

After the global impact generated by the Covid-19 pandemic, we are now experiencing the crisis in Ukraine that is already impacting global supply chains.

Events like this affect the global economy and the relationship between countries. They may gain scale and lead to the imposition of sanctions and hiring restrictions, which requires a thorough analysis by companies, notably those with multinational operations and/or with local ramifications on their supply chain, on the possible impacts of such effects on its hiring.

In addition to the most obvious cases, with contracts involving partners from countries directly related to the conflict or execution of the contract in an area of instability, such analyzes must consider the entire supply chain linked to each contract and that a mapping work is carried out and remediation of imminent risks in existing contracts, establishing possible mitigation measures, as well as preventive work for contracts to be signed during crisis events.

For current contracts, after carrying out a risk analysis, the company may, depending on the case, use certain legal remedies to deal with the situation and the existing risks, such as (i) a suspension of obligations due to an occurrence of acts of God or force majeure, (ii) the request for a judicial review of the installments due or even (iii) the termination of the contract.

It is important to highlight that, in Brazilian law, the institutes of Force Majeure and Fortuitous Event, in order to be configured, depend on a case-by-case analysis in order to verify the presence of their fundamental requirements, such as the impossibility of predicting or avoiding the occurrence of the event, that such event is not attributable to the Party's action or omission and that the Parties have not expressly assumed responsibility for damages caused by the force majeure event.

For contracts to be signed with crisis events already installed, it is recommended that companies do not rely exclusively on a standard Force Majeure clause, which only generically mentions wars, pandemics, and other topics as excluding the responsibility of the Parties. In a practical context, the adoption of generic concepts can lead to discussions about the extent of the conflict, how it directly affects the Parties, the fact that such conflict was already known at the time the contract was agreed upon, and mitigation measures adopted, among others, which can be difficult to prove.

Thus, for more effective protection, it is recommended that force majeure clauses be more detailed, predicting not only the events but also the impacts caused by unknown

developments of such events. It is also recommended the inclusion of other mechanisms that can help the Parties to rebalance the contract without the need for a legal dispute.

Below we deal with some examples of contractual mechanisms that can be adopted by companies to mitigate risks related to crisis events. However, it is worth mentioning that it is imperative that each case is evaluated by specialists in a joint effort between the legal department and all areas of the company involved and/or impacted by such situations.

## **Price adjustment clauses:**

- Inclusion in the price adjustment clauses of mechanisms to compensate for the effects of inflationary and exchange rate variations, if applicable, the inclusion of an adjustment formula that considers a possible exponential increase in the value of commodities;

## **Economic-financial rebalancing clauses:**

- The economic-financial rebalancing clauses are designed to maintain a fair economic relationship between the contractor and the contracting party when, for unforeseen reasons, there is a manifest disproportion between the value of the installment due and that at the time of its execution.
- Normally, the recomposition of the economic-financial balance of a contract will also be authorized whenever there is a significant increase in the prices of inputs and taxes that make up the final cost of the contract. Such recomposition is intended to reflect changes in market conditions – particularly over the course of a long-term contract.
- If there is a new, unpredictable, or predictable fact, but with incalculable consequences, rebalancing may be requested. The quantification of the economic-financial rebalancing value should consider (i) the prices that make up the costs presented above; (ii) objectively demonstrated extraordinary variation; and (iii) the significant increase in the prices of inputs that make up the final cost of the contracted product. Accurate cost assessment will be critical.
- Enforcing the economic-financial rebalancing clause is rarely straightforward, and a common area of debate is the benchmark to be used to measure the change or adverse effect. For this reason, it is extremely important that the clause be constructed objectively and clearly, pointing out, if possible, all the events that would be considered triggers to trigger the right to use such resource, always considering the principle of good faith, in order to not characterizing unjust enrichment.

## **Clauses related to sanctions and embargoes:**

- Inclusion of a protection clause for the Parties in case the scope of the contract is impacted by sanctions or embargoes related to the trade of certain goods, imports/exports, restrictions on the use of means of payment, and restrictions on contracting with certain countries, companies or people.