CHAPTER 45

Supervening impossibility of provision in times of pandemic

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ABSTRACT
The present study aims at the doctrinal survey of the situations in which the theory of supervening impossibility of provision was invoked considering the global pandemic scenario by COVID-19. To this end, we seek to differentiate the proposed theses to address the situations in which the provision suffered an unpredictable obstacle due to the mandatory social distancing, with the limitation of several activities, causing a considerable crisis in contractual relations.

Keywords: Supervening impossibility of Obligation, Excessive Onerosity, Fortuitous Event or Force Majeure, Frustration of the contract purposes.

1 INTRODUCTION

The theme of supervenient impossibility of provision became even more vivid andcontroversial after the occurrence of the global pandemic caused by COVID-19. Thus, situations that were absolutely unexpected and without judicial precedent became a common subject in the legal community and its confrontation of the matter in the Brazilian courts proved to be completely heterogeneous, with diverse judicial solutions and little technical grounding.

Our legal system lacks convincing solutions to accommodate long-lasting contractual relations in the case of supervening circumstances that may affect the basis on which the obligatory relationship between the parties was built.

2 LIMITS OF THE BINDING OF THE PARTIES TO THE OBLIGATIONS ASSUMED

In order to contextualize the theme, it is necessary to approach the concept of obligations and their evolution, especially to verify the elasticity of the pacts assumed between the parties according to the specificities of the historical, social, and legal conjuncture at the time of their conclusion - so that we can identify what are the possiblejustifications to adapt the fulfillment of the obligation assumed, considering the impacts of external and unpredictable situations.

According to most of the doctrine, from the classic concept of obligation three constitutive elements are extracted: subjects, object and bond. However, the interpretationof the term "obligation" goes beyond the mere verification of its three constitutive elements, as it characterizes a relationship as a whole, so that it becomes necessary to verify the existence of a bond between the parties that takes into account its essential cause from which the desire of the parties to contract was born, as well as its specific object and purpose.

In the words of Couto e Silva, "*the obligation is a process (...). It would not be possible to define the obligation as a dynamic being if there were no separation between the level of birth and development and the level of fulfillment" . It* is exactly when one considers the complexity of the obligatory relationships, from its forming source until its conclusion, that currently it becomes relevant its compression within a legal system as awhole - which has important ponderation and safeguard to the basic legal principles, suchas good faith, loyalty, cooperation, social function, human dignity, among others.

As Adriano Ferriani *has* well observed, "*in current times, the existential dimension of the human being has been acquiring more and more relevance, in consideration of the dignity of the human being (article 1, III, of the Federal Constitution). Such conception interferes directly in private relationships, and it is no longer possible to state, peremptorily, that the creditor has a power against the debtor, as it used to be said. The bipolarity and antagonism of interests give way to thecooperation that should guide any bond relationship*" . [3]

It continues:

> Under the economic aspect, an obligation continues to be an obligation, that is, the creditor continues to have the right to require the debtor to fulfill it (...). It is necessary, however, to pay attention to the economic interest of the creditor without disregarding other values, social and existential, of extraordinary importance, which are protected by the legal system (Federal Constitution and infraconstitutional rules) and may interfere in the very structure of the obligation.[4]

Within this legal order there is an undeniable "*characteristic absorbed by privatelaw, echoing the various other mutations of the legal system, from the constitutional root*"[5] - it is not possible to ignore this characteristic, aiming at the interpretation of civillaw in order to adapt it to reality and striving for its harmonization with the facts of life, so that social welfare and the protection of unassailable constitutional principles are achieved, such as the dignity of the human person and other constitutional guarantees that derive from it (FERRIANI, p.32).

Under this view, in exceptional moments, such as the global pandemic by COVID- 19, the enforceability of the obligations assumed must go through *the* necessary evaluation of the specificities of the case, in order to "*be individualized, without prejudice, the normative to be applied through an autonomous and unitary procedure of interpretation and qualification of the causative fact, its effects, voluntary and/or legal, respecting the peculiarities and the real interests and values* involved"[6] .

Thus, the analysis of the disturbances to the fulfillment of obligations should be carried out in association with the search for the preservation of contractual relations in consonance with their social function, as well as in prestige to the good faith and loyaltyof the parties, seeking an equitable solution to the impasses arising from a situation as exceptional as this pandemic event.

