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CURRENT LEGAL ISSUES IN CIVIL MATTERS – THE THEORY OF IMPREVISION

Elena TUDURACHI*

Abstract:

The theory of imprevision represents the answer given by the doctrine and the case-law concerning the fate of the performance of the contract, therefore of having its essential effect desired by both parties in the context of the appearance of such situations, the theory being approached by authors in monographic studies due to the economic context brought about by the passage from the hyper-centralised etatised economy to an economy which is based on demand and supply.

The study aims at analysing the fact that the judicial intervention in a contract affected by imprevision is only apparently against the Article 969 from the Civil Code, in fact, we witness the present tendency of safeguarding the lawful relation between the contracting parties by maintaining its existence taking into account the adaptation to new circumstances.

Keywords :

imprevision, exception to pacta sunt servanda, the principle of good faith and equity

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Being an exception to the principle pacta sunt servanda, (the theory of imprevision represents revising the effects of the judicial act (an onerous, commutative synallagmatic contract, of successive performance) owing to breaking the contractual balance as a consequence of changing the circumstances considered by the parties at the moment of concluding the judicial act (acknowledging in contracts the clause omnis convention intelliguntur rebus sic stantibus as being implicit) because the effects of the civil judicial act are found to be others than the ones which the parties, at the moment of the conclusion of the particular act, agreed to lay them down and which should be compulsory for them.

By exception to the principle of compulsory force, we refer to those situations in which the civil judicial act will not have effect as provided for by the parties, at the moment of its conclusion, but it will have effect independent of the parties' will or, as the case shall be, of the party's will, these effects are either more restricted or more extended than the ones initially laid down.

On the real estate market, applying the theory of imprevision does not become only a legal argument but also a necessity. As a legal argument, the imprevision accounts for a situation apparently having a certain regulation and, as a necessity, imprevision placing again the contract in the current economic and financial context.

Most of the effects of the theory of imprevision take into consideration the necessity of keeping the contract and not terminating it. The principle of safeguarding the contract is founded on the idea that this is the will of the contracting parties, respectively that the concluded judicial act will nevertheless have, with certain adjustments, the effects considered by its parties at the moment of its conclusion. In other words, the termination of the contract is considered as the extreme effect of applying imprevision. The existence in itself of the theory of imprevision indicates the tendency to avoid the termination of the contract for reason of imprevision in the same way that the effects of this theory which tend to reposition the contract indicate the concern for its safeguarding. However, the will of the contracting parties will be the one which will impose the solution which will be adopted in this respect. If the parties wish the maintenance of the contract and agree that the mutual obligations should be repositioned so that the contract should have effect, therefore the parties will negotiate the concrete ways of such a solution. Inasmuch as the obligation of one of the parties became excessively

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onerous for it, the other party can agree with extending the initial deadline for fulfilling this obligation inasmuch as at the new deadline the obligation will be fulfilled. At the same time, the other party which has already fulfilled or is ready to fulfill its own obligations can request an appropriate reduction in its own provision or a correlative cancellation of its performance in accordance with extending the deadline for the performance of the obligation of the other party.

If we refer to the social usefulness of the contract, although the contract is the law of the parties, however, the will of the contracting parties cannot be isolated from the economic and social context in which it was issued and if this context changes, the will does not have an initial basis any longer, the revision of the contract being necessary. It is considered that this fact is an economic necessity because the economic ruin of a participant to the economic circuit can only have negative consequences. (Anton, G., (2000): 30)

In reality, the content of the contract has never been drawn up by the exclusive will of the parties. The freedom of will, far from being a sacred principle, is only an illusion, a deceiving appearance. Even from its beginnings, the law restricted the effects of the contract by prohibiting individuals to derogate by means of their agreements from the norms of interest for the public order (out of which the protection of consumers is a part) and from morality (which requires that profit should be illicit).

The public order and morality both accomplish the same function: they are social prohibitions which restrict the contractual freedom. They point out that, above the particular interests, there are the general interests which the parties cannot disregard by their will.

They have the same conceptual character. They refer to standards which do not correspond to exact definitions and which, most of the time, require delivering a judgement by the judicial Courts in order to become real. The public order points to the prevalence of rules protecting the general interests over the rules inspired by particular interests.

