THE CONDITIONS AND EFFECTS OF THE ENGAGEMENT OF CONTRACTUAL IMPRÉVISION

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Abstract: Starting from the text of art. 1271 Civil Code (2009) and considering the legal foundation of the theory, the following functions of unforeseeability can be identified: The function of restoring economic equilibrium and continuing the contract, which aims to safeguard the contract and maintain the balance between the benefits during its execution. The function of sharing risks between the parties, which would aim to distribute extraordinary and unexpected costs that arise.
The extinction function, considered auxiliary, aligns with the perspective of the theory of contractual solidarity regarding the binding force of contracts.
In specialized literature, there is no consensus on the conditions necessary for applying the theory of unforeseeability. As for the situations qualifying as unforeseeability, it has been concluded that limiting such cases strictly to economic and financial matters is unwarranted. Instead, a broader perspective is preferred, encompassing any circumstances, regardless of their nature, as long as their impact on the contract is significant. Specifically, this impact must predominantly be of an economic-financial nature, directly and immediately causing a substantial disruption to the contractual balance. Regarding normal contractual risk, both national doctrine and those of Italy, Switzerland, Germany, and France emphasize that imbalances within these limits should be borne by the party disadvantaged by the change in circumstances.
The court may intervene to adjust the contract, either by modifying the value of the obligations or altering specific contractual clauses.

Keywords: unpredictability, contract, subsidiary nature, risks, premises of contractual unpredictability, disruptive event

Introduction

Starting from the text of art. 1271 Civil Code (2009) and taking into account the legal foundation of the theory, the following functions of unforesight can be identified:

The function of restoring economic equilibrium and continuing the contract, which aims to safeguard the contract and maintain the balance between the benefits during its execution, is in accordance with the duty of loyalty or fidelity that the parties must demonstrate during the execution of the contract.

The function of sharing risks between the parties, which would aim to distribute extraordinary and unexpected costs that arise. The extinction function, having a subsidiary character, is in accordance with the vision of the theory of contractual solidarism on the binding force of the contract, since, according to it, the raison d'être of a contract is the conciliation of the interests of the parties.

In the specialized literature, the following have been identified as premises of contractual[1] unpredictability: the absence of the debtor's fault, the absence of a contract adaptation clause, the lawful nature of the non-performance of obligations and the manifestation of the party's will in the sense of applying unpredictability.

We consider that only the absence of a contract adaptation clause[2] represents such a premise, starting from the consideration that the provisions of art. 1271 Civil Code (2009) protect a private interest, that of the party affected by the occurrence of a contractual imbalance, not having a public order character, so it represents a supplementary legal norm, from which the parties may derogate through the concluded contract.

From our point of view, the absence of the debtor's fault in causing the change in circumstances or in influencing the effects caused by that change, represents a stand-alone sub-condition that must be analyzed in connection with the conditions of unpredictability relating to the disruptive event. Although the non-performance of the contract due to unforeseeability may be a situation of lawful non-performance of the contract, this does not represent a premise for the finding of the intervention of unforeseeability but a consequence of such a finding. We do not believe that the manifestation of the party's will in the sense of applying unforeseeability[3] should be included among the premises for applying unforeseeability because, from our point of view, this category should only consider substantive legal aspects relating to unforeseeability.

In the specialized literature there is no unified view on the conditions that must be met in order for the theory of unforeseeability to be applied. As far as we are concerned, we have proposed an analysis of the conditions of unforeseeability by reference to three levels: that of the disruptive event, to the effects produced on the execution of the contract and by reference to the conduct of the parties.

