VOICU
FILIPESCU
Attorneys at Law

News in Laws - Monthly Legal Newsletter
August 2011

Cover article: "The Hardship in the New Civil Code"

by Cosmin Bajescu-Oarda, Associate

This month's cover article focuses on the matter of hardship in civil and commercial contracts, highly significant for the economic life. One of the innovations aimed to modernizing the juridical framework and introduced by the New Romanian Civil Code, which will come into effect on October 1, 2011, is that it expressly regulates the possibility to adapt any agreement following the occurrence of unpredictable events that change the conditions existent upon the execution of such.

Legislative Retrospective

Voicu & Filipescu is a full service law firm, covering all legal areas relevant to your company's activity. This issue of our monthly newsletter provides you with a brief description of some of the recent legal amendments in the following areas:

- Banking and Finance
- Capital Market
- Competition
- Debt Recovery
- Employment
- Insurance

VF News

- Careers: Voicu & Filipescu is currently looking for experienced business lawyers, as well as for young law school graduates, interested in joining our team.
- Visit www.vf.ro/insolvency, the website of V.F. Insolventa SPRL, our insolvency specialized company, for news on the activity of Voicu & Filipescu's insolvency practitioners.
- Voicu & Filipescu is recommended by some of the most important legal guides for its activity in the practice areas of interest to your company. Our lawyers' practice has received strong international recognition in renowned publications such as Chambers and Partners, Legal500, PLC Which lawyer? and IFLR1000.

copyright 2011 VOICU&FILIPESCU

THE HARDSHIP IN THE NEW CIVIL CODE

In this article, we will be approaching the issue of hardship in civil and commercial contracts, which has a high importance in the economic life. This issue is of great interest in the context of the coming into force of the New Civil Code[1] as of October 1st, which regulates hardship, for the first time expressly in the Romanian law.

The hardship consists in the possibility of adapting the obligations contained in an agreement following the occurrence of unpredictable events and which are independent from the will of the parties[2].

One may easily notice from the definition of the word "*hardship*" the impact which it may have on ongoing agreements, as well as on those to be concluded in the future, through their *amendment* or *termination* possibility.

Without going into details regarding the way the idea of hardship was perceived until now, we will be mentioning only that, in the past, without rejecting *de plano* such a possibility, the Romanian courts were reluctant to amend or terminate agreements on grounds of hardship, since there was no legislative text to establish such a possibility. Consequently, there aren't many decisions in respect of agreement reviewing on grounds of hardship. However, the doctrine and jurisprudence have established, starting from the articles of the code which instituted mechanisms of similar nature to the reviewing of agreements on ground of hardship[3], a practice which is now acknowledged and applied.

Art. 1271 of the New Civil Code provides that:

> *"(1) The parties must fulfill their obligations, even if their fulfillment has become more onerous.*
> *(2) However, the parties must negotiate the adaptation or termination of the agreement, if its performance becomes excessively onerous for one of the parties due to a change in circumstances:*
> *a) which occurred after the conclusion of the agreement;*
> *b) which could not have been reasonably taken into consideration at the conclusion of the agreement; and*
> *c) in relation to which the injured party has no obligation to bear the risk of its occurrence.*
> *(3) If, within a reasonable term, the parties fail to reach an agreement, the court may order:*
> *a) the adaptation of the agreement in order to reasonably allot between the parties the losses and benefits resulting from the change in circumstances;*
> *b) the termination of the agreement at the moment and under the terms it sets forth.*"

[1] We will be hereinafter generically calling the „*New Civil Code*", the Civil Code contained in Law no. 287/2009, republished in the Official Gazette no. 505 of 15.07.2011.

[2] In the commercial agreements, the parties usually include provisions similar to those provided by the New Civil Code. This clause is usually named „*hardship clause*"

[3] For instance, art. 1070 – amendment of criminal clause, art. 1021 and art. 1101 par. 2 – grace period, art. 836 – revocation of donation due to subsequent child birth, the calculation of damages in terms of contractual civil liability by taking into account only predictable damages – art. 1085.

 copyright 2011 VOICU&FILIPESCU

The quoted text presents, in the first paragraph, the general rule according to which the obligations must be fulfilled as they were assumed and, in the second and third paragraph, the exceptions to the rule (exceptions which constitutes in fact the establishment of hardship) are presented.

