Civil Procedure in time of Crisis

Teresa Arruda Alvim Wambier
Full associate professor with an LL.M. and Ph.D. in laws from PUC-SP. Lectures postgraduate, specialisation, masters and doctoral courses at the same institution. Visiting professor at the University of Cambridge (2008 and 2011). Visiting professor at the University of Lisbon (2011). President of the IBDP. Vice-president of the Instituto Ibero-americano de Direito Processual. Member of the Council of Directors of the International Association of Procedural Law. Member of the Instituto Panamericano de Derecho Procesal, of the Academia de Letras Jurídicas do Paraná e São Paulo, of IAPR and IASP, of AASP, and of IBDFAM. Member of the Advisory Council of Câmara de Arbitragem e Mediação da Federação das Indústrias do Estado do Paraná – CAMFIEP. Member of the Advisory Council of RT publishing house (Editora Revista dos Tribunais). Lawyer.

It is a great honour for me to have been chosen to participate in the keynote speech of this fabulous Conference, held in such a unique city: Istanbul.

I come from a country which is undergoing a deep crisis, just after having been considered as a Country which was “booming”. Well, it “went boom”.

As far as procedural law is concerned, what is expected from the legislator is to create rules to protect the weaker party.

It should be understood that procedure is like a long wave rolling in gently onto the beach. It is not, by any stretch of the imagination, a phenomenon that feels the direct and immediate impact of economic fluctuations. But that influence does, in my view, eventually occur in two distinct manners.

In fact, normally crises affect more intensely the weaker party: the debtor, the consumer, poor people. When government is conscious of this and well-meaning, the normal consequence is the creation of legal provisions/statutory rules to make the burden of the crisis lighter on the weaker party’s shoulder.

It has, in fact, happened in many countries around the world.

* Many thanks to my dear friends: Alan Uzelac, Frédérique Ferrand, Marco Gradi, Nikolaos Katiforis, Paula Costa e Silva, Soraya Amrani Mekki e Viktória Harsági.
In Italy, for example, there is the “blocco degli sfratti” of 2014 that forbids you, in some cases, to EVICT THE TENANT, in the case of residential property. Tenants “con reddito annuo lodo complessivo familiar inferior a 27,000 euro, persone ultrasessantacinquenni, malati terminali, portatori di handicap con invalidità superiore al 66%”.¹

The only possible defence of the owner is to prove that the lessor (landlord/landlady) is in the same situation as the lessee (tenant) who must be evicted.²

In my country, Brazil, several interesting solutions have been conceived to diminish the effects of the economic crisis, always protecting the weaker party: since 1991, we have had a Consumers Protection Code, which has really changed businesses’ behaviour in the 2 last decades. Among the procedural rules are: the possibility of class actions and the inversion of the burden of the proof.³

Most measures involve substantive law (civil or commercial law) and civil procedural rules, since the goal is to protect assets from the enforcement of the award. Since 1990, one cannot seize the only house of the debtor, where he lives with his or her family.⁴

A recent reform has included in our civil procedure code (2006) a rule which says that when a debt instrument is enforced, the creditor is obliged to accept the debtor’s proposal to pay the debt in six instalments if a down payment of 30% is made.⁵

We have a very well developed class action system and the legitimacy of the Public Prosecutor’s Office (Ministère Publique) has been visibly extended in the last decade, by case law, to all the cases of social interest. It should be noted that the Public Prosecutor’s Office in Brazilian Law has, besides its role in the criminal sphere, an important function in the defence of social interests, mainly in class actions.

¹ “with a gross annual family income of less than € 27,000.00, over the age of 65, who are terminally ill, or with a disability rating of over 66%” will have orders to evict the rented property suspended.
⁵ Act 11.382 (6 Dec. 2006)
There is furthermore a special body of public defenders whose function it is to be the lawyers of poor people. On the other hand, the benefit of free legal aid is given to any person: it suffices to submit an \textit{in forma pauperis} affidavit.