Doctrine

Conditions of unforeseeability by reference to the disruptive event

a). The exceptional nature of the change in circumstances. This condition arises from the provisions of art. 1271 para. 2 Civil Code (2009) which states that the execution of the contract must have become excessively onerous "due to an exceptional change of circumstances."[4]

In current vocabulary, the adjective "exceptional" evokes at the same time the rarity and intensity of an event, meanings that are also found when the adjective is used within the legal vocabulary. At the same time, the adjective exceptional refers to the occurrence of a situation that escapes provision. In order to establish the exceptional nature of an event, the reporting must not be done in the abstract, that is, by referring to generic events such as wars, revolutions, strikes, but the assessment must target a specific event. Regarding the category of situations constituting unforeseeability, the conclusion reached was that it is not justified to restrict the situations generating unforeseeability only to those of an economic and financial nature, opting for a broad vision, including any situations, regardless of their nature, the importance of which is "the effect on the contract, an effect that must be par excellence of an economic and financial nature and with a direct, immediate impact on the serious disruption of the economy of the contract"[5]. This conclusion results from the interpretation of the provisions of art. 1271 paragraph 2 Civil Code (2009), from

[1] Jean Carbonnier, *Droit Civil: Les Obligations*, Editura Hamangiu, București, 2009;
[2] André Tunc, *Les effets de la révision des contrats*, Editura Universul Juridic, București, 2005;
[3] Michel Grimaldi, *Les contrats en droit civil*, Editura Hamangiu, București, 2007;
[4] René Demogue, *Traité de Droit Civil*, Editura All Beck , București, 2002;
[5] Jean Carbonnier, *Droit Civil: Les Obligations,* Editura Hamangiu, București, 2007;

the content of which, the intention of the legislator to restrict the category of events generating unforeseeability only to those of an economic or financial nature is not apparent. On the other hand, both "increased cost of execution" and "decreased value of consideration" target the economic-financial component of the contract, so the increased or excessive onerousness of a contract will be related to its economic-financial component.

b). The change of circumstances must have occurred after the conclusion of the contract.

This condition results explicitly from the provisions of art. 1271 paragraph 3 letter a). There have been no controversies in the specialized literature regarding the recognition of this condition. The expression "change of circumstances" has a complex content, since it encompasses in its meaning both the idea of the occurrence of an event and the fact that the respective event has produced a change in the contractual status quo, that is, of the elements taken into account in order to establish the value of the goods or services that form the subject matter of the contract, elements according to which the parties established the initial contractual balance. A distinction must be made between events that inevitably determine a change in the contractual circumstances and events that only give rise to a probability of a change in the contractual circumstances. In the first hypothesis, both the event and the change in circumstances must occur after the conclusion of the contract and until its execution, while in the second hypothesis we believe that the mechanism of unpredictability can also be used in the situation where the event occurs before the conclusion of the contract, but only the change in circumstances occurs after this moment. Also, the change in circumstances must be an effective one and not hypothetical.

c). The condition of unpredictability of the change in circumstances results explicitly from the provisions of art. 1271 para. 3 letter b) Civil Code (2009). In the specialized literature, the question of the criterion according to which the debtor's power of foresight in the occurrence of the change in circumstances must be assessed has been raised. The phrase "were not... taken into account by the debtor" establishes a subjective criterion, since reference is made to the debtor's power of foresight. The use of "reasonable" requires comparing the debtor's foresight with that of a bonus pater familias, a reasonable person, endowed with average prudence and diligence.[6] In order to apply the objective criterion for assessing the debtor's foresight, several benchmarks have been proposed to be taken into account, such as: the frequency or rarity of changes in circumstances, the nature and duration of the contract, the professionalism of the contracting parties, the nationality of the parties, the time of conclusion of the contract. The benchmarks presented above have a guiding value, and can be applied all at the same time or only some of them, depending on the specifics of the contract analyzed.

Conditions of unforeseeability in relation to the effects produced on the contract

a) The condition of the debtor's obligation becoming excessively onerous is clearly evident from the content of art. 1271 paragraph 2 Civil Code (2009).

The meaning of the notion of "onerous" is explained in the first paragraph of the same article which, referring to obligations that have become "more onerous", specifies that this happens "either due to the increase in the costs of performing the obligation itself, or due to the decrease in the value of the consideration". It is worth noting that art. 1271 paragraph 1 Civil Code (2009) analyzes "onerousness" only from the perspective of the debtor because only with regard to his person is any of the two hypotheses in question verified: the increase in the value of the obligation that he must perform or the decrease in the value of the consideration to which he is entitled.

