CONTRACTUAL IMPRÉVISION. THE LEGAL BASIS OF THE THEORY OF IMPRÉVISION

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Abtract: If Roman law tended to ignore the theory of impresario, the same was not true of Roman philosophers, who showed a keen interest in this theory. Historically, the theory of impresario derives its inspiration from the old Latin adage "rebus sic standibus", which in turn finds its origins in the writings of Cicero and Seneca. In the 12th and 13th centuries, under the influence of the Roman philosophers Cicero and Seneca, the opinions of Gratian, Bartolomeo of Brescia and St. Thomas Aquinas, the most prominent authors of this ecclesiastical period of law, did not differ much from the opinions of the two Roman philosophers. The civil legislation that was applied in the national space prior to the entry into force of the Civil Code of 1865, was not foreign to the theory of impresario.
There are certain criteria that must be met to invoke contractual unforeseeability:
1. Unforeseeable event: the situation that led to the inability to perform the contract must be truly unforeseeable and not foreseeable by the parties at the time of concluding the contract.
2. Inevitability: the event must be inevitable and not avoidable by the affected party.
3. Impossibility of performance of the contract: the unforeseeable and unavoidable event must lead to a real impossibility of performing the contractual obligations.
If these criteria are met, the law may allow the modification or even termination of the contract on the basis of unforeseeability. Some jurisdictions may have specific rules regarding contractual unforeseeability, and the application of this principle may vary depending on the legislation and case law.
If we tried to explain "unforeseenness" starting from the literal meaning of the words "unforeseeable", "unpredictability" or "unforeseen", we would end up, on the one hand, excessively restricting the situations in which the theory of unforeseeability could be applied, given the idea of absoluteness that the first two words convey, and on the other hand, we could unpermissibly extend the cases of application to those situations in which the change in circumstances could have been foreseen by the parties with minimal diligence, but they did not do so.

Keywords: unforeseenness; unpredictability; unforeseen; force majeure as a basis for unforeseeability; foreseeability of damage as a basis for unforeseeability; abuse of rights as a basis for unforeseeability; good faith as a basis for unforeseeability.

Introduction

Starting from Roman law, we will see how contractual unforeseeability was viewed over time, namely the source of the theory of unforeseeability is found in the following passage from Africanus, identified in the work Solutionibus et liberationibus: "Tacite enim haec stipulatio videur sit in eadem causam maneat"[1], from which the idea of the existence in the contract of a tacit, implied clause, of termination of the contract, in the event of a change in circumstances, emerges. Specialists in the theory of unforeseeability have identified, in the work of Roman jurists, a series of

[1] *Solutionibus et liberationibus (Digeste, XLVI, 3, fr. 38)*, Editura All Beck, București, 2006;

texts that led them to conclude that this theory was not foreign to Roman law. Also, references that can be associated with the theory of imprevision are found in the works of the jurists Paul, Marcellus or in the Digests of Justinian[2].

If Roman law rather ignored the theory of imprevision, the same was not done by the Roman philosophers, who showed a keen interest in this theory. From a historical point of view, the theory of imprevision draws its essence from the old Latin adage "rebus sic standibus", which in turn finds its origins in the writings of Cicero and Seneca. In the 12th and 13th centuries, under the influence of the Roman philosophers Cicero and Seneca, the opinions of Gratian, Bartholomew of Brescia and St. Thomas Aquinas, the most prominent authors of this ecclesiastical period of law, did not differ much from the opinions of the two Roman philosophers.

St. Thomas Aquinas is considered the most prominent representative of the canonists and the precursor of the admission of impresario by implying the existence in any contract of a tacit clause known as, rebus sic standibus, an expression taken from the following formulation:

"Contractus qui habent tractum succesivum et dependentiam de futuro rebus sic standibus intelligibili" -"Contracts with successive execution and which depend on the future presuppose that the circumstances remain unchanged (t.n)". The glossators did not deal with the issue of impresario in the 14th-16th centuries, but the postglossators showed a real interest in this issue, taking over the ideas of the canonists and trying to generalize them.