In Portugal, Decree-Law 26/2015 changed the Bankruptcy Law (Decree-Law 53/2004) introducing the “discharge of the remaining liability”, meaning that, in certain conditions, debts of natural persons may disappear, assuring them, and their families, the right to sustenance and dignity, provided they do not exceed three times the country’s minimum wage.\(^6\) For five years following the court’s decision, everything the debtor earns will be allocated to settling the debts, preserved ways to satisfy bare necessities.

\(^6\) Portuguese CPC:
Art. 239. Assignment of disposable income.
1 – If there are no grounds to deny the preliminary injunction, the initial ruling is rendered, at the report assessment meeting, or within the next 10 days.
2 – The initial ruling determines that, in the five years following the end of the bankruptcy proceedings, in this chapter referred to as the period of assignment, the disposable income that the debtor may earn is deemed to have been assigned to an entity, herein referred to as trustee, chosen by the court from among those listed in the official list of bankruptcy trustees, pursuant to the following article.
3 – Disposable income includes all the income earned, in any way, by the debtor with the exception of:
   a) The claims referred to in article 115.º assigned to third parties, for the validity of the assignment;
   b) What is reasonably necessary:
      i) To support, with minimal dignity, the debtor and members of his/her household, not exceeding, but for a justified decision by a judge to the contrary, three times the national minimum wage;
      ii) To allow the debtor to perform his/her professional activities;
      iii) To pay other expenses excluded by the judge in the initial decision or at a later date, at the request of the debtor.
4 – During the period of assignment, the debtor is further obliged to:
   a) Refrain from hiding any income earned, in any way, and inform the court and the trustee of his/her income and assets as and when it is requested;
   b) Perform a paid professional activity, not resigning from it without legitimate cause, and diligently seek such an occupation when unemployed, not unreasonably refusing any job for which he/she is qualified;
   c) Immediately hand over to the trustee the share of his/her income which has been assigned;
   d) Inform the court and the trustee of any change of address or employment situation, within 10 days of the respective occurrence, as well as, when requested and with the same deadline, regarding endeavours to find employment;
   e) Refrain from paying the creditors of the bankruptcy unless it is done through the trustee, and from offering any special advantage to any of these creditors.

(…)

\[3\]
Another alteration in civil procedure which can be considered a direct effect of the crisis is “the reduction in the list of enforceable assets that occurred in Portugal, by Decree-Law 226/2008”.7

In order to protect the weaker party, in Spain the “Ley Organica” 1/2013 permits the debtor to defend himself against the enforcement by alleging the existence of unfair clauses in the mortgage such as, for example, exorbitant interest rates and accelerated maturity of the contract.

The “Real-Decreto-Ley” 27/2012 sets forth the stay of execution for two years if the debtor of the mortgaged property is unemployed or has under-age children.

In Croatia, for example, there were recent amendments to the Law on Enforcement, to protect people evicted for not having paid their loans, when this conduct is due to unemployment and the appreciation of the Swiss Franc, which was the common index for mortgage loans. This Act introduced a one year moratorium for eviction under some conditions.8

In France, the notion of “le reste à vivre” becomes increasingly important. The enforcement of judicial decisions should spare “le reste à vivre”, minimum living expenses for the bare necessities of life. Evidently, the exact outline of this notion has been varying for the last 20 years (it was created in 1998).

---

7 Art. 46 (CPC 1961) e art. 703 should be compared:

Article 46
Types of enforceable instruments
1. Enforceability can be based on:
   a) Adverse judgments;
   b) Documents drawn up or authenticated by a notary public or other competent entities or professionals, that bring about the constitution or acknowledgement of any obligation;
   c) Private instruments, executed by the debtor, that result in the constitution or acknowledgement of financial obligations, whose value is determined or determinable by a simple arithmetic calculation in accordance with its clauses, an obligation to deliver something or a service obligation;
   d) Those documents that, by special provision, are rendered enforceable.