[6] François Gény, *Méthode d'interprétation et sources en droit privé positif*, Editura Hamangiu, București, 2003;

The use of the concept of "excessive burden"[7] is not specific to national legislation, but appears to be in line with the trends manifested within civil law in the European area, being used by: the Principles of European Contract Law, in Italian law, or by the French Civil Code, as amended by Ordinance no. 2016-131 of 10 February 2016, which enshrined the theory of unforeseeability in French law, in art. 1195. The condition of excessive burdensomeness of contract execution is an essential condition for the application of the theory of unforeseeability and probably the reason for the birth of this theory. Therefore, one of the central concerns of the studies dedicated to it has been the identification of criteria against which it can be established whether the initial obligation relationship exceeded the threshold of normal burdensomeness. In this regard, the following criteria were proposed for determining the excessive burden of enforcement: the criterion of the debtor's ruin, that of establishing a percentage threshold - in this regard, the proposed values varied from one fourth to double the value of the debtor's obligation, with intermediate opinions also existing in the sense that a threshold of 30% or 50% would be preferable, or even a progressive threshold between 15% and 40% -, the criterion of the debtor's unrealized profit, the Pareto criterion.

The above criteria have been considered by most doctrines as not conclusive to establish whether the performance of the contract has become "excessively onerous". Doctrine and case law have retained several benchmarks for verifying the condition of "excessive onerousness", which we believe should be taken into account in order to establish whether the performance of the contract has exceeded the threshold of normal onerousness:

- establishing a reference system that involves determining the relevant legal relationships, the entire contractual economy between the parties;
- another benchmark that must be taken into account would be not to confuse "excessive onerousness" with the situation of difficulty in which the debtor finds himself;
- establishing the threshold from which the damage suffered by the debtor begins is of paramount importance. In this regard, we believe that the solution crystallized in Italian law is the correct one, being proposed to analyze three objective aspects that would allow establishing whether or not the normal contractual ones have been exceeded. The quantitative aspect, which would seek to establish the monetary valuation of the service and its over-cost, in order to determine, in the abstract, whether the respective service has become excessively onerous. The qualitative aspect takes into account the type of contract in question, in order to verify whether or not the fluctuation that occurred remains within the normal limits of such operations. The temporal aspect involves making a comparison between the economic forecasts, which can be deduced from the value of the service and the consideration, established at the time of conclusion of the contract, and the value actually obtained at the time of execution of the contract.

We can therefore state that excessive onerousness begins where the normal contractual risk ends, specific to the type of contracts to which the contract belongs, with respect to which it is claimed to be affected by unforeseeability.

b). The execution of the contract appears to be manifestly unfair. This condition of unforeseeability explicitly arises from the content of art. 1271 paragraph 2 Civil Code (2009). The adjective “unjust” refers to the idea of fairness and enhances the suggestive force of the expression used by the legislator. Romanian law regulates various aspects of justice, and the concept of “injustice in Romanian law” can refer to various situations in which it is considered that rights and legal principles are not applied correctly or equitably. This may include: Irregularities in the judicial system such as any deviation from established judicial norms and procedures can be perceived as a

[7] Gérard Cornu, *Dictionnaire de droit civil*, Editura C.H. Beck, București, 2009;

form of injustice. For example, unjustified delays in resolving a case, corrupt practices or incorrectly motivated judicial decisions. Inequities in the application of laws, if the law is applied incorrectly or discriminatory, this can be considered a form of injustice. For example, if certain categories of people are treated with favoritism or are unjustifiably disadvantaged. Problems in the field of human rights. Any violation of fundamental human rights can be regarded as a form of injustice in Romanian law. This may include discrimination, unjustified restrictions of individual freedoms or violations of civil rights. As well as other inequities found in every branch of law in Romania and the European space, but which are not subject to unpredictability within contracts. It is important to emphasize, however, that the perception of injustice may vary depending on the subjective perspective of individuals and the specific context of each case. To address such problems, the Romanian legal system has procedures for contestation and appeal, as well as bodies for the control and monitoring of respect for human rights, both state and through NGOs.

