CONSIDERATION REGARDING THE LAW NO 77/2016 IN VIEW OF DECISION OF THE CONSTITUTIONAL COURT NO 623/2016

Valentin COCEAN*

Abstract

The forced giving in payment regulated by Law no 77/2016 has created a lot of polemics which are not necessarily solved by the Decision of the Constitutional Court. The present study represents an attempt to clarify some of the implications of the Constitutional Court Decision upon the Law no 77/2016.

Keywords: *giving in payment; hardship theory; loan ; constitutionality ; court.*

1. Introduction

Adopted upon the existence of a conflict, significantly emphasized by economic events – the global economic crisis, but especially that of the real estate market, the evolution of the exchange rates of some currencies, between consumers and banks, Law no. 77/2016[1] sparked ample controversy. The controversy manifested mainly socially, while law professionals were almost unanimously critical towards the said Law[2]. The present study, however, does not intend to analyze the said Law but only the implications upon it of Decision no. 623/2016 of the Romanian Constitutional Court[3].

The aforementioned Decision, which is by no means safe from any criticism, brought, both legally and socially, a satisfactory solution for all envolved interests. Without preventing the application the dispositions of the Law it criticised, as some authors had anticipated[4], the Constitutional Court established the interpretation, probably the sole possible one[5], by which these could be enforced without transgressing constitutional priciples and , also, without injuring the rights of one of the categories of subjects involved in the relations sought by the Law.

Below we wish to analyze some of the aspects involved by the passing of this Decision, both regarding civil substatial law and civil procesual law, but only, as the Constitutional Court did, with regard to loan contracts placed prior to the coming into force of the Law hereunder.

2. Content

Essentially, decision no. 623/2016 of the Constitutional Court provides that in order to enforce the dispositions of Law no. 77/2016 a court should verify the conditions regarding the existence of the hardship theory6. Starting from the premise that we are only looking at contracts placed prior to the coming into force of Law no. 77/2016 and targeting a rather practical approach, we will try finding answers to three questions, two of them regarding substantial law and one regarding procesual aspects.

2.1. Can the provisions of Law no. 77/2016 be applied to loan contracts placed prior to its enforcement?

Constitutional Court Decision no. 623/2016 (published January 18th 2017), analyzing the issue of the Law's constitutionality (of some of its provisions) exactly with regard to pre-existing contracts, did not deem it unconstitutional. Therefore, the Law will also be applicable to these contracts but only if the court (CCR analysis and disposition on art.11 of the Law) verifies the conditions regarding the theory of the conditions regarding the hardship theory. For that matter, pt. 121 of the Decision clearly states that, in the hypothesis in which the conditions of the hardship

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest; Research Assistant (email: **valentin.cocean@zrp.ro**).

[1] Published in M.Of. no. 330 of April 28th 2016 and enforced on May 13th 2016.

[2] See, e.g. Law on Giving for Payment: arguments and solutions, Valeriu Stoica, Marian Nicolae, Marieta Avram; Bucharest, Hamangiu Publishing House, 2016.

[3] Published in M.Of. no. 53 January 18th 2017.

[4] M. Nicolae in Law on Giving in Payment: arguments and solutions, op. cit., page 96; C. Pintilie, D. Bogdan in Law on Giving in Payment: arguments and solutions, op. cit., page 121-147; L. Mihai, Amicus Curiae regarding giving in payment, https://www.juridice.ro/474428/amicus-curiae-cu-privire-la-darea-in-plata.html; C. Birsan, S. Tirnoveanu, I. Craciun, Law on Giving for Payment – critical exam of some (un)constitutionality and (un)convenyionality elements, https://juridice.ro/essentials/499/legea-privind-darea-in-plata-examen-critic-al-anumitor-elemente-de-neconstitutionalitate-si-neconventionalitate.

[5] The solution had already been brought forward by doctrine. See V.Stoica in Law on Giving for Payment: arguments and solutions op. cit., pages 22-29 and, a different view, M. Avram, About the Law on Giving for Payment: between juridical folklore and the reason of law, pt. 3, https://www.juridice.ro/455084/despre-legea-privind-darea-in-plata-intre-folclorul-juridic-si-ratiunea-dreptului.html.

