IMPLEMENTING THE CONSTITUTIONAL COURT'S RECENT DECISIONS REGARDING CERTAIN PROVISIONS STIPULATED FOR CREDIT AGREEMENTS AND CREDIT CONVERSION

Gabriel VASII[*]

Abstract

The article aims to analyse the practical consequences of the Constitutional Court's recent decisions in respect to the provisions of Law no. 77 / 2016 for credit conversion and of Law amending Government Ordinance no. 50/2010 (credit conversion). The analysis shall be made from the bank's perspective and from the consumer's point of view.

Keywords: *unfair terms, Constitutional Court, credit agreements, credit compensation*

1. Introduction

With this analysis, we aim to present a theme recently appeared in Romanian legal society, namely the changes in the legal framework applicable to the commercial relationship between the consumers and the banking institution. The analysis shall be performed both from the perspective of Law no. 193/2000 and from the point of view of the applicability of Law no. 77/2016 for the return of the asset in exchange for the receivable, published in the Official Gazette no. 330/28.04.2016 ("Law no. 77/2016"). The novelty of the aspects which are to be presented resides in the amendments brought by the Constitutional Court's Decision no. 623/2016[1] regarding the unconstitutionality exception of articles 1 par. 3), article 3, article 4, article 5 par.2) articles 6-8 par. 1), 3) and 5), article 10 and article 11 of Law no. 77/2016 and well as of Law no. 77/2016 itself ("Decision no. 623/2016").

This paper sets out a challenge to analyse the manner of application and the implementation of the dispositions of Law no. 77/2016, pursuant to the modifications brought by Decision no. 623/2016, both from a scholar's perspective and from a practical approach of the procedure for returning the asset in exchange for the receivable, as established by Law no. 77/2016.

2. Review of the main dispositions of Law no. 77/2016

Law no. 77/2016 entered into force on 13 May 2016. This legal norm appeared as a solution for certain retail borrowers who can now opt between paying their loan or using a legal mechanism of transferring the title to the immovable assets which were given as collateral for securing the obligations under such loan agreements to the lenders or to the assignees of the corresponding receivables (jointly referred to as "Creditor").

Law no. 77/2016 applies to credit agreements. Romanian doctrine[2] has criticised the general definition given by the legislator to the agreement during 2009 – 2011, considering that the agreement should be defined through its most general and representative characteristics and should emphasis that the agreement is a special, complex type of legal act, deriving from the parties' will, motivation, interests, finality and purpose.

Recent Romanian doctrine[3] has defined the agreement as being a legal understanding between the parties, meaning a qualified form of the parties' will and consent, which ensured the party acting in good faith that it shall benefit from the state's coercitive force.

This definition applies also to loan agreements concluded between banks, as credit institutions, and individuals, as consumers.

To entail the application of the Law, the following criteria must be cumulatively met, in compliance with article 4 par. 1) of the Law:

a) the Creditor is a credit institution, a non-banking financial institution or an assignee of receivables originated by such credit or financial institutions.
b) the loan agreements are concluded between retail borrowers and consumers, as defined by Government Ordinance no. 21/1992 for consumer protection and by Law no. 193/2000 regarding unfair contractual terms within the agreements between professionals and consumers,
c) the retail borrowers have not been charged by way of a final court decision for criminal offences in relation to that loan;
d) the loan agreements are secured with at least

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email: **gabriel.vasii@tuca.ro**).
[1] Published in the Official Gazette no. 53 / 18.01.2017.
[2] Liviu Stănciulescu, Vasile Nemeș, Dreptul contractelor civile și comerciale în reglementarea Noului Cod Civil, Ed. Hamangiu, 2013, p. 11.
[3] Liviu Stănciulescu, Dreptul contractelor civile. Doctrină și Jurisprudență, Ed. Hamangiu, Ed. 3, 2017, p. 37.

