

Aspects with an impact on the institution of hardship were also legislated in April 2016, when Law no. 77/2016 was adopted, in the same year the Constitutional Court issuing „the rules of its interpretation and application"- Decision no. 623/2016. The Constitutional Judge states, in the considerations of this Decision, that, despite the fact that there is no reference to hardship in the Law no. 77/2016 (which is exactly), the intention of the legislator is to apply the institution of hardship, the conditions regarding this being „those found in jurisprudence and taken over largely in the current Civil Code, in an approximately identical form [art. 1.271]", according to recital no. 95.

Following the same political option of the legislator, Law no. 52/2020 was adopted which, with regard to hardship and to the limits of this Article, concerns the changes made in the body of Article 4, as follows:

In the content of par. (1) letter e) is introduced, in addition to the four already existing, as follows: „(1) In order to extinguish the claim arising from a credit agreement and its accessories by giving in payment, the following conditions must be met cumulatively: (...) e) the condition of hardship is met".

Furthermore, the new paragraph (1^1) of art. 4 comes to present two situations that could fall within the notion of hardship considered by Law no. 52/2020: „a) during the execution of the credit agreement, the exchange

rate applicable for the purchase of the credit currency, registers at the date of sending the giving in payment notification an increase of over 52.6% compared to the date of concluding the credit agreement. In order to calculate the percentage of 52.6%,the exchange rate published by the National Bank of Romania on the date of sending the giving in payment notification and the exchange rate published by the National Bank of Romania on the date of concluding the credit agreement shall be taken into account; b) during the execution of the credit agreement, the monthly payment obligation registers an increase of over 50% as a result of the increase of the variable interest rate".

The paragraph (1^3) of art. 4 further states that: „The presumptions provided in par. (1^1) have an absolute character. The creditor who files an appeal, according to art. 7, has the obligation to prove the omission of fulfilling the conditions of admissibility of the giving in payment notification, provided in par. (1) lit. a) to d)".

After that, article 4 is completed by par. (3) which establishes that: „Hardship is presumed in favor of the consumer, who formulates a notification under the conditions of art. 5 or art. 8 par. (5)" and by par. (4), according to which: „Balancing and continuing the credit agreement are a priority. The termination of the credit agreement may be ordered only in case of obvious impossibility of its continuation".

4. The inclusion of the condition enshrined in par. (1), lit. e)- the existence of hardship- shows the intention of the legislator to put in concordance the text of the Law no. 17/2016 with the Decision of the Constitutional Court no. 623/2016.

Paragraph (1^1) of art. 4 enshrines two situations that could fall within the notion of hardship, the legislator showing that they „represent hardship".

The main aspect of novelty is found in the first sentence of par. (1^3) which seems to convert the previously mentioned hardship situations into two absolute legal presumptions: „The presumptions provided in par. (1^1) have an absolute character".

The essential question- the answer to which is the key to the interpretation and application of the Law and even the verification of its concordance with the constitutional provisions- is the following: through the provisions of art. 4 par. (1^1) have two special legal cases of hardship been established or have two absolute presumptions of the existence of hardship been established or have two absolute presumptions of the existence of only some of the conditions of hardship been established? Does the judge have a role or a power of appraisal or not or, on the contrary, does only a simple

check-in, a simple verification operation as in a non-contentious procedure? All the conditions of hardship are presumed and the judge has no role anymore or, on the contrary, only one element is presumed, only the objective situation- the contractual imbalance- and not the other conditions too- such as the fact that the execution has become excessively onerous and that obliging the debtor to continue to perform his obligations would be unfair?

The legitimacy of our ambiguity is given by the fact that in two consecutive paragraphs, from the content of art. 4, the following expressions are used: „represent hardship (...)" and „presumptions (...) have an absolute character".

5. Apparently, any of the three options could be the right one.

The consecration of some legal cases of hardship can be sustained by recital no. 54 of Decision no. 731/2019, by which the court of constitutional contentious ruled on the constitutionality of the Draft Law no. 52/2020: „The Court notes that the legislator regulated four express cases of hardship, in the form of absolute legal presumptions".

One of the reasons for criticizing the Project was that art. 4 par. (1^1) establishes certain absolute presumptions of hardship, that in certain situations the institution of hardship would operate *ope legis*, the court having only the role of formally verifying the existence of the circumstances provided by the legal provisions previously indicated. All these would contravene Decision no. 623/2016, according to which the institution of hardshipis judicial and cannot be presumed *ope legis*, which means that the court must verify the other conditions of hardshiptoo.

The Constitutional Court removed this criticism and stated, in recital no. 53, that the legislator could consecrate cases/criteria of hardship. Since the court, in the particular cases in which it is invested, establishes the existence of hardship, *a fortiori* the legislator could consecrate special cases of hardship. Although the Constitutional Court has retained this competence of the legislator, to regulate cases/criteria of hardship, it does not specify anywhere about the possibility of the legislator to establish absolute presumptions of hardship too. In fact, in the doctrine, it was expressed, even before the promulgation of Law no. 52/2020, the point of view according to which the legislator is not allowed to establish absolute presumptions of hardship [8].