[6] For an analysis on this cause of waiving the *pacta sunt servanda* principle see, prospective to the old law, C.E. Zamsa, The Hardship Theory. Study of Doctrine and Jurisprudence, Bucharest, Hamangiu Publishing House, 2006, and, prospective to the New Civil Code, G. Boroi, C. Anghelescu, Course of Civil Law. General Part, 2nd Edition, Bucharest, Hamangiu Publishing House, 2012, pages 212-215.

theory are met, the court can rule either the adaptation or the ceasing of the contract, as the application of the hardship theory cand be made "to the upper limit provided by Law no. 77/2016 (handing over the estate and erasing the main and accesory debt)". A counter argument invoking the dispositions of art. 3 of the Law, which refers to the derogation from the provisions of Law no. 287/2009 regarding the Civil Code, cannot be taken into account, because an eventual giving in payment, even if it pertains to a juridical relation risen prior to enforcement of the New Civil Code, would have been governed by its dispositions (and not by the old regulations) as long as it took pplace after October 1st 2011 (art. 112 of Law of application no. 71/2011). And, by hypothesis, an operation of giving in payment based on Law no. 77/2016 would be ulterior to the enforcement of the New Civil Code.

2.2. What is the effect of the RCC decision on the application of Law no. 77/2016 for the pre-existing contracts upon enforcement of this Law ?

We have already established that this Law is applicable to these contracts. But only in the hypothesis in which it is established (case by case) that the requirements of the hardship theory are met. That cannot be if there is only the possibility that the parties could bring the hardship theory into matter in front of the court, but it will be necessary for the court to effectively establish if the conditions of the hardship theory had been met. Surely, if the court is invested by one of the parties regarding giving in payment based on the provisions of Law no. 77/2016 (we will see to the procedural matters separately).

The existence of the conditions of the hardship theory determines the constitutionality of the Law upon application to pre-existing contracts. The possibility of such application is provided in art. 11 of the Law, but this disposition was deemed by the RCC decision to only be constitutional "as far as the court verifies the conditions referring to the existence of the hardship theory". In the minutes, the Court did not refer to the possibility of verification but to the actual verification (grammarly interpretation – mode of the used verb). Surely, in the reasons of the Decision there are points referring to the possibility of the judicial control, but overall the reasons regard the necessity of verifying the hardship theory (pt. 119 and 120 of the Decision). The Court deems Law no. 77/2016 as being an application of the hardship theory to loan contracts (pct. 115 of the Decision) and, therefore, it will not be applicable if the conditions of the hardship theory are not met. Furthermore, the Court considers unconstitutional "the hardship theory *ope legis*" which the legislator had in mind when adopting Law no. 77/2016, and the elimination of this trait (ope legis) requires actually establishing the existence of the conditions of the hardship theory (either by parties' agreement – but this option is not of interest, as the parties are free to decide to modify the elements of the contractual relations between them even if there is no special regulation -, or by ruling of the court).

Thusly, for the application of Law no. 77/2016 to pre-existing contracts it will be necessary to verify the fulfillment of the admissibility requirements provided in the Law (art. 4) but also the existence of the conditions of the hardship theory. In the hypothesis in which the existence of the conditions of the hardship theory is not established in one particular case, the solution (of admittance of the creditor's contestation, or rebuttal of thr debtor's claim for ascertaiment) will be also based on the inadmissibility of the procedure of giving in payment ruled by Law no 77/2016. Practically, the premise for the application of Law no. 77 to pre-existing contracts is the very identification of the conditions of the hardship theory.

As it is the case with the admissibility conditions provided by art.4 of the Law, with regard to the existence of the conditions of the hardship theory the debtor will also have their own view by which they will decide wether or not they can follow the procedure of giving in payment ruled by Law no 77/2016. If the debtor's evaluation has a positive outcome, they will send their creditor a notice, as provided by art. 5 of the Law. In turn, the creditor will assess the admissibility requirements under art. 4 but also on the hardship theory. This is where the lagislator's intervention might be necessary, as to modify art. 5, align. 1 in order to establish an obligation for the debtor to also detail in the notice the conditions of the hardship theory, thus making it possible for the creditor to fairly assess the situation. On the other hand, we think that, given the RCC decision, the debtor would already be forced to take on the hardship theory matter in their notice, or at least would be interested to. According to their evaluation's outcome the creditor will decide wether to lodge a contestation as provide by art. 7 or to give effect to the notice (surely there is a third option, respectively the creditor could wait, keeping the possibility of defending themselves in court in the case regarding the claim for ascertainment made by the debtor, however such a position would not serve their interests, given that the effect of the loan contract would remain suspended). Should the debtor not refer to the hardship theory in their notice, the creditor could lodge the contestation (surely, should they have assessments regarding the admissibility requirements under art.4 of the Law, they will mention them in the contestation) settling to affirm the inexistence of the conditions of the hardship theory.