one mortgage on a residential property. The Law applies even if there are other collaterals besides the mortgage on a residential property;

e) at the date of granting the loan, the principal amount did not exceed EUR 250,000 or the equivalent amount in another currency (based on the exchange rate calculated by the National Bank of Romania for the date when the loan agreement was signed);

The following type of loans are excluded from the application of Law no. 77/2016:

a) loans granted under the "Prima Casa" governmental program;
b) loans (including mortgage loans) secured with collaterals which do not have a residential purpose, e.g. commercial properties, office buildings, land (even if the land may be used for residential purposes but does not have any residential buildings on it);
c) loans which have (at the date of extending the loan) a principal exceeding the threshold of EUR 250,000 (or the equivalent in any other currency);
d) corporate loans, even if such loans are secured with residential properties.

In order to avoid producing a disruption in the balance of legal relationships between parties, Law no. 77/2016 shall apply both to ongoing loan agreements at the date of its entry intro force and to loan agreements which are envisaged to be concluded after this date. Proof of the fact that the Law is oriented to protect consumers is its application to cases when the collateral has already been sold within the enforcement procedure, but only to the extent there are other enforcement proceedings (related to the same loan) which are ongoing against the debtor.

The steps for implementing Law no. 77/2016's mechanism are the following:

- at the debtor's, guarantor's or collateral provider's initiative, a notice is sent to the creditor, informing the latter of the debtor's, guarantor's or collateral provider's intent to return the ownership over the mortgaged property for the full settlement of the debt,
- certain formalities must be observed for sending the Notice, which can be transmitted either through an attorney, or a notary public or a bailiff.
- the Notice must convey two alternative days and a precise timing in which the legal or conventional representative of the credit institution presents himself to the notary public appointed by the debtor, guarantor or collateral provider for the conclusion of the deed for transferring ownership over the mortgaged property and discharge of debt. By debt, Law no. 77/2016 refers to any principal, interest or delay penalties deriving from the loan. The date proposed by the Debtor for the notary's appointment cannot be sooner than 30 days from the date of the Notice.

Legal doctrine[4] stated that the right to settle the bank receivable and the correlative debt, as stipulated through articles 3-5 of Law no. 77/2016 appears to be a truly potestative right, since it empowers a person to unilaterally amend, settle or recreate a pre-existent legal situation. However, the same author reaches the conclusion that this right cannot be qualified as a potestative right since it would grant excessive powers to the consumer. Further on, the same author concludes that Law no. 77/2016 does not stipulate a specific case of hardship, but that the legislator's intent is to make this legal norm compatible to important values and principles in line with our Constitution and internal legislation, with European Union laws and with the guidelines of the European Convention for Human Rights[5].

The primary effect of this mechanism regulated by Law no. 77/2016 is the immediate suspension of any payment obligation of the Debtor to the Creditor together with any legal and administrative proceedings initiated by the Creditor against the Debtor (including guarantors and collateral providers) or its assets, as of the date when the notice is served to the creditor.

Although Law no. 77/2016 carved the way for a higher protection of the debtor, it has also provided a safety mechanism for the creditor, as well, by stipulating the possibility for the latter to challenge the debtor's request to return the asset, within 10 days as of the receipt of the notice, if the creditor deems that the conditions provided by article no. 4 of Law no. 77/2016.

Such a challenge should be judged by the relevant local court (i.e. the local court in the jurisdiction where the Debtor has its domicile) with urgency. Any court decision is subject to appeal which may be filed within 15 working days from the date when the first court decision is communicated. The appeal must be judged with extreme urgency, as well.

In case the Creditor's challenge is successful, the parties will return to their original legal positions prior to the issuance of the notice, meaning that the debtor's obligation to continue to pay the outstanding loan amount is not suspended any more and is due. However, Law no. 77/2016 does not expressly mention when the payments towards the bank are to be resumed.

