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REFLECTIONS ON CONTRACTUAL IMPREVISION AT EUROPEAN AND NATIONAL LEVEL

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Abstract

Imprevision has become a topical issue in the Romanian legal space with its regulation in art. 1271 of the new Civil Code, but the legal construction of the theory of imprevision is not new at all, being enshrined in jurisprudence under the previous regulation, this being so important and frequent that it was impossible for the national legislator to ignore it.

This paper aims to examine the extent to which this institution finds a correspondent in the European law or in the law of other states, for a better understanding of all the conditions that must be met in order for the institution of imprevision to be applicable.

Used as a means of aligning economic and legal realities with the new challenges of this century, the theory of imprevision can be an optimal solution for safeguarding contracts whose completion is endangered by the existence of a major imbalance between the parties' consideration, an imbalance that appeared after the conclusion of the contract.

Keywords: *imprevision, contractual relations, force majeure, fortuitous event, rebus sic stantibus, pacta sunt servanda, comparative law, European law*

INTRODUCTION

In the Romanian civil law, the will of the contracting parties is placed at the center of contractual operations. However, the direct intervention of the legislator and increasingly of the judge in contracts, in the name of public order and in the view of reconciling the interests of the contracting parties to ensure contractual balance, is now manifest and necessary in order to meet the requirements of commutative justice.

The imprevision, as a legal institution, is not entirely new in the Romanian civil law, having its roots in the Romanian legal tradition, where it was shown that *conventio omnis intelligitur rebus sic stantibus*, an expression that meant that all

conventions are considered valid if the circumstances in which have been concluded remain unchanged. Regarding the effects of the contract, the Civil Code of 1864 regulated in art. 969 the principle of binding force of the contract, following the French model, as well as the principle of irrevocability, but there was no provision in the matter of imprevision.

I. ASPECTS OF COMPARATIVE LAW AND EUROPEAN LAW

We note that the relationship between the principle of binding force and the theory of imprevision over a century began in 1920 with the admission of the theory of imprevision and materialized in 2011, when it was established as a real exception to the principle of binding force in the new Civil Code.

Renouncing the francophone legal tradition, the Romanian legislator expressly regulated the imprevision as an exception to the principle of the binding force of the contract in art. 1,271 para. (2) Civil code.

The drafters of the new Romanian Civil Code were inspired by the DCFR Rules (*Draft of a Common Frame of Reference*), which, in paragraph III.-1: 110: Variation or termination by court on a change of circumstances, regulates in a form almost identical to art. 1,271 of the new Civil Code, the theory of imprevision (the only notable difference between the two legal texts is the possibility of invoking imprevision, under the rule of DCFR Rules, and by a person who has assumed an obligation under a unilateral legal act). A similar regulation in terms of content is found in the other source of European contract law, the PECL Rules (*The Principles on European Contract Law*), which in art. 6: 111: entitled Change of circumstances presents in a manner close to that regulated by our civil code, the definition and effects of imprevision. At the same time, the Principles applicable to international commercial contracts codified by the International Institute for the Unification of Private Law in 1994 (UNIDROIT Principles - art. 6.2.1-6.2.3 provided for the revision or renegotiation obligation under a hardship clause implied in all contracts in which the hardship hypothesis was excluded) were another source of inspiration for the Romanian legislator, although, given the specifics of international trade contracts, there are some additional regulations in the text of the convention to our civil code; it is obvious, however, that the theory of imprevision has been and is effectively applied in sale-purchase contracts or in international supply contracts, the UNIDROIT Principles expressly regulating imprevision, under the name of hardship clause, i.e. that exceptional situation that fundamentally alters the contractual balance (Tița-Nicolescu G., 2012, p. 9-12).

The principles of European contract law, which are a set of rules created by reputable legal specialists from European Union countries under the auspices of the Commission on European Contract Law (Lando Commission) and aim to standardize the European contract law, are the common frame of reference for the European contract law. The conditions provided in art. 1,271 para. (2) - (3) are proof of the acquisition by the national legislator of this internationally promoted guideline on the existence of the contract (Seperiusi-Vlad A., 2020, p. 49).

It should be noted that both the 1969 Vienna Convention on the Law of Treaties (art. 62) and the 1980 Vienna Convention on the International Sale of Goods (art. 79) recognize the exceptional application of the theory of imprevision.

Selectively analyzing the legislation of some European states, it is not surprising that we can identify the regulation of an institution similar to the one called imprevision in our domestic law, because as we have already shown, many states have adopted the theory of imprevision long before our country.