We will provide you next with a brief overview of the essential conditions for the enforcement of the provisions of Article 1271 of the New Civil Code (I), of its effects (II), as well as of the hardship enforcement procedure (III):

(I) The conditions for the enforcement of hardship

(1) Condition related to the existence of an "*excessively onerous obligations*"

In order to apply the hardship, the *occurrence of a serious disturbance of the contractual balance* is required. This naturally gives raise to a question: what is the criterion employed for ascertaining the excessiveness of an obligation, since Art. 1271 does not provide any answers in this respect? If we are to relate to the heretofore practice in terms of hardship, the following aspects, amongst others, may be taken into account: the doubling of the value of the obligations assumed by one party, its modification by a quarter and that, if it existed at the conclusion of the agreement, the party would have decided not to conclude the agreement.

In any case, as results from Article 1271 of the New Civil Code, the debtor's economic condition shall be assessed *in concreto*, by the court of law, based on its intimate conviction, taking into account the entire structure and development of the contractual.

(2) The condition related to the *moment* when the modification of the initial contractual conditions occurs

Although Article 1271 does not expressly specify this, it goes without saying that *the factor which determines the occurrence of hardship must be subsequent to the moment the agreement was concluded*. Otherwise, not the hardship but the nullity affects the validity of the agreement,.with specific and distinct effects.

We also mention that the modification of the initial agreement's conditions must not be conditional upon the parties' fault, because in such situation the issue of contractual civil liability of the party refusing to fulfill its obligation may come into play and not the hardship.

(3) The condition of the *unpredictability, at the conclusion of the agreement,* of the subsequent changes

It is normal for the obligation undertaken knowingly not to be covered by unpredictability, while it is assumed that its debtor has acknowledged the risks which it contemplated at the conclusion of the agreement. Thus, unpredictability, and thus

copyright 2011 VOICU&FILIPESCU

hardship, contemplates an event of which the parties are not aware, and which takes them by surprise.

(4) The condition of non-existence of a contractual or legal provision imposing to the debtor to incur the risk born by the obligation affected by hardship.

Since the agreement is the parties' law, there is a possibility for them to provide for within its content a method of sharing contractual risks resulting from the changing of the circumstances contemplated at the conclusion of the agreement. The unpredictability contemplates only unforeseeable aspects, or the assumption of certain risks constitutes in fact their provision, or indication.

(II) The effects of hardship

A highly significant aspect for the civil and commercial practice is related to the effects of hardship. Paragraph 3 of Article 1271 of the New Civil Code states them precisely: *the adaptation of the agreement* or *its termination*.

(1) Adaptation of the agreement
The adaptation of the agreement consists of a broad variety of actions by means of which the parties strive to restore the balance existing at the conclusion of the agreement: price reduction or its increase, the establishment of certain conditions designed to facilitate the fulfillment of the obligations, performance suspension etc.

(2) Termination of the agreement
Although the text of Article 1271 does not expressly provide such thing, we believe that the termination of the agreement must have a *subordinated* application, safeguarding the agreement beeing the first priority. By ordering the termination of an agreement, the court of law sets the time and conditions for such termination.

(III) Hardship enforcement procedure

From a procedural point of view, the New Civil Code provides for ***a two-stage mechanism***. In the first stage, the parties are required ***to negotiate*** the potential adaptation of the agreement or its termination if its performance becomes excessively onerous for one of the parties. The parties' requirement to cooperate is an expression of the modern theory of hardship, which gives priority to the safeguarding of the agreement by imposing the parties the obligation to discuss the potential amendment of the agreement, so as to continue to be valid.

If no understanding is reached by the parties, the second stage of the mechanism provided

copyright 2011 VOICU&FILIPESCU

under Article 1271 is initiated: ***the adaptation or termination of the agreement will be referred to the court***. Either party of the Agreement is free to pursue proceedings. Since for formulating such request the party's interest must be proven, it naturally means that only the party that is affected by the modification of the conditions may formulate such request, its' co-contractor having no interest in filining such claim[4].