If no challenge against the debtor's request is filed or if such challenge is finally rejected by the court, the creditor must continue the settlement procedure, as requested by the debtor. To this end, the creditor must present himself before the notary public appointed by the debtor within 10 days as of the final rejection of his challenge, as per article 7 par. 6) of Law no. 77/2016. Further on, the creditor and the debtor will sign a notarial deed which will evidence the transfer of title over all relevant collaterals, from the debtor to the Creditor. Upon such transfer of title, all the debtor's obligations to the dreditor will be deemed settled.

[4] Valeriu Stoica s.a., Legea dării în plată, Ed. Hamangiu, 2016, p. 10.
[5] Valeriu Stoica s.a., Legea dării în plată, Ed. Hamangiu, 2016, p. 29.

Law no. 77/2016 has foreseen a method for supporting the debtor in case the creditor fails to comply with its obligations after a final ruling is rendered. In this situation, the debtor may file a court claim requesting the court to release him of its debt and to acknowledge the ownership title over the collaterals to the creditor.

Upon the conclusion of the notarial deed or upon a final court decision being rendered, in each case for the transfer of title over the collaterals, from the debtor to the creditor, the debtor's (re)payment obligations to the creditor will be deemed settled in full.

3. Unconstitutionality grounds against Law no. 77/2016

Starting from the contractual relationship between credit institutions and consumers, legitimated through credit agreements, the legislator intervened through Law no. 77/2016 in order to relieve the already accumulated tension between these parties. Law no. 77/2016 was born under the auspices of the world economic crises which led debtors to the impossibility to settle their payment obligations deriving from the credit agreements[6]. Law no. 77/2016 entered into force after 16 years as of the promulgation of Law no. 193/2000 for unfair clauses in credit agreements with consumers, giving rise to a new wave of litigations against the manner in which Law no. 77/2016 has understood to rebalance the risks pertaining to credit agreements and the devaluation of immovable properties.

The constitutionality of Law no. 77/2016 has been contested through the exceptions filed against article 1 par.3), article 3, article 4, article 5 par. 2), articles 6-8 par. 1), 3) and 5), article 10 and article 11, as well as the exceptions filed against the law itself.

The main arguments in support of the unconstitutionality of Law no. 77/2016 may be comprised as follows:

- critics based on the fact that Law no. 77/2016 has been adopted as an ordinary law, instead of an organic law. This opinion is based on the fact that the general legal regime of ownership over lands is governed by the Romanian Constitution, which is an organic law. Therefore, there are no grounds to amend the general regime set through an organic law by using an ordinary law, whose purpose is to regulate other areas.
- Law no. 77/2016 triggers the insecurity of the civil circuit since it may lead to the retroactive the amendment of credit agreements that have been concluded under laws in force at the moment of their conclusion and which are subject to their applicability, based on the principle tempus regit actum. The authors of this argument also believed that the bank's access to an economic activity and its freedom of commerce is severely affected since the bank loses its receivable right gained through the credit agreement. In addition, the bank's position would also be affected if the mortgaged asset is transferred in its patrimony along with the guarantees and encumbrances constituted by other creditors, thus becoming a guarantor for the debtor itself, instead of remaining a creditor.
- the dispositions of Law no. 77/2016 have been criticised also from the point of view of the limited conditions in which the bank may proceed to contest the debtor's request to return the asset, since there are no mentions regarding the bank's possibility to analyse the current status of the returned asset, the debtor's fault for diminishing the value of the mortgaged asset or the debtor's actual status of necessity which makes him eligible for such a procedure. The authors of this argument also invoked the fact that the bank has extremely limited possibilities to rebalance it's contractual risks.
- Law no. 77/2016 has been criticised also for being imprecise, since it stipulates a derogation from the provisions of the Romanian Civil Code, without mentioning which are the legal dispositions subject to this exception,
- the authors of the unconstitutionallity exception also express their disapproval of the fact that Law no. 77/2016 is not exactly correlated to other legal norms, although the provisions of the Law expressly mention this correlation.
- there is an inadvertency between the purpose of Law no. 77/2016, which is said to be the safeguard of debtors overcoming a difficult financial situation and the provisions of the law itself, which do not emphasise its application only to debtors in a difficult financial situation, thus creating the possibility for debtors to benefit from the Law' provisions regardless of their economic status.
- Law no. 77/2016 is deemed unconstitutional based on its retroactive effect, which determins a change in the nature of the credit agreement itself which becomes a leasing agreement. In support of this thesis, the authors claim that for past situations in which the immovable asset had been sold within the enforcement procedure in order to cover the debt and the bank continued the enforcement procedure for the rest of the amount, the legislator has created a new effect, namely that of the settlement of the debt as of perfecting the sale-purchase of the collateral at the request of the debtor, as per article 8 of Law no. 77/2016. Since at the moment when the collateral was sold, this legal situation did not create the right for the debtor to request the settlement of the obligation, it would be unconstitutional for a new law, subsequent to the sell-purchase of the collateral, to be able to retroactively change the effects of the past situation and give birth to the debtor's right to request the settlement.
- another relevant argument for the unconstitutionality of Law no. 77/2016 is that it replaces the bank's receivable with a ownership right