Therefore, the phrase "would make the debtor's obligation manifestly unfair" adds a new rigor to the condition of "excessive burden" whose effect it tightens, increasing the level of "burdensomeness" to the threshold at which its existence is indisputable, being an obvious one. This condition is added to the "excessively burdensome" character that the execution must acquire, reducing the scope of application of this condition, thus making it difficult to apply the theory of unforeseeability.

Within the framework of unforeseeability, we can speak of its conditions in relation to the conduct of the parties. A first condition would be that the debtor did not assume the risk of the change in circumstances and could not reasonably be considered to have assumed it, provided for in art. 1271 para. 3 letter c) Civil Code (2009). This requirement of unforeseeability imposes a double condition: not only that the parties did not assume the risk, but that it could not be presumed that it was assumed. The verification of the first conditionality involves the analysis of the contractual terms and implies the absence of any express contractual clause whereby the parties assume, in general, any risk produced by the change in contractual circumstances or, in particular, even the change in circumstances that has occurred. The second conditionality is that it cannot be reasonably assumed that the risk that has occurred was assumed by the debtor. The presumption that the debtor assumed the risk of the change in circumstances is inextricably linked to the debtor's foreseeability of such changes. The reference to "reasonableness" merely reiterates the same criterion considered by the legislator when establishing the measure according to which the debtor's power of foresight must be assessed, that of a bonus pater familias, that is, of a man endowed with ordinary prudence and diligence.

The second condition explicitly stated in Article 1271 of the Civil Code (2009) is the absence of the debtor's fault regarding the change of circumstances or the extension of their effects. This condition does not arise, there being doctrinal controversies regarding the necessity or usefulness of retaining such a condition, but most doctrine considers this issue to be a condition of unforeseeability. In this sense, it has been argued that unforeseeability does not exist unless the event is unforeseeable for both parties, and its occurrence is beyond their intervention, that is, if none of the parties can be considered, directly or indirectly, responsible for the occurrence of the event. In the specialized literature, it has been proposed to resolve the problem of the debtor's concurrent fault by analogy with the solutions envisaged in the case of concurrent fault for force majeure situations and, respectively, in the matter of tortious civil liability. At the national level, under the old regulation, it was considered preferable to resort to the criteria for establishing the causal relationship, developed in the field of tort liability.

We believe that resolving the issue of the debtor's concurrent fault in determining the change in circumstances or the effects of circumstances on the contract should be resolved by analogy with

the matter of tort liability, by referring to the system of indivisible unity between cause and conditions. In this regard, it is to be established whether the debtor's act does not represent a condition favoring the disruption of the contractual balance. In the event of a positive answer, the debtor will be denied the mechanism of unforeseeability, since, according to art. 1357 paragraph 2 Civil Code (2009) liability occurs for the slightest fault. Also in connection with the absence of the debtor's fault in the occurrence of the event, the specialized literature has discussed the need for the disruptive event to have an external character to the parties. In terms of international trade law, this requirement of externality is translated by the expression "beyond the control"[8] borrowed from English law, which means that the occurrence of the event is beyond the debtor's powers.

We conclude, considering that the condition of the debtor's absence of fault in the occurrence of the change of circumstances or the extent of its effects is met, only in the situation where the debtor cannot be held responsible for even the slightest fault in triggering the disruptive event, or aggravating its effects, if the change produced is beyond the debtor's control or influence, if he has fulfilled his contractual obligations up to the moment of the occurrence of the imbalance, and, after this moment, has taken all possible measures to mitigate its effects.

In order to continue talking about effects, we must analyze the conditions of this theory and the situations that are related to the substance of the analysis of the use of unforeseeability within contracts.

Prior negotiation of contract adaptation. The role of the parties in restoring the contractual balance.

The establishment of the debtor's obligation to attempt to renegotiate the contract is not at all surprising, resulting naturally from the legal foundation of the theory of unforeseeability, which consists of contractual solidarity and the principle of good faith, the latter incorporating in its content the duty of loyalty between the contracting parties that gives rise to the obligation to negotiate in the event of disruption of the contractual balance.