3 RISK THEORY

The supervening impossibility of the provision has as its essential effect the extinction of the bond of obligation, with the exoneration of the debtor, without having to respond for any compensation for losses and damages. In this sense is the teaching of Ruy Rosado, who explains "*The supervening impossibility that cannot be imputedreleases the debtor and discharges him from repairing the losses, since there is no delayon his part (article 396 of the Civil Code), for which reason the creditor is not entitled toinvoke article 475 of the Civil Code to terminate the relationship and claim indemnification. There is ipso jure extinction*"[7] .

Attention should be paid to the necessary assumptions for the debtor to be released from the obligation by supervening situation, so that the impossibility to fulfill the obligation must be effective, absolute and definitive (MENEZES CORDEIRO, 1986, p. 174). More than that, for Wayar, besides being absolute, definitive and supervening, the impossibility must also be unimputable to the debtor[8] . The supreme principle of imputation - at least for the assumptions of impossibility regulated in the Brazilian CivilCode - is that of guilt.

In the same sense, Pontes de Miranda states that the supervening impossibility thatfrees is only the absolute one (MIRANDA, v.22, p.69), and that, in the Brazilian legal system, the supervening impossibility may be with or without fault of the debtor, so thatif the debtor is guilty, articles 234 *in fine*, 236, 239, 248 *in fine*, 250 of the Civil Code apply (MIRANDA, v.22, p.68), which reveal that without fault the principle of liability of the debtor who fails to comply does not prevail. The solution advocated by Pontes de Miranda, if it does not clash with the principles regarding the impossibility whenexamined separately from the texts, will undoubtedly hurt the rule of art. 963), accordingto which "*if there is no fact or omission attributable to the debtor, he is not in default*". Therefore, default may only occur when there is a fact or omission attributable to the debtor.

In this sense the debtor's release - or extinction of the bond relation - would be equivalent to the declaration of ineffectiveness of an originally valid obligation, triggeredby natural force (unforeseeable circumstances or force majeure) or by legal force - the differences between which we will analyze below.

For Couto e Silva, in order to verify the impossibility of the provision that releasesthe debtor, it is necessary to analyze who bears the risks of the perishing of the obligation

- which forces the distinction between obligations arising from bilateral and unilateral contracts[9] . For the author, in the case of bilateral contracts, the risk is borne by the debtor.However, in the transfer of ownership of movable property, the risk is only transferred from the debtor to the creditor (purchaser) with the tradition, as can be seen in article 492of the Civil Code. In unilateral contracts, on the other hand, the principle is that the risksare borne by the creditor, since the debtor does not lose against the creditor, who no longerowns the thing.

In conclusion, one can see that the distribution of risks is intrinsically related to the types of obligation (to give, to do, not to do), in the sense that the impossibility of release requires the absence of

guilt (read imputability) on the part of the debtor.

This theory of risks was increased in our Civil Code by the inclusion of a speciesof release from obligations arising from acts of God and force majeure, which, despite being under different headings in our legal system, result in the debtor's release, with theextinction of the bond, as discussed below.

4 IMPOSSIBILITY OF RENDERING

The options that differentiate the types of impossibility of the provision were notwell reproduced in the Brazilian Civil Code, and it is up to the doctrine to present studiesto better dissect the theme. Thus, the doctrine adopts four classifications of the impossibility of the provision: (i) absolute or relative, whose criterion depends on the evaluation of the true impossibility of the provision or only a difficulty in the exercise ofits fulfillment; (ii) objective or subjective, which has the criterion of verifying where the impossibility is located, whether in the object or in the subject to be provided; (iii) definitive or temporary; (i) integral or partial, as to the extent of the impossibility of the provision.

Absolute impossibility is said to be the provision that cannot be performed - it is not a matter of mere difficulty in complying with the provision, there must be material impossibility (physical or legal), regardless of the will of the parties and without conditions to be replaced know the object, nor the debtor who should comply. For this reason, it is said that the provision is only truly considered impossible when it becomes absolutely impossible[10] .

In turn, the impossibility of the provision is *relative*, which, despite the supervening event, can still be performed if its subjective aspect is altered, while the object of the provision remains viable - in other words, it is not exactly an impossibility,since there is no loss of the obligatory object, it is enough to change who can perform it to subsist.

