

LEGAL ALERT

EXCEPTIONAL REGIME FOR THE RESTORATION OF FINANCIAL BALANCE OF CONTRACTS AND COMPENSATION FOR THE SACRIFICE, IN THE CONTEXT OF THE COVID-19 PANDEMIC

On April 30, 2020, [Decree-Law no. 19-A/2020](#) was published, establishing an exceptional and temporary regime applicable to long-term execution contracts to which the State or other public entity is a party and compensation for the sacrifice (“*indemnização pelo sacrifício*”) of acts practiced in the scope of preventing and fighting the COVID-19 pandemic.

Although, in general, doubts may arise as to the exact scope of the long-term execution contracts’ concept, there are reasons to consider that any contracts containing clauses to restore financial balance or for which the law foresees a possibility to restore financial balance are covered by such concept.

This regime is partly based on the provision of the [Presidential Decree no. 17-A/2020, of April 2](#), (also contained in the [Presidential Decree no. 20-A/2020, of April 17](#)), which renewed the state of emergency and allowed the possibility of “temporarily modifying the terms and conditions of long-term execution contracts or waiving the demand for certain services, as well as limiting the right to restore financial balance of concessions as result of a decrease in their use resulting from measures adopted under the state of emergency”.

The following measures are therefore adopted:

1. Restoration of financial rebalance

The legislator establishes an exceptional regime to restore financial balance of long-term execution contracts where the State or other public entity is a party, due to facts arising from the COVID-19 pandemic, distinguishing two periods of time:

- a) For the period **from April 3rd to May 2nd, 2020**, in accordance with the provisions of Article 3, paragraph 1, the clauses for restoring financial balance and the legal provisions providing for such restoration or for the right of compensation following a decrease in their use, are suspended. This means that counterparties may not claim the right to restore financial balance due to a decrease in use in that period as a result of measures adopted in the state of emergency.

The law only refers the suspension of compensation or restoration due to a decrease in use (which causes loss of revenue), so, Article 3, paragraph 1, will not apply to the right to compensation or restoration for increased costs caused by the COVID-19 pandemic (as set forth in Presidential Decree No. 17-A/2020).

- b) For events occurring **before April 3rd or after May 2nd 2020**, in accordance with Article 3, paragraph 2, the right to compensation or to restore financial balance is maintained in contracts where compensation is provided for a decrease in use or in which the pandemic constitutes a ground likely to generate, under the contract, a right to restore financial balance (whether or not it is expressly mentioned in the contract), but this **can only take place through an extension of the performance period of the services or of the duration of the contract** (even if other forms of restoration are permitted by the contract or under the law).

Unlike the provision of paragraph 1, the limitation to compensation or restoration by extension of the period established in paragraph 2, of Article 3, appears to be intended to apply to any right to compensation or restoration following the pandemic (whether it is a loss of revenue or an increase in costs). In any case, the damage or imbalance resulting from the COVID-19 pandemic will always be at stake, and not any other event giving rise to a right to compensation or restoration.

2. Concession and sub-concession contracts in the road sector

According to Article 4, in concession or sub-concession contracts in the road sector, the grantor or sub-grantor shall determine, as a matter of urgency, which **obligations of the concessionaire or sub-concessionaire are reduced or temporarily suspended**, taking into account, in particular,

updated traffic levels consistent with reality and the minimum services to be guaranteed in order to safeguard road safety. This will involve, among other things, reducing the obligations laid down in operation and maintenance manuals, major repairs, roadside assistance, etc.

As a result, and in all cases where the concessionaire's or sub-concessionaire's payments are made by the public partner (and not by the users) – whether by availability or by service –, the grantor or sub-grantor should also **unilaterally determine the reduction of the payments** in proportion to the cost reduction achieved by reducing or suspending the obligations of the concessionaire or sub-concessionaire.

It should be noted that, with the law providing for a unilateral definition, it will be up to the concessionaires or sub-concessionaires to react by appropriate means when they render the decision in question as illegal.

In any event, the right to restore financial balance in accordance with Article 3, paragraph 2, is not hindered in these contracts.

3. Compensation for sacrifice

The legislator, without any basis in the presidential decrees that declared the state of emergency, determines in Article 8 that **there is no right to compensation for sacrifice for the damage suffered by individuals as a result of lawful measures taken by the State or other public bodies under the powers conferred by public health and civil protection legislation or in the context of the state of emergency**, for the purpose of preventing and combating the COVID-19 pandemic. This provision is therefore not limited to the state of emergency.

In the preamble of the Decree-Law no. 19-A/2020, the legislator justifies this provision by considering that the damages in question do not fulfil the requirement of speciality. However, considering that this conclusion depends on the analysis of the specific case, doubts may arise as to its constitutionality.

4. Appeals against arbitral decisions on matters regulated in this diploma

It is established that of the disputes related to the regime established in this law and settled by arbitration, there may be a review appeal and uniformization of jurisprudence appeal to the

Supreme Administrative Court (under the terms currently established, for arbitration, in the [Code of Procedure in Administrative Courts](#)).

This provision seems to be intended to apply even in the context of contracts which grant to the arbitration court the power to issue a final and unappealable decision, which, if confirmed, also raises questions of constitutionality.

5. Articulation with the Public-Private Partnership regime

The legislator rejects the application of requirements for the public partner foreseen in Article 20 of the public-private partnership regime, approved by [Decree-Law no. 111/2012, of May 23](#), regarding the decisions adopted in the context of the COVID-19 pandemic since March 14th, regardless of their form or nature.

In addition, it is clarified that the regime established in the Decree-Law no. 19-A/2020 is exceptional in relation to the public-private partnership regime, which continues to apply on a subsidiary basis to anything that is not contradicted by this regime.

6. Period of validity

The law applies to facts that occur until the World Health Organization determines that the epidemiological situation of the SARS-CoV-2 virus and the COVID-19 disease do not constitute a pandemic, without prejudice to the effects foreseen therein that by their nature will only occur afterwards or will only be effective thereafter.

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