Finally, should the parties fail to reach an agreement, the court will also assess the admissibility requirements under art.4 of the Law and the existence of the conditions of the hardship theory. To be mentioned that, as it is the case with admissibility conditions under art.4 of the Law, the existence or inexistence of the conditions of the hardship theory, as a premise for the application of the procedure ruled by Law no. 77/2016, (if the parties fail to agree) the court will assess either upon contestation by the creditor (as

per art. 7), or upon claim for ascertaiment mad eby the debtor (as per art. 8 of the Law).

The debtor's notice sent as provided by art. 5 of the Law will produce the effects provided by this law even if in one particular case the hardship theory conditions are not met (similar to the situation in which the admissibility conditions under art. 4 of the Law are not met). Surely, those effects would be removed when the ruling that establishes that the hardship theory conditions are not met remains definitive. The effects of the notice could only be avoided by priorly lodging a claim for ascertainment by the creditor, by which they ask for the establishment of the inexistence of the conditions of the hardship theory (but in such a claim, a matter of interst[7] would rise – as it would only be eventual – and, moreover, it is hard to imagine that a bank would lodge such claims regarding each contract placed rior to the enforcement of Law no. 77/2016).

Surely, we cannot exclude the hypothesis in which the debtor lodges a claim, distinct from the procedure of Law no. 77/2016, by which they ask for the verification of the conditions of the hardship theory. But such a claim's object could not be to ascertain the existence of these conditions (the rule of subsidiarity of a claim for ascertainment would be breached) but the effective application of the hardship theory, which would presume a course of action in accordance with common law, with no ties to the procedure under Law no. 77/2016. This would probably not serve their interests, given they would lose the advantage of by law suspension under Law no. 77/2016 and, on principle, also of exemption from paying court fees. Moreover, the court's ruling, assuming they establish the existence of the conditions of the hardship theory, would not be predictable, as it is highly unlikely it would exceed the advantage given by the giving in payment based on the Law hereunder.

And, as we have reached this point of the analysis, we must take into account pt. 121 of the RCC Decision. Therein the RCC hints that the court, establishing the existence of the conditions of the hardship theory (and of the admissibility requirements under art.4 of the Law) could rule any measure deemed necessary (adaptation or ceasing of the contract) to the upper limit provided by Law no. 77/2016 (handing over the estate and erasing the main and accesory debt). This option of the court could only be in the hypothesis in which they were invested with a claim based on common law.

If the debtor chose to follow the procedure under Law no. 77/2016, then either their step would be considered inadmissible (either because the conditions under art. 4 are not met, or those of the hardship theory) and it would remain without effect (in the end, after the courts decision remains definitive), or, should al the requirements for this procedure be fulfilled, it would have the outcome provided by law. The mention under pt. 121 of the Constitutional Court's Decision cannot have any actual effect, art. 2, align.3 of Law no. 47/1992 clearly stating the impossibility for the Court to alter or complete the legal dispositions submitted to their control. Thusly, a consequence of following the procedure under Law no. 77/2016 (assuming it is admissible) can only be the one mentioned in its provisions (giving in payment, respectively the extinction of the debt rising from the loan contract, accessories included, no supplementary costs, by the transfer towards the creditor of the ownership to the mortgaged asset)[8].

Besides, the principle of availability[9] precludes the court from ruling otherwise. As for the steps taken by the debtor under Law no. 77/2016, the court will be invested by claim made by either the creditor or the debtor. The creditor could file the claim under art. 7 , by which they contest the fulfillment of the requirements needed for the application of the procedure ruled by Law no. 77/2016. Should the court consider they were not fulfilled it will admit the creditor's claim without raising the matter of application of the hardship theory. And if they consider the coditions for application of the procedure are fulfilled they will reject the creditor's claim, without disposing any other measures (a counterclaim made by the debtor would lack interst and, anyway, if it would aim othe consequences, it would be subject to common law). In their turn, the debtor could file a claim provided by art. 8of the Law, but its object is pre-established by this provision (should they have other claims, the debtor would exceed the dispositions of Law no. 77/2016, choosing the way of the common law). So the court would either admit the claim (within the boundries of the expressed claims, the same provided under art. 8, align.1 of the Law), or reject it, in neither case could they rule other measures.