The intervention of the Court has two reasons: in order to set the limits for the reviewing of the provisions or, more radically, for the purpose of terminating the agreement (termination on grounds of hardship).
The establishment of an obligation for the parties to renegotiate the agreement is questionable, as long as it is hard to believe that the party for which the performance has not become more onerous, will accept to lose a part of the benefits which it acquired by signing the agreement. Thus, it is expected for such cases to eventually be referred to a court for settlement.

In regard to the application of hardship, we must also mention that, since it is an exception to the principle of binding force of agreements, *the cases in which the provisions of Article 1271 of the New Civil Code are enforced are of strict application and interpretation*. Consequently, the legal provisions which regulate hardship may not be extended, by analogy, to other situations that those expressly contained in the New Civil Code.

In addition, the legal provisions regarding hardship are applied, as specified also in Article 1271, para. 2 of the New Civil Code, in the sense retained for that matter in the doctrine and jurisprudence, save as obligations resulting from agreements. We consider this mention to be useful because civil obligations may not only result from agreements, but also from unilateral legal deeds or legal or illegal deeds causing damages.

[4] As a matter of fact, if the party that is not harmed by the modification of the conditions wishes the amendment of the agreement on account of unpredictability, it only must agree with the renegotiation of the agreement.

copyright 2011 VOICU&FILIPESCU

banking - legislative retrospective

Statute of the Bank Deposit Guarantee Fund

The Order for the approval of the Statute of the Bank Deposit Guarantee Fund was published in the Official Gazette of Romania, Part I, no. 499, of July 13, 2011.

According to the Statute, the Fund is an independent and autonomous institution, whose activity is not subject to political influences or to the banking sector. The members of the Board of Directors of the Fund must not hold within any crediting institutions the position of employee or administrator, member of the board of directors, of the supervisory committee or of the directorate.

The Fund's objective is to guarantee deposits and pay compensations to the guaranteed depositors, contributing through its activity to the stability and credibility of the banking system. The Fund may also exercise other attributions, such as financing operations which involve the transfer of the guaranteed deposits, administering the special compensation fund or may function as an administrator or liquidator of credit institutions.

Information regarding electronic money institutions

The Regulations no.8/2011 issued by the National Bank of Romania regarding the electronic money institutions were published in the Official Gazette of Romania, Part I, no. 508 of July 18, 2011.

The regulations provide rules regarding the establishment of and conducting of activities by the electronic money institutions, as well as regarding their prudential supervision.

The requirements and the documentation for necessary authorization are provided within the regulations. The conditions regarding the performance of the crediting activity, the reporting requirements, as well as the notification procedure of NBR, are also specified.

copyright 2011 VOICU&FILIPESCU

capital market - legislative retrospective

Registering and deregistering securities within the records of the Romanian National Securities Commission

Order no. 43/2011 on the approval of Instruction no. 4/2011 regarding the registering and deregistering securities within the records of the Romanian National Securities Commission, was published in the Official Gazette of Romania, Part I, no. 506 of July 18, 2011.

According to the instruction, the following securities and financial instruments must be registered with the N.S.C:

(a) securities to be admitted to trading on a regulated market;
(b) securities traded within a multilateral trading facility;
(c) government securities to be admitted to trading on a regulated market;
(d) securities which are to be admitted to trading on a regulated market from another member state, however for which Romania is a state of origin;
(e) financial instruments which are to be admitted to trading on a regulated market within a multilateral trading facility;
(f) securities which were the subject of a prospectus for the public bid approved by R.N.S.C., however which are not the subject of a request for admittance to trading.

The securities are deregistered from R.N.S.C. in case of the issuing company deregistering from the Trade Registry Office or at the expiry of duration for which they were issued. The withdrawal of securities from trading on a regulated market or the withdrawal from trading within a multilateral trading system also leads to their deregistering from R.N.S.C.

The securities which are not transacted on the capital market shall be registered and kept in R.N.S.C.'s records for a period of 2 years, a term within which the issuing company's board of directors must convene EGMS in order to pass a judgment regarding the admittance to trading on the capital market.