For Judith Martins-Costa (MARTINS-COSTA, 2020, p. 165), relative impossibility would be that provision, although possible, with greater difficulty to be fulfilled by the debtor; or, in the words of Gomes da Silva, "*that which derives from an obstacle that cannot be overcome except with efforts and sacrifices to the degreeconsidered typical, that is, greater than the average diligence in certain obligations*"[11] .

It should be noted here that mere economic difficulty in the debtor's performance(a *difficultas praestandi*) does not even constitute hypothesis of relative impossibility.

Precisely because it is relative, most legal scholars believe that this type of impossibility does not release the debtor. Pontes de Miranda, Clóvis do Couto e Silva andRuy Rosado de Aguiar Júnior are in opposition to such current, for whom *"the extraordinary difficulty, or disproportionate, is considered impossibility, the provision that would be exorbitant is considered impossible, if the debtor himself did not assume (...) It is the effectiveness of the impossibility by disproportionality"*[12] .

Objective is the impossibility that reaches the mediate object - the content of the provision - of a given legal relationship of obligation, because, although the debtor can still provide it, its object becomes impossible due to natural, physical, normative and institutional conditions. By its content, this

classification refers to the obligations to giveand to restitute. In logical conclusion, one cannot admit that obligations defined by genreand by quantity may be considered impossible by a supervening event, since the genre ofa certain object does not perish as a whole, the obligation to deliver or restitute it remaining possible. The same is said with regard to alternative obligations, since it wouldalso be inadmissible that all the options of the adjusted installments perish, making the fulfillment of the obligation unfeasible: in the absence of one, he will have to perform thefulfillment of the installment by another.

The *subjective impossibility*, on the other hand, refers to that which affects the subject of the legal relationship of obligation, which occurs when the debtor becomes unable to comply with the provision due to a supervening situation, even if the object of the provision is shown to survive. As a rule, the impossibility of the original debtor of thelegal relationship of obligation to comply with the agreed provision configures a relativeimpossibility of the provision - there is not, therefore, a true impossibility, but rather an impossibility of the original debtor to provide it. Only if the obligation is characterized as being *intuitu personae*, will there exist a subjective impossibility, entering into the classification of absolute impossibilities. According to Almeida Costa "the objective impossibility is equated to the mere subjective impossibility, in the event the debtor cannot be replaced by a third party in the fulfillment of the obligation"[13] . If, on the otherhand, the provision is fungible, only the objective impossibility constitutes an extinctivecause of the bond.

Under the temporal aspect, the classification of the impossibility may be *definitive*or *temporary*. In fact, only the former concerns the thesis of impossibility of the installments, since it is possible to assume that the temporary impossibility can still be overcome, and it is only possible to assume the opportunity of a temporary suspension ofthe installment. In the words of Menezes Cordeiro, "the temporary impossibility has, naturally, nothing to do with the subsistence of the obligation: it is only relevant for purposes of delay" . [14]

Therefore, for being transitory, such impossibility does not have the power to extinguish the bond, but at most to alter it for its adequacy in order to allow the satisfactionof the creditor's interests. In the opposite sense, only the definitive impossibility can be considered within the legal system of the supervening impossibility of installments. In this modality in question, the assumption that the creditor's interest in receiving the installment persists - attaining the purpose of the installment - is essential for the obligation bond not to be considered extinguished. In other words, even if temporary, theimpossibility of the installment may result in the extinction of the obligation if it does notprovide the creditor's interest in timely compliance.

If the creditor continues to have an interest in receiving the installment that was temporarily impossible, the legal hypothesis that would guarantee its maintenance for later compliance must be verified. In specific rules, there is a doctrine that defends the suspension of the obligation as long as the supervening circumstance that made it temporarily impossible subsists - a legal example of which can be found in the analysis of articles 625, item I, for construction contracts, 741 and 753 in transportation and

24, paragraph 2 of the Lease Law (MARTINS-COSTA, 2020, p. 162).

5 FRUSTRATION AT THE END OF THE CONTRACT

A parenthesis is opened for the differentiation of the impossibility of the provision and the frustration of the end of the contract, whose identity of effects does not mean synonymy of terms and has special relevance for the understanding of the usefulness of the provision to the creditor in the face of a supervening fact that places an obstacle to the provision due.

The frustration of the end of the contract is explained by the doctrine as a hypothesis in which the provision is fully possible, but which, due to a supervening situation, loses its meaning or function in such a way that its conclusion is no longer justifiable.