[6] For details, see Valeriu Stoica – "O lectură constituțională, dincoace și dincolo de Legea dării în plată" – Article published on the website - https://juridice.ro/essentials/836/o-lectura-constitutionala-dincoace-si-dincolo-de-legea-darii-in-plata.

against the bank's will, which leads to a decrease of the bank's patrimony if the value of the immovable asset is lower than the value of the due loan.

− the authors of the unconstitutionaly exception believed that Law no. 77/2016 establishes an unwarrantable interference with the bank's hypothec right, in the sense that if the bank decides to enforce the hypothec right, the bank must takeover the asset. In this case, if the bank's hypothec is higher than other creditor's hypothects, the bank's hypothec shall remain without effect as a consequence of taking over the asset but the next creditor's hypothec shall increase and therefore, their right to settle their receivable shall become actual and their creditor shall become the bank itself.

− Law no. 77/2016 has been criticised also due to the lack of preliminary impact studies prior to its adoption, which leads to a lack of consideration for the rights of other parties involved in the credit process.

− last but not least, the authors of the unconstitutionality exception invoked the negative notice of Central European Bank on the provisions of Law no. 77/2016, since the measures established through the latter lack proportionality because it does not mention the just and equitable compensation applicable to the creditor in such a situation. The authors believed that Law no. 77/2016 would have been proportional if the legislator had correlated the settlement measure with the dispositions of Law no. 151/2015 for the insovency of the individual, therefore if the settlement measure would have been limited to social cases or to credit agreements currently under litigation. In lack of a proportionality between the settlement procedure stipulated by Law no. 77/2016 and the cases in which the legislator allows its application, the guarantees for the economic liberty of creditors and of free trade are severly violated.

4. The Constitutional Court's grounds regarding the arguments supporting the unconstitutionality of Law no. 77/2016

Within Decision no. 623/2016, the Constitutional Court[7] analyses and motivates both arguments related to extrinsic unconstitutionality grounds, as well as intrinsec unconstitutionality grounds:

1. ***Extrinsic unconstitutionality grounds*** are related to Law no. 77/2016 itself and refer to the fact that this law has been adopted as an ordinary law instead of an organic law. The Court believed this reason is not grounded since Law no. 77/2016 refers to limited situations which do not entail the geeral regime of ownership. More precisely, the Court considered that Law no. 77/2016 refers to a manner of execution of certain obligations comprised in credit agreements in case of hardship. Even if one of the effects of Law no. 77/2016 is the transfer of ownership, this circumstance does not represent a regulatory framework for the general regime of ownership in Romania. În acest sens, a se vedea
2. In respect to arguments for the ***instrinsec unconstitutionality*** of Law no. 77/2016, the Court acknowledges that the critics refer to the lack of clarity and precision of the law, in the sense that it does not mention who shall bear the enforcement expenses and does not clearly specify what agreements are to be considered credit agreement, it does not specify whether the Civil Code is applicable for the return of the asset, it does not accomodate the purpose of the legal norm with its content. The Court rejected this type of arguments, since it deemed that they mostly refer to the interpretation and application of Law no. 77/2016 by the common court of law and their analysis exceeds the competences of the Constitutional Court.