Modifications regarding the semiannual accounting reporting system towards the Romanian National Securities Commission

Order no. 48/2011 on the approval of Instruction no. 5/2011 for the amendment and supplementation of Instruction no. 5/2006 on the semiannual accounting reporting system of entities authorized, regulated and supervised by the National Securities Commission, was published in the Official Gazette of Romania, Part I, no. 536, of July 29, 2011.

The instruction 5/2011 mentions which are the entities authorized, regulated and supervised by R.N.S.C. that must draft the semiannual accounting reports, namely the entities which apply the provisions of R.N.S.C.'s Order no. 13/2011: financial investment company; investment management companies; collective investment organizations; traders; investment consultants; Investor Compensation Fund;

 copyright 2011 VOICU&FILIPESCU

capital market - legislative retrospective

market/system operator; central depositories; clearing houses; central counterparties; other entities designated by R.N.S.C. by means of normative deeds.

In addition, the Instruction amends the Appendixes to Instruction no. 5/2006, namely the form of the accounting reports.

copyright 2011 VOICU&FILIPESCU

competition - legislative retrospective

Important Modifications brought to the Competition Law

Law no. 149/2011 on the approval of the Government Emergency Ordinance no. 75/2010 on the amendment and supplementation of the Competition Law no. 21/1996 was published in the Official Gazette no. 490 of July 11, 2011.

The new Law brings several significant changes and, in some cases, even contrary to the previous ones, consolidating the Competition Council institution in the national business environment by optimizing its intervention means when it receives signals from the market regarding potential anti-competitive practices. The modifications brought to the Competition Law also encourage and simplify the company procurement procedure.

THE MOST SIGNIFICANT MODIFICATIONS

(1) The companies that have a market share of over 40% on a relevant market shall be presumed, subject to proof to the contrary, as holding a dominant position
This modification suggests not only a 180 degrees turn of the Council's view on the proof of existence of a dominant position, but also violates the European Union's regulations. According to such regulations and to the previous form of the Competition Law, a market share of up to 40% is a presumption of non-existence of a dominant position, a market share exceeding such limit giving the Council the task to prove the existence of a dominant position. The new modification basically establishes a safety threshold which, once exceeded, it puts the company in charge of proving the non-existence of a dominant position.

(2) The value of the bail which the companies must pay in order to obtain the suspension of the enforcement of the decisions by means of which the Competition Council imposes fines, was reduced
The value of the bail paid by the companies is reduced from 30% from the challenged fine to maximum 20% (the new law enforces the provisions of the Fiscal Procedure Code, according to which the court sets a bail at a maximum value of 20% of the fine). Such reduction, together with the establishment of a material value by the court for each particular case allows for easier access to justice for the sanctioned companies which challenge the fines given by the Council and which wish to obtain the decision's suspension.

(3) The fee related to the authorization of economic concentrations was reduced
The payable fee in case of acquisitions subject to the control of the Competition Council is reduced from maximum € 100,000 (the companies used to pay 0.04% of its total turnover, maximum € 100.000) to a value between € 10,000 and € 25,000. Such reduction encourages the performance of acquisitions and simplifies the procedure by annulling turnover relevancy

 copyright 2011 VOICU&FILIPESCU

competition - legislative retrospective

within the fee computation procedure.

(4) The information obtained by the Competition Council within an investigation or dawn raid shall be used for the purposes of enforcing the competition laws

So far, this information could be used only for the purposes for which it was obtained. According to the new law, the information obtained by the Competition Law may be used "for the purposes of enforcing the competition laws", respectively the findings of an investigation may be used for the purposes of settling another investigation or dawn raid, for example, and the transfer of the information gathered by the Competition Law during the conducted investigations or dawn raids to other institutions or state authorities, shall also be possible. This provision also violates the European Union regulation which is identical to the previous form of the law, namely the use of information for the purposes for which it was obtained.