For example, the English law encompasses contractual imprevision under the broader concept of *frustration*, which designates that sphere of impossibility of execution, among which, along with imprevision, is the force majeure (Orga Dumitriu G., 2013, p. 4). Also, although the German law does not regulate a theory perfectly corresponding to the contractual imprevision in Romanian law, a broader concept can be identified under the name of *Geschäftsgrundlage*, in art. 313 of the German Civil Code of 2000, being a theory of disruption of the contractual basis, respectively that situation occurred in a totally unforeseen way, which completely destabilizes the contractual balance (Zimmermann R., 2002, p. 2).

At the same time, it is worth mentioning the Italian law, which has a general regulation in art. 1467 and 148 of Italian Civil Code, the concept being called *eccesiva onerosita*, and the remedy implying a termination of the contract that has lost its balance of benefits. And in France, starting with October 1, 2016, the imprevision is regulated by art. 1195 of the French Civil Code, being provided conditions almost identical to those found in our law (Iftimie E., 2015, p. 23).

II. CONDITIONS AND EFFECTS OF APPLYING THE THEORY OF IMPREVISION

The binding force of the contract, a principle also known as *pacta sunt servanda*, imposes on the parties the obligation to strictly fulfill the duties they have assumed, an aspect justified both by the need to ensure the stability and security of the relationship itself and by considerations of justice and equity between these parties. Although the *pacta sunt servanda* and *rebus sic stantibus* principles are seemingly antagonistic, they complement each other, the second operating as an exception to the first, with the common goal of ensuring the legal security of contracts (Ungureanu C., 2015, p. 49).

Contracts are exposed, during their existence, to random circumstances whose origins lie in economic, social or even political circumstances. Obviously, in order to be able to discuss changes affecting contracts concluded between the parties, their effects must not have occurred in full, with a focus on successive contracts and contracts affected by a standstill period. At the time of concluding a contract, especially in periods of relative monetary stability, the contracting parties assume obligations in view of the circumstances or economic realities of the moment, but there is a possibility that after the conclusion of the contract and before its execution unforeseen events, revolution, pandemic, etc.), leading to serious imbalances between the value of benefits.

In the absence of a definition provided by the legislator, the imprevision was qualified in the doctrine as the damage suffered by one of the contracting parties

as a result of the serious imbalance of value between its services and the other party's compensation during the performance of the contract or other circumstances (Pop L., Popa I., Vidu S., 2012, p. 153).

It is very relevant to specify that not all circumstances may be relevant to the imprevision, but only those exceptional and objective circumstances which occurred during the performance of the contract and which could not have been foreseen by the parties.

Given the nature of the causes of imbalance between the contracting parties, namely economic instability or various forms of legal interventionism and taking into account the limits set out above, we state that the theory of imprevision was built in relation to the possible interference of the judge in contracts, interference that was intended to be corrective, an idea viewed at first with great reluctance by judicial doctrine and practice, being at this time enshrined in law (Burzo M., p. 67).

In the current legislative configuration, the application of the imprevision theory implies the intervention of the judge to restore the contractual balance affected due to unforeseen circumstances of the parties at the conclusion of the contract and unforeseeable from the same date, in the absence of express clauses or legal provisions to review their contract. These express clauses could be the hardship clauses.

The entire regulation of this institution finds its basis in a single article of the new Civil Code, respectively in art. 1271 of the Civil Code, which provides that *(1) Parties are bound to fulfil their obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance they receive has diminished. (2) If, however, performance of the contract becomes excessively onerous because of an exceptional change of circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation, the court may order:*

a) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances;

b) terminate the contract at a date and on terms to be determined by the court.

(3) The provisions of par. (2) are applicable only if:

a) the change of circumstances occurred after the time of conclusion of the contract;

(b) the possibility of a change of circumstances as well as its extension were not and could not reasonably be considered by the debtor at the time of the conclusion of the contract;

c) the debtor did not assume the risk of changing circumstances and could not reasonably be considered to have assumed that risk;

d) the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adaptation of the contract.

This provision establishes a real exception to the principle of binding force of the contract, a principle found in art. 1270 of the Civil Code, which stipulates that: *"(1) The valid contract concluded has the force of law between the contracting parties. (2) The contract is modified or terminated only by agreement of the parties or for reasons authorized by law."*

The limitations of the *pacta sunt servanda* principle are essential to ensure the fairness of the contractual relationship, the parties being required to perform their obligations even though the execution has become more onerous, either due to increased performance of their obligation or to a decrease in the value of the consideration (application of the principle of binding force of the contract), thus highlighting the principle of *monetary nominalism* (Holban D., Marțincu I., 2019, p. 1).