The contract has the power of law, with the exception of the case in which it is contradictory to a norm of public order. In other words, the public order is founded on a hierarchy of values. It attests the fact that in a judicial system, there is an order having a superior value which is placed above the interests aiming at particular contracts and whose compliance with is necessary for the cohesion of society. The object of the clause

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which breaches the rules presenting interest for the community is illicit, affecting the safety and the rights of other citizens.

It is said that it is a matter of estimation whether an act complies or not with "morality" Therefore, the attention was drawn on the fact that the power conferred by Article 5 from the Civil Code "can produce abuses if the judges are not too rigid when appreciating what is and what is not contrary to morality". Therefore, when appreciating, moderation and caution are necessary.

Analysing closely and in a comparative way the power of appreciation which is awarded to the judge in different other matters (for example: force majeure, judicial resolution), it has been ascertained that the respective fear is not grounded, it is rather a prejudice. What ensures the parties against a possible arbitrariness is the specific of the theory of imprevision which resides in meeting certain conditions which account for such an intervention. Furthermore, the role of the judge is only subsidiary, he intervenes when the parties have not foreseen a mechanism of adaptation for the contract. The disadvantages of some revision systems of the contract can be also overcome, especially those resulting from the economic inequality of parties which would impinge on a possible renegotiation of the contract affected by imprevision. (Zamşa, C.,E., (2006) : 210)

A contract has the power of law between parties as it is assumed that it is ruled by good faith and it is of interest for the contracting parties.

At the time when, as a consequence of the serious disturbance of its economy, this requirement for relevance does not susbsist any longer, at the same time or not with the failure to comply with the rule for good faith performance, the ground itself of being of the principle disappears. At that point, the intervention of the judge in the contract is not only necessary but it is also possible from a legal point of view with the purpose of being permitted, by correlating the principle of good faith and that of equity.

In order to account for the theory of imprevision, some authors point out that, every time the performance of a synallagmatic contract becomes too onerous for one of the contracting parties, the revision of the contract's effects is permitted with the purpose of resetting the balance of values of provisions because the parties were bound under the present economic conditions at the moment of concluding a contract so that, if in the meantime these conditions changed, it is necessary that the

contract should be adapted to the new economic circumstances; as changing the economic conditions was unpredictable, that means that the revision of the contract's effects corresponds to the asumed will of the contracting parties (Beleiu, Gh., (1994), : 172).

Others proponents of the theory justify it either by appealing to an extensive interpretation of the notion of force majeure, assimilating the assumption of absolute impossibility to the assumption in which the contract performance would be very difficult owing to the clauses which in the meantime became too onerous either due to the enrichment without a just cause or to the idea of equity associated with the good faith of the parties in the performance of the contracts (Beleiu, Gh., (1993), : 34-36).

As far as the case-law in the matter is concerned, this is contradictory (in the sense of acknowledging the possibility of revising the clause related to the price in a contract of succesive performance). We have to keep in mind that if the parties stipulated in the contract a clause which provides for the revision of the contract's effects in case of changing the circumstances taken into consideration at the moment of its conclusion, we do not witness an exception to the principle pacta sunt servanda any longer, but an aspect of the principle of freedom of the legal acts.

Applying equity in the performance, the interpretation or the revision of the contract, the manipulation of law by means of contracts can be removed and, instead of the contract manipulation, the contractual justice can be initiated. However, the contract can be also manipulated in a positive *way*: the legislator can declare null and void some clauses in the contracts or the contract in its entirety as they breach the public order or morality and the judge can cancel the contract totally or partially or he can draw it up again in order to correct the contractual imbalance or to (re)concile the parties' interests.

As a legislative application of the theory of imprevision[1], first of all we deal with the supposition to which Article 43 (3) of the Law no. 8/1996 refers concerning the copyrights and the related rights according

[1] Law no. 195/2001 of volunteering, Article 12 provides that "if during the performance of the volunteering contract, independent of the parties' will, appears a situation which can make difficult the performance of the obligations assigned to the volunteer, the contract will be renegotiated and if the situation makes impossible the further performance of the contract, it ceases as of right"

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to which "in the case of an evident disproportion between the remuneration of the author of the work and the benefits of the one who obtained the cession of proprietary rights, the author can request to the competent legislative bodies the revision of the contract or the appropriate rise in remuneration".[2] (Boroi,G., Stănciulescu, L., (2003), : 116-117).