The English origin institute was then absorbed by other European countries, especially by German law, based on Windscheid's theory - which aimed to "solve the legal problems arising from the supervening of circumstances other than those at the time of contracting, especially after World War I, when Germany experienced unspeakable inflationary moments, causing a total turnaround in contract law" (NANNI, 2016).

According to this theory, the objective basis disappears when there is destruction of the relationship of equivalence or frustration of the purpose of the contract. In the teachings of Arnoldo Medeiros da Fonseca (1943) on the theory of the basis of the business:

> The basis of the transaction is understood to be the representations made by the parties at the time of the conclusion of the contract about the existence of certain basic circumstances for their decision, in the event that these representations are regarded by both parties as the basis of the contractual agreement (Geschäftsgrundlage), thus including, in principle, among them, e.g., the equivalence in value between the service and the consideration, considered tacitly intended; the approximate permanence of the agreed price, etc. When, as a result of events occurring after the contract was concluded, the basis of the business disappears, disturbing the initial balance, the contract would no longer correspond to the will of the parties and the judge should, through his intervention, readapt it to this will, either by terminating it or modifying it, so that it corresponds to what theparties would have wanted if they had foreseen the events[15] .

The frustration of the end of the contract occurs when the practical result of the provision is verified to be unfeasible, the effect of which is the removal of the debtor's liability for late payment, imperfect performance, contractual imbalance and default, evenin the face of the fact that the provision is still possible, but such "release" only becomesjustifiable "*if there is a change in the* factual *support of the contract that generates a disconnection between the formal provision itself and the practical and objective interestof the contracting parties"* (NANNI, 2016), the basis of the legal business ceasing to subsist.

The theory of frustration of the end of the obligation to perform was incorporatedby Brazilian doctrine, due to the lack of legal provision in the system of the Civil Code of 1916, which did not deal with the figure of contractual revision, nor with the excessiveonerosity, relying on the BGB to justify the understanding that it would be impossible toprovide a service "*whose fulfillment requires extraordinary and unjustifiable effort* on thepart of the *debtor*"[16] . The first decisions on contractual resolubility and

revisability - as figures of their own, divorced from the institute of supervening impossibility not attributable to the obligor - came from Nelson Hungria, when he was still a first degree judge in the 1930s (MARTINS-COSTA, 2020, P.195). Also dates from the 1930s the useof the theory as grounds for solving legal conflicts arising from the global crisis, a time when the theme began to be recurrently (and unduly) mixed with the theory of unforeseeability and fortuitous cases in order to create some confusion between the institutes.

The theory was so well received that it was included in Enunciation No. 166, in the III Conference on Civil Law, held by the Judiciary Studies Center of the Federal Justice Council:

> The frustration of the end of the contract, as a hypothesis that cannot be confused with the impossibility of providing the serviceor with excessive onerosity, is supported in Brazilian Law by theapplication of article 421 of the Civil Code.

It is important to emphasize the requirements for the frustration of the end of the contract to remove the effects of arrears or default from the debtor *(a) that the contract be bilateral or unilateral, of patrimonial nature, commutative or aleatory, of deferred orcontinuous performance; (b) that the purpose of the contract be part of its content; (c) the contract loses its meaning, its raison d'être, due to the impossibility of reaching its end; (d) an event occurs subsequent to the contracting that was not within the contract'scontrol and was unrelated to the faulty performance of the parties; (e) the frustrated contracting party is not in default* (NANNI, 2016).

From the frustration of the end of the contract, two consequences may be verified:its termination or its readjustment, adjusting some obligations in order to preserve the contractual bond - contracts that have their synallagm radically affected due to the profound changes that have taken place between the moment they were signed and the moment they were concluded, greatly altering the basis of the business, require its termination if impossible or its modification if possible.

As pointed out by Professor Nanni, "*As a consequence of the frustration of the endof the contract, the doctrine does not disagree in pointing out that, if the contract has notbegun to be performed, there is the resolution with return to the previous state, being theparties released from the installments; if it has started its execution, the fulfilled installments remain firm, not being performed those falling due"* (NANNI, 2016). Thus, in addition to the verification of the possibility of maintaining the bond between the parties with the survival of the obligation, one should consider the contractual stage in which they are at the time of occurrence of the supervening event that changed the contractual basis.

