



INCREASE IN RAW MATERIALS PRICES: CONSEQUENCES ON ONGOING CONTRACTS



The difficulties in sourcing raw materials and the consequent increase in procurement costs have an ever-greater impact on the contractual relationships between clients and suppliers and often entail that the execution of supplies becomes excessively expensive and that a corresponding price adjustment is needed.

As a consequence, many companies are forced to request a change in the selling prices they have previously agreed with their clients.

It is therefore essential to know which contractual remedies can be adopted and which regulatory provisions can be invoked, in order to restore the balance of the parties' obligations, while still trying to safeguard business relationships that have been effortfully built up over time.

1) Contractual remedies: price adjustment clauses and hardship clauses

In order to deal with this problem under a legal point of view, the seller must, first of all, check whether the contract between the parties contains a **price adjustment clause**. For example, such clauses provide for automatic adjustment of the price of products in the event of a given increase in production costs or, more

generally, allow the seller to change prices during the course of the relationship.

Similarly, it should be checked whether the contract contains a **hardship clause**.

Hardship clauses originate in the practice of international commerce and provide remedies that can be used by the parties in the event that the performance of one of them, although capable of being rendered, becomes excessively burdensome due to the occurrence of exceptional and unforeseeable events.

In hardship clauses, the parties can agree in advance on the remedies that can be applied in the event that the performance becomes excessively onerous.

The remedies normally set forth in hardship clauses consist of termination of the contract or, more frequently, of renegotiation of the contractual conditions. In the latter case, with the hardship clause the parties:

- undertake, in the event that a performance has become excessively onerous, to enter into negotiations in good faith for the adjustment of the contractual conditions;
- regulate upstream the consequences of any failure to reach an agreement.

Drafting special price revision and hardship clauses is undoubtedly a best practice in writing national and international business contracts, since they are a highly effective remedy for managing contingencies that affect the balance of the contract.

2) The legal remedies from the Italian law side: supervening excessive onerousness (Art. 1467 Civil Code) and the duty of good faith in the performance of the contract (art. 1375 Civil Code)

In the absence of a revision clause and/or a hardship clause, it will be appropriate and/or necessary to check, as last resort, whether the law applicable to the relationship provides for legal remedies in this case.



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If the contractual relationship is governed by **the Italian law**, the latter provides for three legal remedies:

- a) Article 1467 of the Italian Civil Code, which regulates the **supervening excessive onerousness** in contracts with continuous, periodic or deferred performance;
- b) Article 1664 of the Italian Civil Code, which regulates **onerousness in project contracts**;
- c) Article 1375 of the Italian Civil Code, which regulates **good faith in the performance of the contract**.

a) Article 1467 of the Italian Civil Code, relating to **supervening excessive onerousness**, provides that the party affected by an extraordinary and unforeseeable event, which performance has become excessively onerous, can judicially demand the termination of the contractual relationship, provided that it proves the existence of the conditions laid down in the same Article 1467.

The party against whom termination is demanded, if it has an interest in maintaining the contractual relationship, may offer to modify equitably the conditions of the contract.

On the basis of Article 1467 of the Italian Civil Code, the party affected by the extraordinary event may not request and/or obtain a modification of the contractual conditions, but only withdraw from the performance of the contract, invoking its termination.

b) Article 1664 of the Italian Civil Code, **regarding project contracts**, allows the contractor to request a revision of the price, but only if the increase in the price of raw materials is such as to determine an increase of more than 10% of the price agreed for the work contracted. It should be borne in mind that the price revision will only be granted for the difference exceeding 10%.

c) Finally, a good part of the doctrine has identified an obligation of renegotiation on the part of both parties, as a declination of the general **duty of good faith in the performance of the contract** provided by Article 1375 of the Civil Code, in light of relationships affected by supervening inequalities, also considering the provisions of the Unidroit Principles for international contracts.

In concrete terms, it is set forth the obligation of the parties to renegotiate the contract in order to bring it back to equity, where there has been an alteration of the original contractual balance due to supervening circumstances which were unforeseeable at the time of the contract was entered into.

Recently, following the impact that the Covid-19 pandemic has had on long-term contracts, case law has shown openness in this sense too. However, differences in interpretation remain, especially with reference to the consequences to be attributed to a possible breach of the above-mentioned renegotiation obligation.

3) In conclusion

A seller who needs to increase previously agreed sales prices must, first of all, ascertain whether, and within what limits, this is possible under the contractual provisions.

In the absence of contractual provisions to be invoked, the vendor will have to carry out the same assessment in light of the laws applicable to the relationship.

Bacciardi and Partners remains at disposal to evaluate every single case and to search for the applicable solution.