In essence, the discovery of this effect of imprevision reflects the present tendency to safeguard the lawful relation between the contracting parties, a demarche which necessarily requires abandoning the thesis of absolute fixity, of the inviolability of the contract in favour of flexibility. The advantage of changing the approach in the direction of promoting the contractual flexibility is an important one as the power of the contract will not reside in its intangibility but in its capacity to survive in case of disturbance of its balance by adapting to the surrounding circumstances.

The contractual flexibility is indirectly related to the absolutism of the compulsory power of the contract and directly related to its scope. This aspect becomes comprehensible if we note the extension of the application field of the principle of obligativity in the sense that it will not include only the obligations deliberately stipulated by the parties, but also imposed by justice: the obligations of safety, information and loyalty.

In concrete terms, the unmediated intervention of the Court can concern the provision whose value changed substantially or/and the consideration; assuming that the value of a provision increased beyond predictable limits, the solution may reside in its quantitative diminishing or in increasing the correlative provision. In a similar way, cutting down the value of a provision can determine either appealing to the variant of quantitative rising or to the reduction in the consideration.

Nevertheless, according to the contract type, the judge is not always allowed to have the faculty of choosing, he rather has at his disposal only one solution: for example, in a contract of service provision, the revision can reside exlusively in rising the price of the service and not

[2]See also Article 32 of the Law no. 219/1998, text which provides that "the contractual relations between the concession provider and the concessionaire are founded on the principle of financial balance of the concession, respectively on achieving a possible equality between the advantages which are awarded to the concessionaire and the tasks assigned to him. Consequently, the concessionaire will not be obliged to bear the growing tasks connected with the performance of his obligations in the case in which this increase results as a consequence of: a) an action or a measure decided by a public authority; b) a case of force majeure or unforeseeable circumstances."

in the reduction of the provision. In that case, a limit of the revision will reside in the concern that the rise in the price of the service should not have negative consequences on the consumer or it should not determine the rise in prices of other products and services.

In order to be annihilated or manipulated in a negative way, the law must be accomplished with a view to organising social peace. The negative manipulations of law can be corrected if law is awarded its deep meaning, that is equity or, better said, the common sense which legitimates the law, the contract and the judge's sentence. The contract, as well as the law and the judicial system on the whole can be manipulated. The contract can be the instrument of abuse, can provide an appearance of legality to the petty interests or to fraud.

As far as the technical aspect is concerned, the indirect intervention of the judge in the contract by initiating the obligation of renegotiation includes several phases. In principle, the court seised by the affected party will initially note the fulfillment of the conditions of contractual imprevision, it will then "invite" the parties to renegotiation on the basis of the pre-existing legal obligation. A compulsory preliminary procedure, of friendly conciliation, having a special order, is not required, notwithstanding the provisions of the Civil Procedure Code in commercial matters. According to the complexity of the contractual relations and to the professionalism of the parties, it is likely that the parties should proceed to a negotiation before seising the court, but its lack does not represent a reason for not being received to court.

The power which the judge possesses is not considered as discretionary as it is similar to the one in a resolution/cancellation request in which we can reject the termination of the contract by awarding a holiday period.

The second phase contains the so-called performance of negotiations. As we mentioned above, the conciliation of parties can be a continuation of the negotiations initiated prior to seising the court or it can be initiated as a consequence of the judicial "invitation" as it is provided for in accordance with Article 21 of the new Civil Procedure Code, the mission of the judge to mediate the parties. Mediation represents a fundamental change at the level of mentality and an important progress of civilization because it allows the parties to dominate their own destiny when they failed to try to find a solution themselves. Introducing mediation in the field of civil law may be compared to the

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introduction of democracy in political life. It is a tenacious and lasting process which is never concluded but which represents a progress whose accomplishment is worth all the efforts.

Registering mediation in the new Civil Procedure Code[3] contributes both to knowing this mehod of settling disputes and to increasing the credibility of the efficiency of mediation by placing it beside other alternative methods for settling disputes (for example: arbitration). Therefore are removed many fears and perplexities of the litigants related to the validity of agreement of the parties in dispute, agreement resulting from mediation or the value of the agreement (its consolidation by the decision by means of which the agreement of the parties is agreed on).

At the recommendation of the court or at the request of the parties, we can appeal to mediation during a dispute, requesting in this way the adjourning of the process with a view to carrying out the mediation procedures. Mediation can concern settling the process totally or partially, the mediator being obliged to inform the judicial court on the result of mediation which will deliver a consent judgement in accordance with the Article 271 of the Civil Procedure Code, judgement which represents an enforceable title.