The initiation of negotiations must aim to save the contract, by restoring the contractual balance in relation to the new circumstances, but we see no impediment to the parties, following negotiations conducted in good faith, reaching the conclusion that the best for their economic interests is the termination of the contract.

The initiated negotiation must satisfy several requirements in order to be considered fulfilled this prior obligation, established in the debtor's charge. Thus, first of all, a formal requirement of a "reasonable term" must be respected. The reasonable term, we believe, refers both to the time interval granted by the debtor to the creditor in order to prepare the negotiations, and to their duration. The second requirement that the negotiation must meet is a substantive one and refers to the condition of good faith. Negotiations will be considered to be conducted in good faith, as long as their purpose is that of the fair and reasonable adaptation of the contract.

Even if the text of art.1271 para. 3 letter d) seems to impose only the debtor the obligation to act in good faith during the negotiations, the creditor must also demonstrate the same attitude, since such conduct is imposed on him by the provisions of art. 1170 Civil Code (2009) which regulates good faith as a general principle.

The question has been raised in the specialized literature whether, during the negotiations, the contract must still be performed or its execution is suspended. As far as we are concerned, we believe that no sustainable arguments can be brought to support the right of the disadvantaged party to suspend the execution of the contract during the negotiations. The continuation of the execution

[8] Sir Roy Goode, *The UNIDROIT Principles of International Commercial Contracts*, Oxford University Press, Oxford, Marea Britanie, 2007;

of the contract during the negotiations is in accordance with the principle of its binding force. Even if unforeseeability represents a justifiable clause for the non-execution of the contract, it acquires this character only following the amicable or judicial finding of the intervention of a situation of unforeseeability. Until that moment, the contract retains its binding force and, consequently, must be executed. Accepting the opposite solution, of suspending the execution of the contract during the negotiations, would lead to inadmissible consequences in the case of a bad-faith debtor, who would no longer wish to execute his obligations or would intend to delay their execution, and for whom invoking unforeseeability would represent an easy way to interrupt the execution of the contract at the slightest change in the value of the performance or consideration.

The answer to this question, what will be the legal consequences of failure to comply with the obligation to negotiate, may differ depending on the qualification of the negotiations, as a procedure prior to the court's notification, or a condition on the fulfillment of which the right to request the application of the imprevision mechanism depends.

The qualification of the negotiations that must be held in case of imprevision, as a prior procedure, would entail the rejection of the request for summons to court, pursuant to art. 193 para. 1 and 2 of the Civil Procedure Code (2010), but only conditional on the defendant invoking, by way of a response, this omission. Such an interpretation would lead to the content being emptied of some imperative legal provisions, giving the parties the possibility, by their agreement, to transform the requirement of prior negotiation of the adaptation of the contract, from a mandatory condition of the law, into an optional one.

As far as we are concerned, we do not believe that the obligation to negotiate is a simple prerequisite for the court to be notified, according to art. 193 of the Civil Procedure Code (2010), but we consider that the right to request the court to adapt or terminate the contract does not become current until the condition is met, that following negotiations conducted in good faith, the attempt to reasonably and fairly adapt the contract has failed. Thus, the phrase "only if" used in paragraph 3 of art. 1271 clearly establishes a conditionality depending on the fulfillment of which it is possible or not to apply the theory of unforeseeability.

If the right is not current, the lack of this condition can be invoked during the trial by means of the exception of prematurity, a substantive exception, peremptory/dirimant and absolute and which can be raised by any of the parties, by the prosecutor or by the court ex officio.

Refusal to accept the negotiation, regardless of the content of the offer and the reasons invoked by the debtor, is contrary to the requirements of art. 1170 Civil Code (2009), representing a violation of the principle of good faith, so that such an attitude on the part of the creditor is to be qualified as bad faith. The creditor's bad faith may be considered by the court as representing an indication of the creditor's lack of intention to continue the contract in another form, of the loss of his interest in a performance other than the current one. This may determine the court's adoption of the radical solution consisting in ordering the termination of the contract. On the other hand, the creditor's bad faith may lead to his liability under the conditions of art. 1350 with the consequence of being obliged to pay damages for the prejudice suffered by the debtor, by initiating and conducting negotiations.