With the advent of the 2002 Civil Code, the contractual basis theory (or frustrationof the end of the contract) was "solved"[17] by the legal provisions that allow contractual revision due to excessive onerosity, as well as by the institutes of termination in case of supervening impossibility of providing the service, there being significant doctrinal aversion to the resumption of a theory idealized to deal with the lack of specific legalprovision.

6 EXCESSIVE ONEROSITY

Once the doctrinaire reflection is over, the Civil Code of 2002 brings mechanismsthat aim at the preservation of legal businesses affected by supervening circumstances that hinder the fulfillment of the obligations, highlighting what is preconized in article 317.

The rule that provides for the possibility of revision of the installment brought in the aforementioned article, which "*has as limits, the fact that (i) it is limited to pecuniaryobligations, as indicated by its topography in the Civil Code, and (ii) governs the imbalance that affects the same installment considered in two temporally distinct moments, namely: the moment of its covenanting and that of its execution; and having asa requirement the existence of unpredictable reasons that cause manifest disproportion between the value of the due installment and that of the moment of its execution*" (MARTINS-COSTA, 2020, p.212).

In these terms, the reach of article 317 seems to suffer a relevant limitation[18] , which justifies the continued articulation of the contractual basis theory (or frustration ofthe end of the contract) to supplant its reach to non-pecuniary obligations. Note that, in the strictness of the civil law, excessive onerosity may result in the review of pecuniary obligations (317); or in the review or termination in contracts of continued performance (articles 478-480 - whose terms derive from the theory of supervening excessive onerosity

- which align with devices addressed to contractual review of commutative contracts, such as in cases of lease, contracting and insurance). *In verbis*:

> Article 478. In contracts of continued or deferred performance, ifthe performance of one of the parties becomes excessively burdensome, with extreme advantage for the other party, due to extraordinary and unforeseeable events, the **debtor** may **request the termination of the contract**. The effects of the sentence thatdecrees it will be retroactive to the date of the summons.
> Art. 479. The resolution may be avoided by the defendant offeringto **modify the** conditions of the contract **equitably**.
> Art. 480. If in the contract the obligations are incumbent upon only one of the parties, he may plead that **his provision be reduced**, or the manner of performance be altered, in order to avoid excessive onerosity. (Emphasis added).

Art. 478 of the Brazilian Code provides for the rescission, at the debtor's request, in case of supervening onerosity, having as requirements: the existence of a synallagmaticcontract, with installments deferred in time, one of them being burdened by superveningonerosity at the time of the contractual conclusion, arising from extraordinary and unpredictable factors, causing the other party "extreme advantage". Once these requirements are met and proven, the debtor's legal sphere is entitled to the formative right of termination (rescission, in the case of long-lasting contracts) of the legal contractual relationship arising out of the contract (MARTINS-COSTA, 2020, p. 214).

Thus, art. 478 establishes, therefore, an option for the debtor who may request the contract's termination, provided that some requirements are met. The contract will only be reviewed, pursuant to art. 479, if the creditor offers the adjustment. It seems, therefore,that the Civil Code failed to prioritize the preservation of the contract by establishing as an immediate consequence the contractual rescission in the

face of supervening difficulties that generate an imbalance between the obligations assumed by the parties. However, after doctrinaire construction in the sense that "*the rules on the contract termination due to excessive onerosity did not follow the spirit of the new Civil Code (*LGL\2002/400*), since to terminate the contract making both parties lose, directly affronts the principle of the preservation of legal business (article 170 of the CC), whichis founded on the social function of the* contract"[19] .

With such construction, Enunciation 176, of the III Journey of Civil Law of the Center of Judiciary Studies of the Federal Justice Council, states that: "*In attention to the principle of conservation of legal business, art. 478 of the Civil Code of 2002 should lead,whenever possible, to the judicial review of contracts and not to contractual resolution*.

The issue that matters for the present study is to differentiate the institute of the supervening impossibility of the provision of services from the consequences of the excessive onerosity established in our civil system: while the excessive onerosity occurred by unpredictable phenomenon in a way that causes contractual imbalance between the parties may have as effect not only the contractual termination, but also the readjustment of the provision (of what is assumed to be still possible); the supervening impossibility is an institute that directs exclusively to the extinction of the obligation in the face of its complete impossibility of provision by the debtor, which is released due tothe lack of imputability for the occurrence of the supervening event.

