

Adjustment for inflation in contracts: which index?

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Authors

Felipe Galea

Bruno De Conti

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Perhaps because of Brazil's past experience with chronic inflation, the country has many indexes that track the purchasing power of money. The General Market Price Index (IPG-M – *Índice Geral de Preços – Mercado*) is one of the indexes most frequently used to adjust prices under contracts. The IGP-M is broad in scope because it is composed of three other price indexes: the General Producer Price Index (IPA – *Índice de Preços ao Produtor Amplo*), which records variations in the prices of agricultural and industrial products in transactions prior to sale to the final consumer, makes up 60% of the IGP-M; the Consumer Price Index (IPC – *Índice de Preços ao Consumidor*) represents 30%; and the National Construction Cost Index (INCC – *Índice de Custo da Construção*) is responsible for the last 10%.

In 2020, due to macroeconomic factors driven by the covid-19 pandemic and its impacts on Brazil (such as the increase in the value of the US dollar), the IPA in particular climbed sharply and the IGP-M necessarily followed suit, leaving the official inflation index, the National Broad Consumer Price Index (IPCA – *Índice Nacional de Preços ao Consumidor*, published by the Brazilian Institute of Geography and Statistics) quite some distance behind.

Players in various economic sectors reacted by trying to negotiate the replacement of the IGP-M under continuing performance contracts by another, more moderate index. This movement was particularly notable in the real estate sector, where use of the IGP-M to adjust rents under commercial and residential leases is almost universal, but which has little or no relationship to the IPA, which contributed the most to the increase in the IGP-M.

In recent months, lessees who were frustrated in their attempts to renegotiate rent increases have brought lawsuits to try to compel lessors to accept their claims.

Although the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*, the highest court on non-constitutional matters) has taken the position that “adjustment for inflation adds nothing to the value of money, serving only to restore its purchasing power, which has been corroded by the effects of inflation”,¹ the court has not yet considered the issue in the current scenario. In 2003, however, in a case dealing with the distance between the IGP-M and the actual inflation rate, the STJ held that “A contractual option for one of the currently used indices, which is considered legal, ... does not justify the conclusion that [the index] is abusive, ... without an effective demonstration that the disparity arose in a certain period, by reason of an abnormal, unforeseen circumstance.”²

In contrast, the Court of Appeal of the State of São Paulo is dealing with cases arising in the current situation, and has issued preliminary decisions on both sides of the question, sometimes denying demands to substitute the IGP-

M,³ and sometimes granting lessees' petitions in light of the disproportion shown by the index.⁴

The question is a significant one in Brazil, and BMA is keeping a close watch on developments in the courts.

NOTES:

¹Appeal REsp 1702692/RJ (AgInt nos EDcl).

²Appeal REsp 403.028/DF.

³Proceedings 2046357-72.2021.8.26.0000, 2003888-11.2021.8.26.0000, 2051192-06.2021.8.26.0000 and 2262248-86.2020.8.26.0000.

⁴Proceedings 2298701-80.2020.8.26.0000, 2012910-93.2021.8.26.0000 and 1000029-96.2021.8.26.0228.

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Felipe Galea



Bruno De Conti