Until this moment, the concept of tacit clause was present only in canon law in relation to oaths, and in the work of Saint Thomas Aquinas, in relation to promises in general, without any legal implication being attributed to it. Bartolus seems to be the first author to introduce the idea of the existence of a tacit clause (rebus sic standibus) into civil law[3].

His disciples, Balade and Jason de Mayno, add a new extension to the idea of imprevision and generalize it with regard to contracts and declarations of waiver. The writings of French jurists in the 16th century differed in their approach to the theory of imprevision, some of whom, such as Alciat and Tiraqueau, addressed this theme, while others, such as Cujas and Doneau, ignored it.

If the doctrine of that era rather ignored the issue of imprevision, this theory found its application among practitioners, being reflected in some jurisprudential solutions. In the context of this statement, the decision of the Parliament of Grenoble of March 2, 1634, in which a full application of the theory of imprevision was made, is given as an example. Unlike French law, Italian doctrine and jurisprudence from the 16th and 17th centuries showed particular concern for the development of the concept of imprevision.

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[2] *Digestele lui Justinian (sau Pandectele)*, Editura All Beck, București, 2004;

[3] Sfântul Toma de Aquino, *Summa Theologica (Summa Theologiae)*, Editura IBMBOR, București, 1999;

Cardinal Mantica set out his view on the issue that is the subject of our research in his work De tacitis et ambiguis conventionibus, Liber secundus and also in Liber tertius in which he developed a theory of unforeseeability with the same constitutive elements as today. According to his view, when a contract is affected by an enormous disproportion between the consideration, by reference to the moment of its conclusion, as a result of the intervention of an unforeseeable event, it must be abolished or modified, showing at the same time that contracts with successive execution or those affected by a term are susceptible to being subject to such events.

Civil side

The doctrine developed by Cardinal Jean-Baptiste de Luca was set out at length in his work entitled Theatrum veritatis et justitiae. His theory was considered all the more interesting, as it is the result of a study of the phenomenon of unforeseeability in the case of particular contracts such as the donation contract, the dowry contract, etc.

In the Germanic area of Europe, the jurists of the time also formulated considerations regarding the existence or not of an implied tacit clause in conventions, thus contributing to the development of the theory of impresario.

Hugo Grotius, in his work De jure belli ac pacis (1625), adopted a more restrictive and objective approach to the application of the theory of the implied clause. In turn, Samuel von Pufendorff, in his work published in 1672, De jure naturale et gentium, (Book V, Chapter XII) limits the application of the causal theory to two situations.

Augustin Leyser generalized the application of the theory of impresario to all contracts, stating that "Omne pactum, omis promissio rebus sic standibus intelligenda est". As has been emphasized, his work deserves special attention also in light of other ideas it contains. First, it supports the idea that, if there are sufficient reasons, the main aim should be to adapt the contract to the present conditions and time and not to proceed to its dissolution. Second, it considers that, for the theory of unforeseeability to be applicable, three conditions must be met: a) the promise would not have been made if the new event had been present at the time of the conclusion of the agreement; b) the affected party is not responsible for the change in circumstances; c) the parties did not foresee the change in circumstances.

The first codification that explicitly recognized the existence of the rebus sic standibus clause in contracts, with the consequence of the possibility of requesting partial performance or adaptation of the contract, was the Codex Maximilianeus Bavaricus Civilis enacted in 1756 by the Duke of Bavaria, Maximilian III Joseph, and which was in force until 1900.

The General Code for the Prussian States, promulgated in 1794 by Frederick William II and in force until 1900, was the second codification that adopted the theory of unforeseeability.

In the 17th century, in the old Anglo-Saxon law, the debtor's exoneration in the event of the occurrence of unforeseeable events was possible under very strict conditions, the doctrine and jurisprudence supporting the principle of the absolute binding force of the contract. Traditionally, it is considered that the most pronounced affirmation of the principle of the binding force of the contract is given in the famous case of Paradine vs. Jane (1647).