Surely, imposing a certain solution is not entirely in accordance with the idea of equity which stand as grounds for the hardship theory. And, indeed, it is possible that the solution chosen by the legislator reverses the situation, respectively generating an imbalance in reverse to the one they wished to remove (the value of the mortgaged asset could be clearly lower than that of the debt). But these are the provisions of Law no. 77/2016 (art. 3, art. 5, art.6, align. 6, art. 8, align.1 and art. 10), disposisions which have not been declared unconstitutional.

2.3. How can the court be invested to rule on the existence of the conditions of the hardship theory ?

We start from the premise that we are looking at the application of the procedure under Law no.

[7] For this requirement for lodging a civil claim see G. Boroi, M.Stancu, Civil Procedural Law, 3rd Edition, Bucharest, Hamangiu Publishing House, 2016, page 36.

[8] For a different opinion see M. Avram, Does forced giving for payment still exist after Constitutional Court's Decision no. 623/2016?, https://juridice.ro/essentials/760/mai-exista-darea-in-plata-fortata-dupa-decizia-curtii-constitutionale-nr-6232016.

[9] For an analysis of this principle see G. Boroi, M. Stancu, op.cit., pages 12-17.

77/2016, thus we will not address eventual claims made by the parties on different grounds (as per common law).

In this procedure, the court is invested by either the creditor, by claim as per art. 7 of the Law, or the debtor, by claim as per art. 8.

Let us first assess the case of the claim made by the creditor, as per art. 7, distinguishing between the situation in which the creditor refers to the hardship theory and that in which he makes no such reference.

Should the creditor, lodging the claim provided by art. 7 of the Law, contest the existence of the conditions of the hardship theory (we must include the case in which the creditor invokes reasons in which the court could include the inexistence of the hardship theory conditions, e.g. if the creditor invokes the inapplicability of the procedure under Law no. 77/2016) two hypotheses become possible.

In the first one the court will assess that the hardship theory conditions are not met and, consequently, will admit the creditor's claim. Of course there could be a discussion on the qualification of the creditor's claim's threads and on the solutions the court might give on each of them. On principle, the creditor will lodge a claim for ascertainment (to be ascertained that the hardship theory conditions are not met, that the procedure of giving for payment under Law no. 77/2016 is not applicable, that the debtor's notice of giving for payment lack effect or, as proposed based on the provisions of the Law, the ascertainment of the failure tu fulfill the conditions necessary for the debtor's right to extinguish the debt to arise). We do not think lodging any other claims makes sense. For example, *restitution in integrum* is an effect of the admission of the claim, it is not necessary for it to be object of a different thread (of course, here it would be necessary to establish the contents of *restitution in integrum* and, given the result, to be decided if such a claim in a different thread is necessary, but detailed – should it be deemed interest can be requested for the period the contractual effects were suspended, or if the debtor could be asked to immediately pay all the instalments which would have been due during the suspension).

In the second hypothesis, should it be deemed that the hardship theory conditions are fulfilled, the court will proceed to verify the other admissibility requirements (art. 4) contested by the creditor and will rule accordingly (admit the claim if the admissibility conditions are not met or reject it if they deem they are fulfilled).

Further, let us analyze the situation in which the creditor, filing the claim under art. 7, does not refer to the hardship theory (probably the case of claims filed prior to the ruling of the Constitutional Court).

Firstly, we must assess if the court could or could not analyze the fulfillment of the hardship theory conditions.

We deem that the court is called to check the existence of the hardship theory conditions even if the claimant (here, the creditor) fails to invoke they were not fulfilled.

This idea arises from the reasons for the RCC Decision (pt. 116, 119, 120), but also from its minutes.

Then, when solving the claim by which it was invested, the court must apply the dispositions of Law no. 77/2016 (art. 4 mainly), but their applicability (and that of the entire procedure ruled by the Law hereunder) to pre-existing contracts depends on art. 11 of the Law, and this article's constitutionality presumes establishing the existence of the hardship theory conditions. In other words, in order to assess the applicability of Law no. 77/2016 to a certain case, the court will have to firstly check the existence of the hardship theory conditions.

Therefore, the issue of breaching the availability principle cannot be taken into account by analyzing the hardship theory conditions, this analysis is necessary to establish the applicability of the procedure ruled by Law no. 77/2016. Doing so, the court does nothing more than checking the applicability of the special procedure to the contract regarded by the claim (and by the prior notice from the debtor).