It should be mentioned that art. 1271 of the Civil Code states that not every change in the consistency of the obligation occurred after the conclusion of the contract leads to the possibility of using the imprevision mechanism, but the text states that the change must be "*exceptional*", i.e. it must be of such magnitude that the obligation becomes "*excessively onerous*" (Bârsan C., 2015, p. 80).

The application of the imprevision mechanism implies the verification of the conditions established by art. 1271 para. (3) Civil Code, cumulatively, respectively: the change of circumstances to have occurred after the conclusion of the contract; the change in these circumstances, as well as the extent of the imprevision, were not and could not reasonably have been envisaged by the debtor at the time of the conclusion of the contract; the debtor did not take the risk of changing circumstances and could not reasonably be considered to have taken that risk; the debtor has tried, within a reasonable time and in good faith, to negotiate a reasonable and fair adjustment of the contract (Zamșa, 2006, p. 231-232).

Excessive onerousness is based on an exceptional and unforeseen change by the parties when establishing the contractual relationship, putting one of the parties in an economic difficulty or in a position to drastically reduce the creditor's performance, with the consequence of unbalancing the value of benefits and loss of interest in maintaining the contract. In other words, in the context of that unpredictable situation, the party would not have concluded the contract in such conditions. The premise of excessive burden is the exceptional and unforeseen change by the parties of the circumstances taken into account at the conclusion of the contract (Andrieș, M.C. 2016, p. 36).

Obviously, this exceptional change must have an objective character, an aspect that emerges from para. (1) of art. 1271 of the Civil Code, since we are talking about an execution of the obligation which has become more onerous for the debtor and which does not remove the binding force of the contract, and para. (2) requires that the more difficult execution of the obligations by the debtor be directly correlated with a gain recorded by the creditor.

It is necessary in this context to emphasize the difference between imprevision, on the one hand, and force majeure and the fortuitous case, on the other hand, because in case of imprevision, change or event is not absolutely invincible and inevitable, as in case of force majeure, according to art. 1351 para. (2) Civil Code, or one that cannot be prevented by the one who would have been called to answer, as in the situation of the fortuitous case, according to art. 1351 para. (3) of the Civil Code, he must be out of the ordinary, exceptional.

Regarding the change of circumstances, unlike the corresponding texts of the UNIDROIT Principles and the Principles of European Contract Law (which provide

for the condition that the unbalancing event itself is unpredictable), the national legislation provides for the (apparently cumulative) condition that both the event itself as well as its extent, not to have been provided at the time of concluding the contract. Together with other authors, we consider that the legal text should not be interpreted in a literal, strictly formal sense, the condition to be considered fulfilled insofar as the party affected by the contractual imbalance did not foresee and could not reasonably foresee the effects of the change of the circumstances of the contract (Sandar V., 2013, p. 14).

At the same time, if the parties provided at the time of concluding the contract the possibility of amending the contract and introduced in the contract means of readjustment, we cannot retain the applicability of imprevision, as the parties have prepared in advance for possible unpredictable changes and agreed means of rebalancing contractual obligations. In this context, the question arises how unpredictable the changes were if the parties had "prepared" for this purpose by agreeing on a milestone or benchmark for adapting mutual and interdependent benefits.

Another condition requires that the debtor has not assumed the risk of changing circumstances or is not reasonably considered to have assumed such a risk. This condition is subsequent and complementary to the previous condition, and the legislator understood to emphasize two hypotheses in which the imprevision does not work: in one of them, the debtor expressly assumed the risk of an unpredictable event and in the second case, the risk of the unforeseen event is inferred by way of interpretation of the contract. The presumption that the debtor assumes the risk of a change of circumstances is inextricably linked to his prediction of the occurrence of such changes.

With regard to the timing of the start of negotiations on the adjustment of the contract, it was stated that it is necessary that these negotiations should take place as close as possible to the intervention of the contractual imbalance (Lozneau V., Barbu V., Bebi P., 2012, p. 24).

This condition has raised many questions in judicial practice, in view of its nature as a precondition for notifying the court or a substantive condition for the incidence of imprevision, as to the reasonable time within which it must be fulfilled, or as to the state of performance of the contract during the negotiations and the literature has shown that the provision established by art. 1271 para. (3) Civil Code establishes a mandatory prior procedure for the parties for the conventional review of the contract, before notifying the court, the non-fulfillment of this condition constitutes a condition of inadmissibility if it is formulated in court without fulfilling this preliminary procedure (Ludusan F., Puie O., 2013, p. 5). In the same sense, it was stated that this condition does not represent a condition of imprevision, but rather a condition for notifying the court, a preliminary procedure similar to the procedure of direct conciliation in cases and requests in commercial matters, provided by art. 720 ind. 1 of the old Code of Civil Procedure (Seprusi – Vlad A., 2020, p. 69).