5. The Constitutional Court's grounds regarding the arguments supporting the unconstitutionality of Law no. 77/2016

The Constitutionality Court begins its analysis from the purpose of Law no. 77/2016, as mentioned in its preamble, by referring to the intention of the legislator to promote equity by dividing the contractual risks between the creditor and the debtor, in the current social context after the economic crisis. As opposed to this new theory, in relation to contracts the principle pacta sunt servanda is the one governing the relationship between the parties, who are the ones who establish the extent of their obligations and must observe such extent.

3.1. The compatibility between the mandatory force of the agreement and the provisions of Law no. 77/2016, considered instrusive by the authors of the unconstitutionality exceptions

Therefore, the main issue the Court must clarify first and foremost is the compatibility of the principle pacta sunt servanda, which regulates the parties' autonomy of will with the provisions of Law no. 77/2016.

In order to proceed to this analysis, the Court establishes that the principle pacta sunt servanda reflects the mandatory force of an agreement, entered into by the parties through their true and autonomous will. Since the agreement is mandatory for the party, so is its execution. Therefore, if the parties intend to bring any changes to the initial obligations construed within their agreement, they must express their will in order to do so.

[7] For details, see Mihnea Săraru și Alina Ciocoiu – "Ce efecte mai poate produce "Legea darii in plata" ca urmare a Deciziei Curtii Constitutionale nr. 623 din 25 octombrie 2016?" – Article published on http://www.hotnews.ro/stiri-dosare_juridice_rezolvarea_disputelor-21391551-efecte-mai-poate-produce-legea-darii-plata-urmare-deciziei-curtii-constitutionale-623-din-25-octombrie-2016.htm.

However, in practice, there are certain situations which the parties cannot foresee at the initial moment of entering into the agreement and which can lead to a change in the parties' possibility to execute the undertaken obligations.

Based on this situation, the Court proceeded to analyse whether the provisions of Law no. 77/2016 accommodate or interfere with the parties' autonomous will.

3.2. The applicability of hardship

The Court recognizes the applicability of hardship under the Civil Code of 1864, as an expression of article 970, which stated that conventions were mandatory between the parties if concluded in good faith and their effects were limited not only to what the parties expressly mentioned but also to all the consequences attached to the obligation based on equity, habit or law. Some authors[8] have reached the conclusion that hardship may not be applied in relation to Law no. 77/2016.

The hardship represents an exeption from the mandatory force of the agreement, namely from pacta sunt servanda, and is stipulated in the New Romanian Civil Code under art. 1271. In recent doctrine[9], the hardship has been defined as the impossibility of the party/parties occurred at the moment of the conclusion of the agreement that a prejudice may happen due to the serious imbalance between the contractual performances during the execution of the agreement, usually produced as a consequence of economic changes.

The agreement itself comprises a risk assumed by the contracting parties and a supplementary risk, which the parties did not foresee and which exceeds their reasonable predictability. In such circumstances, the hardship covers the supplementary unforeseen risk, opening the way for the parties to adapt the agreement if its social utility is still justified.

It was pointed out in doctrine[10] that the hardship clause may be triggered not only in synallagmatic continuing agreements, but also in uno ictu agreements, insofar as the circumstance trigerring the contractual imbalance is generated after the agreement is concluded, but prior to the moment when the contractual obligations should have been executed.