In the filed of civil law, the mediators should focus on the disputes which have a material object, respectively the partitions of common goods, inheritances, cessation of joint possessions, claims, disputes whose duration is usually greater when settlement by court is chosen.

Therefore, at a first reading, Article 969 of the Civil Code seems to be contrary to judicial revision of the agreement, the court having to comply contractually with the law. However, we note a significant evolution in comparison with the moment of drawing up the Civil Code up to the present concerning the application field and the interpretation of Article 969, a concrete form being given by acknowledging and extending the possibility of adaptation or termination of the contracts in a judicial way, at the request of a party. It is important not to disregard the rich content of the Article 969 concerning the moral, economic, social aspect and which has the power to explain its apparent strictness.

[3] Article 108 (1) (1) (f), article 131, article 614 1 the Civil Procedure Code.

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The new Civil Code brings under regulation according to the provisions of art.1271 of the New Civil Code [4]and the exceptional situations that may lead to the adaptation of the contract according to the possibilities of the legislator. This institution newly introduced in the field of the civil law consecrating a rule and an exception and giving to the court the possibility to interfere in the contract by relating to a well-determined reason. The application of unpredictability refers to the fact that all the contracts affected by unpredictable situations shall produce other effects that the ones that were initially established by the parties.

It is necessary that new circumstances create an unbalance of certain gravity that can be appreciated in concreto by a judge or in abstracto by a legislator and who can set a threshold which, if it is surpassed by the unbalance of services, to mark the unpredictability. One can notice that the difference between the application of the rule (regarding the exact execution of the obligations committed through the contract) and the application of the exception (that supposes the adaptation of the contract by court intervention) is rather difficult, the court having the task to discriminate between the situations where the obligation of one party has become "more onerous" or "excessively onerous". The new circumstances should put the debtor in a very difficult economic position. An example could be that when he reaches bankruptcy, but an eventual bankrupt is not the only case when the theory of unpredictability could be applied.

However, the modification of contracts will be realized only if the change of circumstances has appeared after the conclusion of contracts, the new regulations being applicable only for contracts that were

[44] Title II – The sources of obligations, Chapter 1 – The Contract, Section VI, The effects of the contract, 1.The effects between parties, Art. 1271 of Civil Code stipulates that „paragraph (1) The parties are bound to perform their obligations, even if their performance has become more onerous. Paragraph (2) However, the parties are bound to negotiate in order to adapt or finish the contract if the performance becomes excessively onerous for one of the parties due to a change of circumstances: a) that occurred after the conclusion of the contract; b) that could not have been taken into account when the contract was concluded; c) regarding the injured party that should not support the risk of such an event, Paragraph (3) If in a reasonable period of time the parties do not reach an agreement, the court can decide: a)the adaptation of the contract in order to divide between parties the loss and the profit that result from the change of circumstances; b) the suspension of the contract at the moment and the conditions that it establishes".

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concluded after the date of enforcement of the Civil Code, respectively October 1st 2011.

These provisions are completed by the ones from the new code of civil procedure stipulating that the court can decide the adaptation and the suspension of contracts only if the debtor has not taken the risk of modification of circumstances and he could not reasonably have considered to have taken this risk. The debtor must have tried in due time and in good faith to negotiate the reasonable and jut adaptation of the contract.

In conclusion, we appreciate that one of the problems that will appear in practice is caused by the vagueness of the terms "unjust character", "circumstance" or "reasonable". In addition, this absolute freedom that the courts will enjoy in order to decide the amendment of the contract will produce inevitably a lack of predictability and the creation of a heterogeneous jurisprudence that can affect the stability of the civil circuit. Moreover the law does not specify the extrinsic character of changes (their interference should not be the result, not even the partial result, of the debtor's deed).

On the other hand, we will witness a large number of contractual provisions that stipulate the fact that the debtor assumes the risk of eventual future changes of situation which are extrinsic to the juridical act, fact which will prevent the court's interference in the modification of the convention clauses.

The unpredictability institution that is provided in the current Civil Code corresponds to the social reality, being a necessity of our age, its implementation representing an important step for the reform of the Romanian justice. The theory of unpredictability is not and should not be an attenuation of the principle of contractual freedom, but rather a conceptual reinforcement of this principle.

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