Adaptation of the contract. One of the measures that the court can take when it finds that the conditions of unforeseeability are met is to proceed to “adapt the contract, in order to distribute equitably between the parties the losses and benefits resulting from the change in circumstances;”.

The preference of the drafters of the Romanian Civil Code for the term “adaptation” is explainable if we consider the source of inspiration of the Romanian legislator, namely the UNIDROIT

Principles and the Principles of European Contract Law which, in art. 6.2.3 and art. 6:111 respectively, use the same expression.
The adaptation of the contract involves the direct intervention of the court, so that, through the court decision, the economic values of the parties' performances are modified in order to restore the disturbed contractual balance. The legal text excludes the possibility of opting for indirect intervention by the court, in the sense of establishing an obligation for the parties to negotiate, since it speaks of the court's role in distributing losses and benefits between the parties, which implies a direct intervention by it within the contract.
Adapting the contract involves finding a solution to preserve it within which, judging in equity, the court achieves an adequate distribution of the losses and benefits resulting from the change in circumstances. In the French and national doctrine, developed prior to the codification of unforeseeability, several criteria were proposed that could be used, simultaneously or separately, in order to restore the contractual balance: the criterion of reciprocity of benefits, that of commutativity, the criterion of equivalence of benefits and the criterion of proportionality.
Without denying the correctness of the proposed criteria, we believe that the fair judgment of the adaptation of the contract must have as its starting point the legal foundation of unforeseeability, those reasons that justified the regulation of this theory and must aim to restore proportionality between the parties' services, so that, following the reestablishment of contractual relations, the execution of the contact ensures once again the satisfaction of the interests of both contracting parties.
To achieve this objective, we believe that the court's legal reasoning must go through several stages. A first stage involves the identification in concreto of the initial proportionality of the contract, starting from the premise that the parties concluded a balanced contract, and that the initial services fully satisfied their interests. A second stage would consist of identifying the risk of normal contact related to the type of contract concluded. The third stage would involve identifying the benefits and losses resulting from the change in circumstances and which are to be distributed fairly in order to adapt the contract. The next stage would consist in distributing the benefits and losses without seeking to establish a perfect balance, but taking into account the initial proportionality between the values of the benefits. An adaptation of the contract should be considered satisfactory when, in relation to the new circumstances (the conditions under which a contract of the type subject to the adaptation could be concluded at the time of the adaptation), the performance of the adapted contract would still be economically beneficial for the parties.
The adaptation of the contract does not necessarily have to lead to a complete distribution of benefits and losses, in the sense of having re-established a full contractual economic balance, as at the time of its conclusion, but this will have to be considered satisfactory if the new execution imposed by the court is "more onerous" for the disadvantaged party, than in the version initially agreed to by the contract.
With regard to the normal contractual risk, both in the national doctrine and in the Italian, Swiss, German and French, it has been emphasized that the imbalance included between these limits must be placed on the burden of the party prejudiced by the change of circumstances
The court can proceed to adapt the contract either by acting on the value of the benefits or by modifying certain contractual clauses. If the latter option of adapting the contract is chosen, the court will have to take into account the fact that, by correcting the contract, it cannot novate, that is, the court is prohibited from rewriting the contract or changing its nature by imposing on the parties a new and completely different contract, within which its subject matter has been changed or completely new obligations have been imposed.

Termination of the contract. Another measure that the court can take in the situation where it finds that the conditions of unforeseeability are met is to order "termination of the contract, at the time and under the conditions that it establishes."

From a gradual perspective on the effects of the intervention of contractual unforeseeability, the termination of the contract was considered to be the most serious, most radical and least flexible consequence, as it leads to the disappearance of the contract.