If we consider the current form of Law no. 77/2016 on the giving in payment, regarding the exchange rate differences that could occur during the execution of the contract, they, indeed, may be the basis for triggering a state of hardship. However, establishing that the performance of the contract has

become excessively onerous, the unfair nature of the debtor's obligation to continue to perform the contract and, finally, the legal qualification of the situation as hardship will be part of the judge's sole task.

6. In support of the consecration of absolute legal presumptions of hardship, we must take into account Law no. 77/2016, as amended.

At first sight, the provisions of art. 4 par. (1^3) suggests that the legislator excludes, from the court's scope of analysis, the fulfillment of the hardship condition when verifying, within the appeal filed by the creditor, the fulfillment of the admissibility conditions: „The creditor filing an appeal, according to art. 7, has the obligation to prove the omission of fulfilling the conditions of admissibility of the giving in payment notification, provided in par. (1) **lit. a) -d)**".

It is easy to point out that letter e) is not found in the content of this text of law and a first mechanical conclusion would be that letter e) was not taken into account given the fact that the institution of hardship is an *ope legis* one. This text of law can be corroborated with the presumed character of hardship, in favor of the consumer, established by par. (3) of art. 4: „hardship is presumed in favor of the consumer".

Therefore, it would be understood that the judge will not be able to analyze any condition specific to hardship, or precisely this aspect was clarified even by the Constitutional Court through Decision no. 623/2016, namely that the institution of hardship has a judicial character and cannot be presumed *ope legis*. As mentioned above, the role of the judge cannot have a simple formal character because, admitting this, it would certainly create a favorable ground for arbitrary attitudes on the part of debtors. So the court does not have to fulfill, as we posed the problem in the introductory part of this article, only a role of ticking the articles/positions from a list of conditions.

The mechanical interpretation according to which, through Law no. 52/2020, absolute presumptions of hardship are established, it could be an inadequate one given the fact that the institution of hardshiprepresents a legal effect that is triggered only after the fulfillment of some punctual conditions, found in art. 1.271 par. (3) of the Civil Code. It could therefore be considered inappropriate to state that hardship, which is not a mere factual situation, can be absolutely presumed, together with all its conditions.

Going on this line of interpretation, if we refer to the provisions of art. 4 par. (1^3) of Law no. 52/2020, it could be sustained that only one of the conditions of hardship is presumed, which the Constitutional Court called, in recital no. 96 of Decision no. 623/2016, as: „an exceptional and external

event that could not reasonably have been foreseen at the date of concluding the contract regarding its amplitude and effects, which makes excessively onerous the execution of the obligations provided by it". In other words, it is not presumed hardship, as such [9], but only the exceptional and external event that generates the contractual imbalance, a condition that was very difficult to prove in the judicial process.However, along with this condition, it will be need to be fulfilled the other conditions provided by art. 1.271 par. (2) and (3) of the Civil Code too, such as the excessive burden, the manifestly unfair nature of the debtor's obligation to continue to fulfill his obligations and good faithor, if we consider what the Constitutional Court stated in recital no. 100 of Decision no. 623/2016: the subjective condition– „good faith in the exercise of the contractual rights and obligations of the parties" and the mixed condition – „equity".

Moreover, an interpretation such as the one according to which hardship would be absolutely presumed is likely not to pass the test of proportionality, proportionality which, according to art. 53 of the Constitution, must exist between the measures adopted by the legislator and the purpose to be achieved through them and, consequently, to determine a violation of the creditor's property right. That is why the role of the judge remains extremely important, being necessary for the courts to perform this test of proportionality by still verifying the common law conditions of hardship, even with the current form of Law no. 77/2016, as the Constitutional Court did, as it results from the considerations of Decision no. 731/2019.

Therefore, the active role of the judge remains the essence of the civil trial, as required by art. 22 of the Code of Civil Procedure [7], he being the one who will analyze both the procedural conditions and especially the substantial ones. It is also necessary to be reminded that art. 22 of the Code of Civil Procedure provides, in par. (4), that the judge is the one who „gives or reestablishes the legal qualification of the acts and facts deduced to the court". These texts of law strengthen the idea of the Constitutional Court according to which the legislator could only regulate cases of hardship or provide criteria for individualizing such cases, which would prove to be useful landmarks in the judicial process, the task of legal qualification of a situation as hardship- a legal institution that involves an accumulation of conditions that must be proven- returning to the judge [4]. In this regard, recitals no. 50 and 51 of the Decision no. 731/2019 are eloquent.

Last but not least, we must not lose sight of the fact that hardship is a limitation of the principle of binding force of the contract [10], so it is an exceptional situation, which exceedsthe sphere of what is natural, or presumptions have in view precisely the common factual situations, in order

to consolidate a certain rule of conduct [11].

7. Although it would have been desirable that the amendments to Law no. 77/2016 to put an end or at least to amortize the unclear and debatable aspects of this matter, this conclusion could not receive, entirely, a truth value after reading art. 4 of Law no. 52/2020. The main reason resides in the failure of the legislator to reconcile the Law no. 52/2020 with the rulings made by the Constitutional Court regarding the judicial nature of hardship.It remains to be seen whether the courts will enhance their active role in the trials generated by the new form of Law no. 76/2016, making use of the old „user manual" issued by the Constitutional Court or using an improved one or they will apply the new form of Law no. 76/2016 *mot à mot*, resuming only to a purely formal role in the civil trial.

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