Thus, the supervening impossibility of the provision may determine the extinctionof the duty to provide, provided that the impossibility is absolute and definitive - excepting only the case of temporary impossibility that by subordination to the creditor's interest, the consequence of the supervening impossibility of the provision is only the contractual termination. On the other hand, the supervening event that changes the contractual balance in an unpredictable manner influences the contracts of successive tracts so as to readjust it, with termination being its consequence only by exception.

As Gustavo Tepedino brilliantly synthesizes the explanation differentiating the institutes of supervening impossibility and excessive onerosity:

> Unlike the institute of excessive onerosity, which deals with hypotheses of subjective impossibility of performance that affectsthe commutativity of the contract, in the case of fortuitous event or force majeure the impossibility is objective, preventing compliance *tout court*, since the provision becomes impossible.[20]

In other words, while the hypotheses of fortuitous or force majeure cause objectiveimpossibility in the fulfillment of the provision, the excessive onerosity, on the other hand, generates subjective impossibility, characterized by the extreme difficulty in the fulfillment associated with significant contractual imbalance, caused by supervening,extraordinary and unpredictable facts.

7 SUPERVENING IMPOSSIBILITY IN THE BRAZILIAN CIVIL CODE

As already said, when studying the supervening impossibility of the provision, there is no sense the differentiation of the expressions "fortuitous case" and "force majeure", especially because they appear together in the legal text and provide the same effect for the purposes of exclusion of liability of the debtor. Thus, when the impossibilityarises from a third party fact or natural force (act of God or force majeure) or legal force,the search for the possible consequences for the solution of the impasse begins, seeking the verification of the effects authorized by law: (i) the termination of the contract, its undoing, its extinction, with effects *ex nunc, i*.e., from the moment in which the termination was declared forward; (ii) "irresponsibility" of the debtor for the losses caused to the creditor.

In the Brazilian Civil Code, the supervening impossibility was regulated in a fragmented manner, since it is possible to verify its occurrence in general hypotheses, "*disciplined when dealing with the modalities of obligations and the species of contractual obligations, as well as the specific cause of impossibility, namely, the removal of liability (and consequent duty to indemnify) by unforeseeable circumstances or force* majeure"[21] .

Thus, we have the *general* regulation brought in articles 234-235, 238-240, 245- 246, 248, 250, 254-256, 279, whose lack of imputability of the debtor for the occurrenceof the obstacle in its provision is defined as a situation that releases it specifically considering the types of obligation assumed - that is why the supervening impossibility of the provision is foreseen as a consequence individually considering the different typesof obligations in the Civil Code.

It is verified as a general basis, in the obligations to give and return something certain, the impossibility of the debtor occurs by the perishing of the thing, which is released from its obligation if such deterioration has not occurred by circumstance not attributable to the debtor. However, the contractual rescission is excepted in alternative obligations, being possible to the creditor the option of accepting the thing owed with a reduction in the price, according to his interest.

As for the obligations to do and not to do, which have as their core the provision of an activity, the supervening impossibility to comply with the agreed upon provision may or may not result in the release of the debtor, depending on the personal nature of the obligation: observed the personal nature, in the event of supervening impossibility, it is evident that the extinctive effect of the legal transaction is imposed, as it is an absolute impossibility. In the opposite sense, if it is possible for someone else to perform the installment, but not the debtor, the supervening impossibility is not verified in an absolute manner, because it is still possible for someone else to perform the installment, which is not the case of the debtor's release from its obligation.

In addition to the specific provisions applicable to the types of obligation, the supervening impossibility in the provision is foreseen in specific causes arising from unforeseeable circumstances or force majeure, as seen in articles, 393, 399, 535, 607, 625, item I. It is verified, therefore, that the fortuitous case or force majeure is also related to the involuntary non-performance of the provision, extinguishing

the obligation by the absolute impossibility of its fulfillment, in view of a supervening fact.

Act of God and force majeure appear as supervening causes that give rise to suspension of the obligation or impossibility, in addition to motivating the debtor's exemption from liability for losses and damages resulting from non-performance of the obligation.

8 PANDEMIC AND THE DISRUPTION OF COMPLIANCE

According to statistics reported by the Brazilian Association of Jurisprudence, by the beginning of April 2020 (approximately one month after the decree of measures to control the pandemic in the State of São Paulo), by consulting the first degree judgments of the Court of Justice of the State of São Paulo, 811 decisions mentioning the terms researched had been identified, referring to 530 different cases. According to the research, "*the first mention of Covid-19 in the bank of judgments occurred on March 13, 2020, one week before the declaration of public calamity by the state government. The exponential behavior identified in the amount of confirmed cases of Covid-19 in the state of São Paulo is not observed, but there is certainly a tendency for an increase in the volume of decisions mentioning the terms*"[22] . Thus, in addition to the threat to individual health, the pandemiccaused by Covid-19 had an undeniable impact on several contractual relationshipspreviously assumed.