3.3. Good faith and equity in the context of fundamental changes of the conditions in which the agreement is executed

The Court analysed the relevance of good faith and equity in the execution of an agreement, and deemed that the legitimacy of an agreement is maintained as long as it is the result of the existance of the two principles of mandatory force and execution in good faith, which are interdependantly connected. Therefore, equity and good faith provide a solid ground for invoking hardship. In the Court's opinion, by taking into consideration the element of good faith, the role of the common law judge is extended and therefore, the security of the relationships between the parties is not harmed, since the court's intervention is limited to the acknowledgement of the specific conditions of contractual hardship.

4. The Constitutional Court's conclusion

By corroborating the above with the legislator's intent to balance the contractual risks, the Constitutional Court deemed that through Law no. 77/2016 the legislator wanted to introduce the applicability of the hardship in credit agreements.

However, the Court pointed out that it is the common court of law's prerogative to verify whether the conditions of the hardship.

Within its analysis, the Court established that Law no. 77/2016 does not represent a case of retroactive application of legal dispositions, since the credit agreements have been concluded under the dispositions of the Civil Code of 1854, which allowed the use of hardship clauses and did not deem that hardships interferes with the principle of autonomy of will.

5. Applicability of Decision 623/2016 in the legal procedure of solving complaints conducted in the cases on the dockets of the courts

As previously mentioned, the new legal framework regulated by Law 77/2016 has been determined by the idea of fairness and sharing of contractual risks in the performance of loan agreements under those circumstances that occurred further to the economic crisis, when debtors were no longer able to perform their obligations undertaken in loan agreements.

However, this allowed debtors to suspend, based on a simple notice, according to Article 5 of Law No. 77/2016, the creditor’s right to have recourse against the debtor, the codebtors, as well as personal guarantors or mortgagors and, implicitly, to have its debts under loan agreements extinguished, along with their accessories, with no additional costs, by giving in payment the immovable asset mortgaged in favour of the creditor.

In all this unfavourable mechanism, creditors were forced to unwillingly become the owner of an immovable asset the market value of which is in most cases much below the value of the loan contracted by

[8] For details, see Marieta Avram – “Mai există darea în plată forțată după Decizia Curții Constituționale nr. 623/2016?” – Article published on - https://juridice.ro/essentials/760/mai-exista-darea-in-plata-fortata-dupa-decizia-curtii-constitutionale-nr-6232016.

[9] Liviu Stănciulescu, Dreptul contractelor civile. Doctrină și jurisprudență, Ed. Hamangiu, Ed. 3, 2017, p. 102.

[10] Gabriel Boroi, Liviu Stănciulescu, Instituții de drept civil în reglementarea Noului Cod Civil, Ed. Hamangiu, 2012, p. 151.

the debtor, which automatically resulted in the filing, pursuant to Article 7(1), of the challenge in court of the procedure regulated by this law.

Further to the filing of challenges with the courts of law, a series of cases are being tried, large part of which have been stayed until the issuance of Decision 623/2016.

Please note that the courts currently grant other motions concerning the plea of unconstitutionality of the provisions of Law 77/2016, which motions will lead to an analysis by the Constitutional Court of the constitutionality or non-constitutionality of the articles mentioned in such motions. It is highly probable that the Constitutional Court will dismiss such new motions in consideration of the fact that they made an analysis concerning the constitutionality by Decision 623/2016.

From the considerations of Decision No. 623/2016 it results that, from a procedural perspective, the court approached for solving a challenge to the notice for giving in payment will check in against Decision 623/2016 the cumulative fulfilment of the admissibility conditions: (i) the proof of completing the prior notification procedure, (ii) Fulfilment of the requirements under Article 4 of Law No. 77/2016 and (iii) Fulfilment of the hardship conditions, existence of a risk that none of the parties could reasonably foresee in the context of the application of Article 7, or Article 8 or Article 9 of the law.