And an eventual counterclaim from the debtor (notwithstanding litigation risen prior to the passing of the Constitutional Court's decision in which the moment by which a counterclaim could be filed could very well have passed – of course we could talk about a request for reinstatement within term in the 15 days following the passing of the RCC decision) would be hard to admit. Because we either appreciate that the court would have to check the existence of the hardship theory conditions anyway and then the counterclaim would lack interest, or we deem the court could not proceed to that matter and then it could not admit the claim based on the lack of the hardship theory conditions (or on the failure to prove them).

In the end, taking into account the Constitutional Court's decision, there are two possible solutions: either the hardship theory conditions are met and the application of the procedure under Law no. 77/2016 to pre-existing contracts does not breach constitutional provisions, or the hardship theory conditions are not fulfilled, in which case the procedure ruled by Law no. 77/2016 cannot be applied to pre-existing contracts. And the court not only can, but is forced to act for a correct application of the law, and in order to do that it must first establish the norms applicable to the case. And that presumes, as per the RCC decision, verifying the existence of the hardship theory conditions. The judge's active role principle[10] (art. 22 C.p.c.) prevents any doubt on an eventual breach of the availability principle (art.9 C.p.c.).

Thusly, even if the creditor (claimant) fails to invoke the failure tu fulfill the hardship theory

[10] See G. Boroi, M. Stancu, op. cit., pages 20-25.

conditions, the court will, however, proceed to analyze their existence.

Difficulties arise as for the solution the court should pass in the hypothesis in which, after analysis of the hardship theory conditions, they will not establish they exist (if it is assessed the hardship theory conditions have been met, then the court will rule according to the solidity of the creditor's contestation of the admissibility requirements under art. 4). In such case, the procedure ruled by Law no. 77/2016 would not be applicable to the contract under matter.

But let us see what are the possible solutions in case the creditor fails to invoke the lack of the hardship theory conditions.

Should the court fail to verify the existence of the hardship theory conditions three solutions are possible.

Thus, without checking the existence of the hardship theory conditions, the court could reject the creditor's claim verifying and assessing that the admissibility requirements under art. 4 are met (those contested by the creditor), with no reference (analysis) to the hardship theory. However, in such case, the court would pass a ruling regarding a pre-existing contract (by hypothesis, such contracts are subject of the matter here) based on art. 11 of the Law, though this article would only be constitutional if the hardship theory conditions are met (according to RCC decision). Without verifying the fulfillment of these conditions the court cannot apply art. 11, and if this article does not apply, the procedure ruled by Law no. 77/2016 cannot pertain to contracts placed prior to its coming into force.

In a second hypothesis, without checking the existence of the hardship theory conditions, the court could admit the creditor's claim, verifying and deeming that the admissibility conditions under art. 4 have not been fulfilled (those contested by the creditor), making no reference (analysis) to the hardship theory. But this situation is similar to the aforementioned. The court would rule in accordance with legal norms that might not be applicable to the contracts under matter, and they could not find base in the dispositions of art. 11 without checking the fulfillment of the hardship theory conditions. Surely, the interest of discussing such a hypothesis is fairly low, because, either the hardship theory conditions were met or not, the application of the giving for payment procedure ruled by Law no. 77/2016 would still be inadmissible.

Finally, without proceeding to effectively checking the existence of the hardship theory conditions, the court could admit the creditor's claim on grounds that the debtor failed to invoke and prove the existence of the hardship theory conditions, an aspect on which the admissibility of the applicability of the procedure ruled by Law no. 77/2016 to pre-existing contracts depends. However, if we were to consider that the court is prevented from analyzing the existence of the hardship theory conditions because of the availability principle, even more so we could not accept the passing os a ruling based on an aspect upon which the court had not been invested (and which was not brought into matter with the parties). And we must not omit the fact that the court's ruling (assuming it is mentained in appeal) would be *res judicata*, therefore there would be no more means to verify the existence of the hardship theory conditions in a new step based on the provisions of Lawu no. 77/2016.

Given the aforementioned, we deem the court will be forced to proceed to checking the existence of the hardship theory conditions. In this case there are also multiple possible outcomes.

Thusly, it is possible that the court verifies the existence of the hardship theory conditions and to assess they do exist, in which case they will also check the other admissibility requirements (art.4) contested by the creditor and will pass a solution accordingly (admits the claim if the admissibility requirement are not fulfilled and rejects it if it deems they are met).