In light of this, much has been discussed about the institutes of law that would guarantee the flexibility of *pacta sunt servanda* to deal with unpredictable phenomena such as this one, invoking the most varied of theses that include the fortuitous case, forcemajeure, rebus sic stantibus, unforeseeability, excessive onerosity, breach of the objectivebasis, pacta sunt servanda, imbalance, exception of unfulfilled contract and objective good faith are just some of the figures invoked.

In a study on the subject, André Abelha, who holds a Master's degree in Civil Lawfrom the State University of Rio de Janeiro (UERJ), presented an interesting article withthe aim of reflecting on the four most common impacts of the pandemic on contractual relations, summarizing: "*(i) the permanent impossibility of fulfilling the obligation or, with a similar effect, frustration of the end of the contract; (ii) the momentary impossibility of fulfilling the obligation when it is due; (iii) the supervening imbalance of the obligation; and (iv) the deterioration of the debtor's financial situation*"[23] .

Firstly, under the perspective of the definitive impossibility, the author points outthat the pandemic would not be a *priori* and generically a fortuitous or force majeure casein itself, each party must prove its impact on the contractual reality individually considered, triggering a necessary and irresistible fact, whose effects could not be avoidedor prevented (art. 393, sole paragraph of the CC), and that generated the impossibility ofthe fulfillment of the provision (arts. 234, 248, 250 or 607 of the CC), or the frustration of the objective of the contract (CC, art. 421), whose consequence would be the termination of the contract. The caput of art. 393 of the Civil Code, however, does not bring a rule of termination, but rather of exclusion of liability, breaking the causal connection and exempting only the debtor from indemnifying the creditor for losses resulting from unforeseeable circumstances or force majeure (ABELHA, 2020).

In dealing with temporary impossibility of the obligation, Abelha concludes that if the pandemic is found to generate fortuity for the fulfillment of the contractual term, there will be no delay by virtue of the provisions of article 396 of the Civil Code – which may result in two hypotheses: *"(a) due to facts arising from Covid-19, the purpose of thecontract may be frustrated even before maturity (Impact no. 1), and the party may pleadfor termination without fault; or (b) even after maturity, the creditor is obliged to receivethe installment (delivery of the opinion) fulfilled by the debtor after the deadline (no delay!), provided that the end of the contract is preserved (possibility of use in arbitration*)"[24] .

Thirdly, if a supervening imbalance in the contractual performance is verified, theauthor indicates that the situation should include an evaluation of the possibility of reestablishing the original contractual synagma: if so - except for contracts governed by the Consumer Protection Code - the debtor, even if he/she meets the requirements of art.478 of the CC, he would be entitled to a revision of the contract by virtue of an extensiveinterpretation of article 317, which, together with article 478, can be applied not only to merely financial matters (such as monetary correction), but also to the obligations to giveand to do in order to promote the rebalancing of any provision (ABELHA, 2020).

9 CONCLUSION

Much has been discussed about the institutes of law that would guarantee the flexibility of *pacta sunt servanda* to face the unpredictable phenomenon of the pandemicby COVID-19, invoking the most varied of theses that encompass the fortuitous case, force majeure, *rebus sic stantibus, unforeseeability*, excessive onerosity, breach of the objective basis, *pacta sunt servanda,* imbalance, exception of unfulfilled contract and objective good faith. The theme has been addressed in court under the most diverse themes of civil relations, noting a considerable volume of lawsuits seeking the modification of pacts formalized before the pandemic.

In this context, the differentiation between the institutes of frustration of the end of the contract, supervening impossibility of performance and excessive onerosity - whichwere already frequently debated under the same perspective of disturbances in the performance of the obligation - began to have even more doctrinal and jurisprudential fusion in order to justify the most varied consequences to contractual relations affected by the supervenience of a global pandemic.

Despite the clear differentiation between these types of breaches of obligation and their effects, many authors who have approached the subject to justify the easing of obligations in times of pandemic have used a doctrinal mixture to justify the application of one or another legal solution to the cases.

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