From a historical perspective, this effect has been recognized since the beginning of the emergence of the theory of unforeseeability, being considered by most authors from the interwar period as one of the most accessible solutions in the case of contracts affected by changing circumstances.

The recent codification of unforeseeability in both Romanian and French law has opted for a variant in which unforeseeability is seen as a stand-alone cause of the extinction of obligations, choosing the solution of terminating the contract and not by applying the mechanism of a sui generis termination/resolution.

With reference to the assessment criterion that the court must take into account when choosing to order the termination of the contract, it was shown that, if the aim of safeguarding the contract can no longer be achieved by adapting it, because it would generate an unfair situation for at least one of the parties, then the solution of terminating the contract should be chosen, by imposing conditions that would generate the least possible damage for both parties.

If by choosing any adaptation solution, an unfair performance is imposed on the party not affected by the unforeseen event, the court will have to turn to the solution of terminating the contract. Also, if any variant of adapting the contract would lead to the loss of contractual interest on the part of both parties, the only solution that could be adopted would remain that of terminating the contract.

The solution of contract termination is a subsidiary one and is preferable only if the appropriate adjustment of the contract cannot be achieved. In this regard, including in the official commentaries of the Principles of European Contract Law, it is emphasized that the termination of the contract must be viewed by the court as a last resort, with the attempt to preserve the contract by adapting it prevailing.

Regarding the conditions that the court should impose when ordering the termination of the contract, we believe that the award of damages is not always mandatory when ordering the termination of the contract, the court having to proceed circumstantially according to the specific facts of the case, and then making an equitable assessment of the value of the possible compensation that it will establish as compensation for unforeseeability, weighing the following objective elements:

- The costs that should be borne by the debtor affected by the change in circumstances by continuing an excessively onerous execution;
- The unexpected gain made by the creditor (the party not affected by the change in circumstances) during the period in which he benefited from the performance of the obligation under excessively onerous conditions;
- The losses that would be caused to the creditor by the future non-performance of the contract determined as the difference between the value of the services remaining to be performed and the value of the services that should have been performed under normal contractual risk.

Conclusions

The possibility for the court to adopt intermediate solutions between the adaptation of the contract and its termination. The solutions we are considering are those that would order the early performance of the contract or the suspension of its performance.
Regarding the early execution of the contract, we believe that this could be included in the solution of its termination. Even if the provisions of art. 1271 paragraph 2 Civil Code (2009) do not explicitly provide, among the solutions that the court can adopt, that of suspending the execution of the contract, we believe that such a solution is possible to be pronounced for the following arguments: First, such a solution would be in the "spirit of the law", in accordance with the purpose envisaged by the legislator when regulating the impresario, that of providing an effective remedy for situations of contractual imbalance that occurred during the execution stage; Second, such a solution, although not provided for by the legal text, is not prohibited by it either. Thus, when the legislator wanted to exclude from the scope of application other hypotheses than those to which it referred, it used a separate legislative technique of expression, by using the conjunction "either", which restricts the possibility of choice, only to one of the listed situations, without the possibility of opting for a third option; Thirdly, we take into account the fact that even in the official commentaries of the Principles of European Contract Law and the UNIDROIT Principles, which contain provisions similar to those of art. 1271, in the sense that they do not explicitly mention the possibility of suspension of the contract by the court, it is admitted that in exceptional situations such a measure can be justified.
Within the framework of the action in imprevision, only the party affected by the change of circumstances may have active procedural capacity, within a request formulated through the main route. Only this will justify an interest in promoting such an action, since only it can pursue a practical benefit, consisting in restoring the disturbed contractual balance.
Regarding the legal nature of the action in imprevision, from the perspective of classifying civil actions according to the purpose pursued, in: actions in ascertainment, in the realization of the right or in actions in the establishment of rights, we consider that we are in the presence of an action in realization since, by promoting such an action, the party affected by the change of circumstances seeks to materialize its right to benefit from the adaptation, temporary suspension, or termination of the contract.
In terms of classifying civil actions into non-patrimonial and patrimonial claims, with the subclassification of the latter into personal, real and mixed claims, we believe that the action in imprevision represents a patrimonial action, which may have a personal or mixed character depending on the legal nature of the contract affected by the imprevision.
The court will be able to order by presidential ordinance the suspension of the execution of the contract under the conditions in which the admissibility conditions of this procedure are met. The condition of urgency will be met if the affected party will justify, in addition to the damage caused by the intervention of unforeseeability, the fact that it could not be effectively repaired through a common law action. The condition of non-judgment of the merits requires the judge to conduct a summary examination of the merits of the case, which involves analyzing all the conditions of unforeseeability and not only the level at which the value of the performance increased or the level at which the consideration decreased. In relation to the specifics of unforeseeability, we believe that the condition of temporality cannot be considered fulfilled in the absence of a common law dispute. With respect to the requirements of this condition, that the measures ordered have a provisional nature, we believe that neither the adaptation of the contract nor its termination can be ordered through this procedure, since such measures would definitively affect the execution of the contract.