(5) The hearing system is modified
According to the previous laws, upon the drafting of the investigation reports, the hearing stage was initiated, which was followed by the application of sanctions according to the sanctioning decision. According to the latest modifications, upon the receipt of the investigation reports and at the same time with the submittal of the written observations, the companies may require the holding of hearings. The law has yet to provide under which circumstances such requests are to be approved or rejected by the Council.

(6) The reduction of the fine with a percentage between 10% and 30% for the undertakings which acknowledge, within the observations or hearings, the breaching of a law

Another novelty is the insertion of several provisions according to which if an undertaking expressly acknowledges the committing of an anti-competitive deed, and, if applicable, proposes remedies which lead to the removal of the deed, it shall be retained as a special mitigation factor under the form of collaboration and shall determine a reduction of the fine with a percentage between 10% and 30% (according to the previous laws, the maximum being 25%).

(7) An acquisition may be prohibited by the Government at the proposal of Supreme Council of National Defense (SCND) if it is a risk for national safety. The Competition Council must inform SCND in regard to such operations.

(8) The minimum and maximum fine thresholds for newly established undertakings, which did not record a turnover in the previous year, are reduced by half (the maximum fine may not exceed RON 2,5 million)

copyright 2011 VOICU&FILIPESCU

competition - legislative retrospective

OTHER MODIFICATIONS

(1) The Competition Council becomes competent for sanctioning acts of unfair competition provided under Law no. 11/1991, a competency which previously pertained to the Competition Office.

(2) The Advisory Board is established and shall issue non-binding opinions regarding the main aspects of the competition policy and appointment proposals for the members of the Competition Council Panel.

(3) Proceedings for remedying damages caused through an anti-competitive practice may be initiated by consumer protection associations for consumers and by trade associations by its members.

(4) The maximum prison sentence for natural persons who participate with fraudulent intent and determinably in the establishment, organization or application of the practices prohibited by Art. 5 of the Law, is reduced from 4 years to 3 years.

copyright 2011 VOICU&FILIPESCU

debt recovery - legislative retrospective

On June 24, 2011, Law no. 125/2011 on the approval of the Emergency Ordinance no. 121/2010 for the amendment and supplementation of the Emergency Ordinance no. 146/2002 on the formation and use of resources managed by the state treasury and for the amendment of Art. 52 of Law no. 500/2002 on public finances, came into force.

The novelty brought by this approval law refers to **the (unitary) regulation of the conditions regarding the assignment of debts owned by private entities and the results from service provision, work performance or product supply to public institutions.**

Firstly, according to the provisions added by the approval law, the assignment of debts owned against public institutions is valid only upon obtaining the prior approval of the debtor institution. The new legal provisions also regulate the methods and the terms under which the assigned debts are to be paid by the debtor institutions towards their assignee acquirers. Thus, upon the debt assignment becoming effective, and prior to the payment of the assignees, the public institution shall verify whether the assignor economic operator has due tax obligations. If, according to the tax clearance certificate, the economic operator has due and payable tax obligations, the public institution shall inform the assignor and the assignee in this respect, and shall give the assignor the opportunity to submit a proof of payment for such tax obligations within 10 business days (but no later than December 20th). Otherwise, the debtor public institution shall pay the value of the tax obligations in the treasury account of the assignor economic operator and only the difference in the assignee operator's account.

Consequently, according to the amendments of Law no. 125/2011, any person interested in acquiring debts owned against the state must take into consideration the fact that the collection of the acquired debt is conditional upon the attitude of its assignor in regard to the payment of the tax obligations. Such debt collection may be obtained by paying special attention to the clauses to be included in the debt assignment agreement and, especially, to the safeguarding and guaranteeing methods and to the obligations imposed to the assignor in relation to the payment of its obligations towards the state.

copyright 2011 VOICU&FILIPESCU

employment - legislative retrospective

New Framework Individual Labor Agreement

Order no. 1616/2011 on the amendment and supplementation of the framework individual labor agreement, provided in the appendix to the Order of the Ministry of Labor and Social Solidarity no. 64/2003, was published in the Official Gazette of Romania, no. 415, of June 14, 2011 ("**Order 1616**") and became effective on June 14, 2011.