Article 703. (art. 46. CPC 1961)
Types of enforceable instruments
1. Enforceability can be based on:
   a) Adverse judgments;
   b) Documents drawn up or authenticated by a notary public or other competent entities or professionals, that bring about the constitution or acknowledgement of any obligation;
   c) Negotiable instruments, even if a mere “IOU”, provided, in this case, that all the facts regarding the underlying relationship are held in the document itself or are cited in the enforcement request;
   d) Those documents that, by special provision, are rendered enforceable.

8 Enforcement Act, Off Gaz 112/2012, 25/2013, 93/2014 (art. 84,a).
L’ordonnance 2014-326 reformed measures to prevent the economic difficulties of companies and l’art 331-2 of the Consumer Code extended these benefits to “personnes physiques” (natural persons).

In 2014 (17 jun.) the Loi Hamon created French class actions, to fight the conduct of some companies which were not opposed because they generated small damage. So, it would not be worthwhile for the victims to individually act against this type of conduct.

In France, as in many other countries, ADR is visibly encouraged.

In Hungary, it has been possible for a natural person to put off the eviction of a residential property if it occurs in the winter period since 2003.9

As for Greece, we have also two significant examples of the consequences of the economic crisis. All the auctions of immovable property (2009-2011) were suspended for 3 years, provided the debt exceeded 200 thousand Euros. A moratorium was created by art. 46 par. 2 of Law 3986/2011, and art. 1 par. 1 of legislative Act dated 16/12/2011. The auction is prohibited if the debtor has a very low income and the debt can be paid in monthly instalments.

I would not go further than that, because all the examples which could be cited are very similar and their goal is always to protect the economically weaker party.

There is, nevertheless, another possible aspect of the influence of the economic crisis on civil procedure. In fact, it is an opposing trend: instead of protecting the weaker party, the government issues urgent measures to shrink fundamental procedural guarantees, to dodge the crisis.

For example, in Estonia in 2009, when the economic crisis was at its peak, the Estonian legislator decided to significantly increase state fees. The Code of Civil Procedure, which entered into force on 1 January 2009, was amended. State fees to ensure somebody’s right of recourse to justice reached the German average. No

---

9 The winter period is between 1 December – 1 March (V. Viktória Harsági, National Report, Hungary, Seoul Conference, 2014).
satisfactory explanation was given by official authorities, they simply said it was caused by the need to guarantee the so called “self financing court system”.  

As for Croatia, in spite of the pressure from the European Union to establish a functional legal aid system, reforms were made but used as an alibi for shrinking the level of public financing and thus the accessibility to Courts.

In Argentina, since 2001, the government has created several rules to prevent judges from protecting the right that citizens have to exert control over the money they have deposited in bank accounts. In the beginning, people rushed to the Courts to ask for injunctions for the Bank to give them their money back. Then, the government issued a decree (Decree 1387/01 of 2001) saying that every injunction against the state had to be filed before the Supreme Court. The visible goal of this decree was to control these injunctions against the State. This decree created a new article in the Argentinian CPC.

After that, Law 25561 and Decree 214/2002 prohibited these injunctions. These Acts were both declared unconstitutional by judges.

The assessment of Argentinean scholars is that judges played a significant role in maintaining social peace.


12 Art. 50. – Incorpórase al Código Procesal Civil y Comercial de la Nación el siguiente artículo como artículo 195 bis:

“ARTICULO 195 BIS – Cuando se dicten medidas cautelares que en forma directa o indirecta afecten, obstaculicen, comprometan o perturben el desenvolvimiento de actividades esenciales de entidades estatales, éstas podrán ocurrir directamente ante la CORTE SUPREMA DE JUSTICIA DE LA NACION pidiendo su intervención.