The civil legislation that was applied in the national space prior to the entry into force of the Civil Code of 1865 was not foreign to the theory of impresario.

Regarding Transylvania and Banat, contractual impresario was introduced as a result of the application in these territories of the General Civil Code of the Austrian Empire of 1811. Although the General Austrian Civil Code did not include a generalized application of the theory of impresario, it nevertheless applied this theory in the matter of the promise to contract, within the provisions of art. 936 of the code. In Muntenia, although there was no legal text with general or specific application, the theory of impresario was sporadically applied in specific situations.

The Calimach Code, promulgated in 1817 by the ruler of Moldavia Scarlat Callimachi, in turn contains some provisions that are reminiscent of the theory of impresario in the content of art. 1254 of the Calimach Code[4].

In general, the term "force majeure" refers to situations where one of the parties is unable to fulfill its contractual obligations due to unforeseeable and unavoidable circumstances that could not have been anticipated at the time the contract was concluded. These circumstances may include major natural events, wars, legislative changes or other exceptional events beyond the control of the parties involved.

In civil and contract law, the general principle is that parties must perform their obligations in accordance with the terms of the contract. However, in certain cases, the law may provide an exception in the case of contractual unforeseeability. There are usually certain criteria that must be met in order to invoke contractual unforeseeability:

1. Unforeseeable event: the situation that led to the inability to perform the contract must be truly unforeseeable and could not have been foreseen by the parties at the time of concluding the contract.

2. Inevitability: the event must be unavoidable and could not have been avoided by the affected party.

3. Impossibility of performance of the contract: the unforeseeable and unavoidable event must lead to a real impossibility of performing the contractual obligations.

[4] *Codul lui Calimachi*, Editura Academiei Române, București, 1958;

If these criteria are met, the law may allow the modification or even termination of the contract on the grounds of unforeseeability. Some jurisdictions may have specific rules regarding contractual unforeseeability, and the application of this principle may vary depending on the legislation and case law.

The name "theory of unforeseeability", under which this theory is known today in national law, was borrowed from French doctrine where the effects of changing circumstances were analyzed under the title of "la théorie de l`imprévision", probably in order to emphasize the primary element, the cause of the change of circumstances and the breaking of the contractual balance: the occurrence of an unforeseeable event. If we were to try to explain "unforeseeability" starting from the literal meaning of the words "unforeseeable", "unforeseeability" or "unforeseen", we would end up, on the one hand, excessively restricting the situations in which the theory of unforeseeability could be applied, given the idea of absoluteness that the first two words convey, and on the other hand, it could unduly extend the cases of application to those situations in which the change of circumstances could have been foreseen by the parties with minimal diligence, but they did not do so.

Regarding the word "imprevision" it is worth noting that, unlike the French language, where the word "imprévision" is defined as a feminine noun meaning "lack of foresight", it is not found in either the Explanatory Dictionary of the Romanian Language or the Dictionary of Neologisms, being a term specific to legal language.

Art. 1271 paragraph (2) of the Civil Code regarding "Imprevision" - "However, if the performance of the contract has become excessively onerous due to an exceptional change in circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation, the court may order: a) the adaptation of the contract, in order to distribute equitably between the parties the losses and benefits resulting from the change in circumstances; b) the termination of the contract, at the time and under the conditions it establishes.; refers to the "performance of the contract" that has become excessively onerous due to the exceptional change in circumstances, changes that, according to the third paragraph letter. a), occurred after the conclusion of the contract. It therefore follows that the execution of contractual obligations must take place either at a certain time interval after the conclusion of the contract, or periodically. Therefore, imprevision cannot be applied to contracts with immediate (instantaneous) execution unless they are affected by the modality of the term or the suspensive condition. Instead, the preferred category of contracts to which imprevision is addressed is that of contracts with successive execution, contracts whose existence is usually long-term.