The novelties provided in Order no. 1616, with a significant impact, from our point of view, on the labor market in Romania, include:

- As regards the employee's activity, the clause "Assessment criteria of the employee's professional activity" is inserted, and such criteria are to be defined in the agreement by the employer. In addition to this novelty, the right of the employer to set objectives for the individual performance of the employee is expressly provided.

- As regards salary, two components of the salary, namely: "additional services in cash" and "method of additional services in kind" are to be distinctively highlighted in the individual labor agreement.

- As regards the employer's obligations, its obligation to provide the employee with a copy of the individual labor agreement, prior to commencing work, is set forth. In addition, if required, the employer must issue a document confirming the employee function of the petitioner, its activity, the duration of the activity, the salary, length in service, on the job and specialty respectively.

- In relation to the employee's right to training, the new Order eliminates the compulsoriness of drafting addenda in order to indicate the exercise of such right. Also in regard to addenda, an exception from the compulsoriness of their drafting is instituted due to the amendment of the contractual clauses. Therefore, if the amendment is expressly provided by the law, the obligation to draft an addendum in relation to such amendment does no longer exist.

Significant Fines for Employers which Dismiss Female Employees in Childcare Leave

Law no. 132/2011 on the approval of the Government's Emergency Ordinance no. 111/2010 on the leave and monthly allowance for childcare was published in the Official Gazette of Romania, no. 452 of June 28, 2011.

- A legislative amendment brought to the Government's Emergency Ordinance no. 111/2010 having an impact over the employer is the differentiation of penalties provided in the previous

copyright 2011 VOICU&FILIPESCU

employment - legislative retrospective

regulation. Thus, if the employer fails to fulfill its obligation to approve childcare leave and monthly allowance, as well as unpaid leave for which the female employee opted, it is subject to a fine of 10,000 Lei.

- As regards work relationships, the employer is prohibited to order the termination of work or service relationships in the case of:

  (i) A male/female employee who has taken a childcare leave for a child under one year old or under 2 years old, 3 years old respectively, in case of a disabled child;

  (ii) A male/female employee receiving payment of the child rearing incentive provided by the law.

The expansion of this interdiction is possible, once, with up to 6 months upon the final return of the male/female employee in the unit. And, in this case also, failure to comply with these provisions is sanctioned with a 10,000 Lei fine.

copyright 2011 VOICU&FILIPESCU

VOICU
FILIPESCU
Attorneys at Law

News in Laws - Monthly Legal Newsletter
August 2011

insurance - legislative retrospective

Modifications regarding the Organization of the Activity of Insurers

Order no. 12/2011 on the amendment and supplementation of the Norms regarding the organization principles of an internal control and risk management system, as well as the organization and performance of the internal audit activity in the case of insurers/reinsurers, approved by the Order of the president of the Insurance Supervisory Commission no. 18/2009, was published in the Official Gazette of Romania, Part I, no. 506 of July 18, 2011.

According to the new regulation, certain activities may be outsourced only upon obtaining the prior approval of the Insurance Supervisory Commission. However, the insurer/reinsurer must always have an alternative competencies system which allows for the resumption of direct control over the outsourced activity.

In addition to the activities related to internal audit, accounting, current legal activity and investments in regard to the placement and management of assets admitted for covering the gross technical reserves, according to the new order, neither the database management, nor the activity of ascertaining and liquidating damages for the compulsory civil liability insurance for damages caused by car accidents - RCA, on the territory of Romania, may be outsourced.

The order brings also modifications in regard to the reporting obligation related to the reinsurance program. Thus, insurers must draft on an annual basis a report on the reinsurance program used for assigned risks, which is to be sent to the Insurance Supervisory Commission within 120 days as of the conclusion of the financial year. The report must contain information regarding the strategy of the reinsurance strategy, the selection criteria of reinsurers, the operation market and the applicable jurisdiction.

For more information about the above, please contact:

Daniel Voicu: daniel.voicu@vf.ro
Mugur Filipescu: mugur.filipescu@vf.ro

26-28 Stirbei Voda Street
Union International Center II
5th floor, 010113 Bucharest
ROMANIA
Tel: +40 21 314 0200
Fax: +40 21 314 0290
www.vf.ro