In a second hypothesis the court may check but assess that the hardship theory conditions are not established. In which case the court should not proceed to analyze the fulfillment of the admissibility requirements under art. 4. Therefore solutions of admitting or rejecting the creditor's claim based on the failure tu fulfill the admissibility requirements should be excluded.

Two more possible solutions remain.

The court could admit the claim based on the inexistence of the hardship theory conditions. But this would mean admitting the claim based on a reason the creditor has not invoked. If the court would do so they would breach the availability principle, by changing the cause of the claim.

That is why we consider that the court should reject the claim, mentaining, though, in the reasons the inapplicability of the procedure ruled by Law no. 77/2016 (this is where the solution of rejecting the claim without analyzing the admissibility requirements contested by the creditor arises from). By such a ruling the court would abide by both principles under matter, the availability principle and the active role principle.

This last solution presumes an analysis of its consequences.

Although their claim has been rejected, the creditor wil be able to request payment of the amounts due according to the contract and can start or continue forced execution. The by law suspension of contractual effects will be deemed, in view of the passed ruling's reasons, as inoperable. Any opposition on behalf of the debtor, in any way, will be removed by *res judicata* which will include the reasons (decisive) for the solution[11] by which the creditor's claim was solved (including an eventual debtor's claim upon art. 8 of the Law).

The only unsolved issue for the creditor remains that of litigation costs. However, in case their claim was

[11] G. Boroi, M. Stancu, op.cit., pages 586-587.

filed prior to the Constitutional Court's ruling, we deem that, assessing the matter of procesual guilt, although their claim was rejected, they should not be forced to pay for litigation fees.

Finally, in case the creditor did not file a claim based on art. 7, or they have filed such a claim but it has been rejected and, in all cases, did not follow the debtor's notice, tha later could lodge the claim under art. 8 of the Law. We consider that, no matter if the debtor has or has not invoked the fulfillment of the hardship theory conditions, the court must check their existence, as well as that of the other admissibility requirements. Of course, the debtor's claim was preceeded by the one of the creditor (which has been rejected), *res judicata* of the ruling by which the creditor's claim was solved will be taken into account (for that matter, we think it should be considered that, in a litigation having the debtor's claim as object, the creditor will be able to invoke the failure to fulfill any admissibility or hardship theory condition, if those have not been invoked by their prior claim).

From the perspective hereunder (the hardship theory) the creditor will have to contest:

a) the fact that the execution of the contract has become excessively burdensome for the debtor;
b) the fact that the situation under pt.a) is due to exceptional changes of circumstances;
c) the fact that the change in circumstances took place after the conclusion of the contract;
d) or they should prove :
e) the fact that the change in circumstances, and also thir extent were or should have been taken into account by the debtor upon concluuin of the contract;
f) the debtor took the chance of changing circumstances or it could reasonably be considered that they took that chance;

As for the burden of proof, we think the debtor will have to prove the existence of the hardship theory conditions mentioned above under pts. a), b) and c) and the creditor should have to prove the aspects mentioned under pts. d) and e). Given that the failure to meet any of these conditions makes the procedure under Law no. 77 inapplicable (as the hardship theory conditions do not exist)and they can only be assessed consecutively (on principle, in the aforementioned order) it results that the debtor will firstly prove aspects under pts. a), b) and c) and only after that the creditor, in order to win the case, will have to prove the aspects under pts. d) and e).

Regarding the condition for applying the hardship theory consisting of the debtor having tried to negotiate a reasonable an equitable adaptation of the contract, we think the failure to do that cannot be taken into matter (in the procedure ruled by Law no. 77/2016) given that the solution of modifying the contract is mentioned by the legal dispositions and, moreover, the procedure starts by notice given by the debtor.

3. Conclusions

Therefore, the Constitutional Court's Decision cannot be deemed to generate the inapplicability of the procedure under Law no. 77/2016 to pre-existing loan contracts.

Thus, the necessity to set the terms in which the procedure ruled by the Law hereunder will be applied and these have been the very object of the present study.

Of course, we do not pretend to solve all the difficulties that might arise upon application of the law according to the conditions set by the provisions of the Constitutional Court's Decision, nor do we consider our proposals to be absolute. This article represents an attempt to help practitioners, courts or representatives of involved parties, which will be called to answer the questions above.

Naturally, as per the matter's actuality, it will be subject to far more ample anlyses in the specialty literature and the solutions brought forward will be either confirmed or denied by jurisprudence of courts which have already been invested with a significant number of claims under Law no. 77/2016.

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