Regarding the effects of imprevision, they are regulated by art. 1271 para. (2) of the Civil Code which stipulates that once the conditions of imprevision are met, *"if the performance of the contract has become excessively onerous due to an exceptional change of circumstances which would to distribute equitably between the parties the losses and benefits resulting from the change of circumstances, the termination of the contract, at the time and under the conditions it establishes"*.

In the production of the effects of imprevision on the contract there are two stages: on the one hand, the negotiation stage initiated by the debtor in order to adapt the contract, and on the other hand, the judicial stage, of court intervention, or in order to adapt the contract to re-establish the contractual balance, or for its abolition with effects for the future.

III. APPLICATIONS OF IMPREVISION

First of all, it is necessary to mention the applicability of a customized imprevision in the context of Law no. 77/2016 on the payment of real estate in order to settle the obligations assumed through bank loans.

Thus, the analysis of the Explanatory Memorandum of the Law on giving in payment shows that the idea of "restoring the contractual balance" is evoked, as well as the one referring to the situation of "crisis of the contract", defined as a context in which debtors, parties to the credit agreements, do not have the necessary means to pay the loan to the credit institution, to the non-bank financial institution or to the assignee of the claim.

As such, as a remedy to the contract crisis, determined by the debtors' inability to pay the loan, the law offers the possibility to achieve such a finality through the mechanism of payment of the mortgaged property to guarantee the obligation, so that, changing the object of the obligation, the latter no longer it is executed in kind, according to the initial agreement of the parties, but by another performance or other equivalent good.

In this view it is relevant Decision no. 623/2016 of the Constitutional Court, in the considerations of which it was noted that *"these phrases must be interpreted as a particular expression at the level of the credit agreement of the theory of imprevision", since, "even if Law no. 77/2016 does not refer in term to imprevision, the intention of the legislator to apply the institution of imprevision results from art. 11 the first sentence, which refers to the balancing of risks arising from the credit agreement, as well as from the Explanatory Memorandum of the law which uses the expression "crisis of the contract" "(para. 102).*

Furthermore, the institution of imprevision has found a natural application in the context of credit agreements granted in foreign currency, commutative contracts, with successive execution, the execution of which usually extends over a period of several years and which may be subject to unpredictable and objective changes during their development (monetary depreciation, currency devaluation). On this occasion, we recall the well-known situation of credit agreements granted in CHF and the devaluation of the national currency in relation to this foreign

currency. Regarding the concrete way of intervention of the court in this case, the Constitutional Court held, in the recitals of Decision no. 62/2017, that “it has the possibility to intervene on the contract effectively, either in the sense of ordering the cessation of its execution, or in the one of its adaptation to the new conditions, with legal effects only for the future, the already executed services remaining earned to the contract. Adaptation to the new conditions can also be made by converting payment rates into national currency at an exchange rate that the court can determine according to the specific circumstances of the case in order to rebalance obligations, which can be the exchange rate from the date of concluding the contract, the date of the occurrence of the unforeseen event or the date of the conversion”.

In the recent litigations regarding the bank credit agreements concluded with the consumers, the unforeseen nature is not the main argument used by the parties, as they often prefer to base their actions on legal grounds offered by Law no. 193/2000 on abusive clauses, for reasons related to the protection offered to consumers by these special provisions (Petrisor S., 2015, p. 16). However, recent decisions of the Romanian courts in the matter of abusive clauses also incidentally deal with the theory of imprevision, this being invoked by the debtors in the alternative.

CONCLUSIONS

The regulation of imprevision in the New Civil Code is certainly one of the great challenges brought by the legislator in the Romanian civil legislation, in the context of denying the intervention of the judge in the contract and evolving towards the possibility of adapting the contract to rebalance it.

The institution of imprevision is and must remain - according to its own nature - a remedy for the contractual imbalance, and not one for the imbalance between the debtor's and the creditor's patrimony, respectively, its purpose being to protect the contractual debtor, and not necessarily on the insolvent debtor.

The current social and economic context has undergone significant changes due to the rapid development of globalization, meaning that the institution of imprevision also comes to help the contracting parties to save the concluded contracts.

From a practical point of view, as a general conclusion, the work of the courts will develop mainly in the direction of crystallization of criteria according to certain areas of activity, to measure excessive onerousness and / or equitable distribution of losses and benefits.

We consider that this institution has a praetorian character compared to some unregulated aspects, such as the criterion for determining excessive burden and unpredictability, the courts being called to assess the fulfillment of the requirements of the imprevision mechanism, for each case.

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