From the perspective of procedural law, the court is bound to decide only within the limits of its jurisdiction. In this regard, the court is entitled to pronounce the adaptation of the contract, in the event that the party requests its termination, since pronouncing a solution of adaptation would be equivalent to a partial admission of the request for summons.
Regarding the answer to the question of whether it is possible to pronounce a solution of termination of the contract in a situation where the party only requests the adaptation of the contract, we believe that the active role of the court would be exceeded, if the termination of the contract were pronounced in a situation where the plaintiff only requested its adaptation. However, the solution pronounced by the court cannot depend only on the plaintiff's request but also on the defendant's procedural position, to the extent that it is expressed. Thus, in the event that the plaintiff exclusively requests the adaptation of the contact, and the defendant, responding to the plaintiff's request, indicates that for him the adaptation of the contract, in any sense, would no longer be useful, requesting its termination, the court will have to consider that such a procedural position represents a counterclaim, with which it was invested incidentally.

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CONDIȚIILE și EFECTELE ANGAJĂRII IMPREVIZIUNII CONTRACTUALE

Rezumat:

Plecând de la textul art. 1271 Cod civil (2009) și având în vedere fundamentul juridic alteoriei pot fi identificate următoarele funcții al impreviziunii:

Funcția de restabilire a echilibrului economic și de continuare a contractului prin care se urmărește salvgardarea contractului și menținerea echilibrului între prestații pe parcursul executării acestuia, este în acord cu îndatorirea de loialitate sau de fidelitate de care părțile trebuie să dea dovadă pe parcursul executării contractului.

Funcția de împărțire a riscurilor între părți ce ar urmări repartizarea costurilor extraordinare și neașteptate survenite.

Funcția extinctivă, având un caracter subsidiar, este în concordanță cu viziunea teoriei solidarismului contractual asupra forței obligatorii a contractului, întrucât, potrivit acesteia, rațiunea de a fi a unui contract, o reprezintă concilierea intereselor părților.

În literatura de specialitate au fost identificate ca ***premise ale impreviziunii contractuale***: absența culpei debitorului, absența unei clauze de adaptare a contractului, caracterul licit al neexecutării obligațiilor și manifestarea de voință a părții în sensul aplicării impreviziunii.

În ceea ce privește categoria situațiilor care constituie imprevizibilitate, s-a ajuns la concluzia că nu se justifică restrângerea situațiilor generatoare de imprevizibilitate doar la cele de natură economico-financiară, optându-se pentru o viziune largă, care să includă orice situații, indiferent de natura lor, a căror importanță este „efectul asupra contractului, efect care trebuie să fie prin excelență de natură economico-financiară și cu impact direct, imediat asupra perturbării grave a economiei contractului”.

În ceea ce privește riscul contractual normal, atât în doctrina națională, cât și în cea italiană, elvețiană, germană și franceză, s-a subliniat că dezechilibrul inclus între aceste limite trebuie să fie pus în sarcina părții prejudiciate de schimbarea circumstanțelor.

Instanța poate proceda la adaptarea contractului fie acționând asupra valorii prestațiilor, fie prin modificarea anumitor clauze contractuale.