Decision No. 623/2016 clearly provides that it is impossible to reduce the role of the court of law merely to checking the fulfilment of the requirements under Article 4(1) of Law 77/2016.

The court may grant the creditor's challenge either because one or another of the five admissibility conditions is not fulfilled, or because one or another of the substantial hardship conditions is not fulfilled.

In order to decide if the debtor was in a hardship situation, the court will review the situation in its entirety, in consideration of several criteria, mentioned in Decision 623/2016 of the Court:

1. the co-contractors' economic/legal capacity and expertise,
2. the value of the considerations determined by the agreement,
3. the risk already materialized and borne by the agreement and
4. the new economic conditions that alter the parties' will, as well as the social use of the loan agreement.

Therefore, the courts will check if the hardship conditions are fulfilled and will consequently order that the agreement should be adapted or terminated[11]. In this respect, there needs to be a distinction between two categories of substantial hardship conditions: the objective and subjective ones. All the objective and subjective hardship conditions must be fulfilled simultaneously.

Objective requirements are the exceptional cause that determine the alteration of the circumstances existing upon the execution of the agreement, resulting in the unbalance of the relation between the parties' considerations, so that the performance thereof would become excessively burdensome.

The subjective condition concerns the debtor's good faith, the debtor's conduct, if the latter is unable to pay for reasons unimputable to him or if, on the contrary, an ill-will refusal to pay is involved.

To conclude, challenges to notifications for giving in payment may be supported by the non-fulfilment of the hardship conditions since the fact that the agreement becomes more burdensome is practically circumscribed to an inherent risk of the loan agreement and in order for hardship to occur the situations that generated excessive burden had to be more drastic, as well as in consideration of the fact that, if, however, the court upholds the fulfilment thereof, the agreement must be adapted.

If it upholds that all the procedural and substantial hardship conditions are fulfilled, the judge may order either the adaptation, or the termination of the agreement, depending on the circumstances of each case.

The application of these two rulings is included in the grounds of Decision No. 623/2016: "Adaptation takes place when the social usefulness of the agreement may be maintained, while termination occurs when in case new conditions occur, the agreement loses its social usefulness. Consequently, the Court upholds that the parties are firstly under the obligation to renegotiate the agreement, and, secondly, the renegotiation should be effective in consideration of the new reality."

The termination, or, as applicable, the adaptation of the agreement, lie with the judge, who may rely on Directive 17/2014, the only legislative act that provides for a renegotiation of the agreement and a potential adaptation when the variation of the aggregate amount to be reimbursed increases from the amount that it would have reimbursed in consideration of the exchange rate applicable at the execution date of the agreement.

6. Conclusions

We believe that Decision 623/2016 of the Constitutional Court is a general one that sets forth the principle for application of Law 77, which means that it lies with the courts of law to continue the interpretation process started by the Constitutional Court, in order to analyse *in concreto* how the provisions of Law 77/2016 will be applied, in consideration of the hardship theory.

Relying on Decision 623/2016, the courts will apply a theory of hardship in connection to the other principles of the Civil Code of 1864, with balance and just measure, at the same time observing the giving in payment concept.

[11] For details, see Radu Rizoiu – "Paradoxul călătorului în timp a fost evitat… la timp: Condițiile (constituționale ale) dării în plată" – Article published on https://juridice.ro/essentials/722/paradoxul-calatorului-in-timp-a-fost-evitat-la-timp-conditiile-constitutionale-ale-darii-in-plata.

Decision 623/2016 of the Constitutional Court, however, has not fully clarified the problem resulting from the legal practice, it will also face the difficult issue of prescription of the right to request the ascertainment of the fulfilment of the hardship conditions and the application of the solutions for termination or adaptation of the loan agreement. Also, the correlation between the special procedure regulated by such law and the general law procedure gives rise to numerous issues. Such aspects will be clarified by the legal practice.

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