Con el pedido deberá acompañarse copia simple suscripta por el letrado de la representación estatal del escrito que dio lugar a la resolución y de los correspondientes a la sustanciación, si esta hubiese tenido lugar y de la medida cautelar recurrida.

La CORTE SUPREMA DE JUSTICIA DE LA NACION podrá desestimar el pedido sin más trámite o requerir la remisión del expediente.

La recepción de las actuaciones implicará el llamamiento de autos. La CORTE SUPREMA DE JUSTICIA DE LA NACION dictará sentencia confirmando o revocando la medida cautelar”.
In Spain, there was also an increase in the fees charged for using court services. Law 10/2012 applied general fee with a fixed percentage and another that varies according to the claim value.

An interesting situation happened in Croatia: the pre-bankruptcy settlement proceedings. These proceedings are mandatory for the reduction of debts of financially strained companies. But the control of these proceedings was almost entirely in the hands of the debtor and conducted not by judges but by the Ministry of Finance and its agencies.\(^\text{13}\) There has recently been a reaction on the part of creditors and a constitutional challenge before the Constitutional Court by one judge, based on the argument that parties are deprived of their right to judicial protection.

What is in fact interesting about this example is that it can be used in both categories: measures which protect parties affected by the crisis \textbf{and} that simultaneously shrink rights (those of the creditors!).

There is also, as a consequence of the crisis in Croatia, the possibility that debtors will request moratorium on eviction if the subject matter of the enforcement is his place of dwelling which is necessary for satisfaction of his fundamental housing needs. Courts shall suspend enforcement proceedings if they find that the debtor is likely to pay the creditor within a year.\(^\text{14}\)

I will take the liberty of concluding these brief remarks by manifesting a personal point of view: all these measures which help the weaker party are in perfect harmony with a civilized world. Nevertheless, one cannot forget that the needs of the less privileged should be handled with great care and “to the right extent”. Firstly, the solutions conceived to promote inclusion cannot imply a kind of “punishment” to those who have achieved entrepreneurial success. The prosperity of a country, to a large extent, depends on its entrepreneurs.

There should be a balance in the social costs of crisis: the weaker party must be protected but there must be production and generation of jobs. It is an illusion


to imagine that the Government alone can be held responsible without being supported by an active economy. There are no means to distribute “wealth without generating it”.

On the one hand, it is impossible not to see a certain naivété in procedural measures which shrink fundamental guarantees to “solve” the crisis. On the other hand one cannot but feel inclined towards measures that protect the weaker parties.

However, the effects of the economic crisis on procedure are not felt exclusively in the law. They are also felt in the attitudes of judges. The law is not always clear and is often open to more than one interpretation.

Decisions that thwart the expectation of the performance of obligations, even if based on one of the possible interpretations of statutes, discourage the execution of contracts and economic activity.

The principle of trust cannot be discredited. Economic players must trust the legal system, which involves statutory law, its interpreters and legal professionals. The constant frustration of those who invest their financial resources in society deters them from investing.

The respect for predictability reduces the risks inherent to business, generating a balance of prices and services, which benefits families, the individual and society as a whole.

The excessive frequency with which the frustration of purpose doctrine is applied in order to justify breaches of contract, the extension of guarantees protecting the debtors’ assets to the guarantors of the debt (sureties, for instance) has the effect of preventing the execution of agreements, the circulation of money, the growth of the country.

With the stagnation of the country everyone loses: bankers, entrepreneurs, the middle class and also the underprivileged, whose inclusion is so desired.

15 These were the exact grounds used to substantiate the Appellate Decision of Portugal’s Constitutional Court, in the sense that one could only apply the rule that invalidated certain documents that could lead to the enforcement, to the documents drawn up after this rule came into effect. The pre-existing documents continued to be enforceable instruments. Available at: http://www.tribunalconstitucional.pt/tc/acordaos/20150161.html?impressao=1. Access to: 23 Mar. 2015.