The applicability of imprevision is obvious in the case of synallagmatic contracts where the obligations of the parties, being reciprocal and interdependent, have their causal support in each

other, so it is natural to resort to the imprevision mechanism in order to restore the contractual balance.

The possibility of applying imprevision also in the case of unilateral contracts is not excluded by the provisions contained in art. 1271 of the new Civil Code. Another textual argument in support of the claim that unforeseeability applies to unilateral contracts is found in paragraph (1) of art. 1271, where it is stated that this increased burdensomeness may be caused by either "an increase in the costs of performing one's own obligation, or ... a decrease in the value of the consideration." – "The parties are required to perform their obligations, even if their performance has become more burdensome, either due to an increase in the costs of performing one's own obligation, or due to a decrease in the value of the consideration."

If the second hypothesis, that of the decrease in the value of the consideration, only considers synallagmatic contracts, since only with reference to these contracts can we speak of a consideration, we believe that the first hypothesis can be applied both in the case of synallagmatic contracts and in the case of unilateral contracts. In the case of imperfect synallagmatic contracts, in the situation where the court, applying the mechanism of unforeseeability, decides to adapt the contract, it will have to proceed as if it were faced with a unilateral contract and a legal relationship arising from unjust enrichment. The application of the theory of unforeseeability in contracts for consideration is a unanimously accepted issue. As far as we are concerned, we believe that the theory of unforeseeability is also applicable in the case of contracts for gratuitous purposes. These are divided into liberalities and contracts for free services or disinterested contracts. In the case of a donation without obligations, we identify several arguments for which we consider that this contract is excluded from the application of the theory of unforeseeability. Thus, the donee only has the capacity of a creditor, so he cannot invoke unforeseeability in his favor. As for the donor, he will not be able to invoke unforeseeability in his favor, requesting a reduction of the donation or termination of the contract, since such a measure would conflict with the principle of irrevocability of donations. In the case of donations with charges, under the title "revision of conditions and charges", the Civil Code (2009) regulates in art. 1006-1008 a particular case of application of the theory of unforeseeability. In the case of free service contracts or disinterested contracts, we consider that in principle unforeseeability also applies to these contracts. The application of the unforeseeability mechanism within commutative contracts is a unanimously accepted, uncontested matter, as in the case of synallagmatic contracts.

As for us, we consider that, in principle, unforeseeability can also be applied in the case of random contracts, this being nothing more than a variety of contracts for consideration. Typically, when concluding a random contract, the parties assume a certain risk of loss or gain that depends on

certain future and uncertain events. This risk represents an initial risk according to which the parties assess the concluded contract as balanced. When an unforeseen event occurs that adds an additional risk to the contract, the application of the unforeseeability mechanism can be conceived. The current regulation partially excludes life annuity and maintenance contracts from the application of unforeseeability, in the sense that the life span of the beneficiary of the annuity or maintenance cannot constitute a reason for unforeseeability. Speculative contracts are those random contracts in which the element of unforeseeability has a total or extremely high dependence on hazard, the future event on which it depends being impossible, or almost impossible to foresee or estimate, so that in their case the application of the unforeseeability theory is excluded.

Finding and explaining the legal foundation of the theory of unforeseeability is necessary not only to demonstrate why the theory is applicable even in the absence of express legal provisions in this regard, but also because in this way, by identifying the sources, the fundamental principles of law on which it is based, both the conditions for the application of the theory and the limits of its application can be defined.

The theory of the implied clause: "rebus sic stantibus". The modern theory of the "rebus sic stantibus" clause starts from the old ideas, enunciated by canonists and developed by postglossaries, regarding the existence of a tacit clause in contracts. According to it, in contracts with successive execution there is an implied tacit clause, by virtue of which the contracts will be executed, as long as the factual situation at the time of the formation of the contract remains unchanged and during the execution of the contract.

The authors in favor of this theory identified three conditions, which must be met cumulatively, for the theory to apply: the event must be unpredictable at the time of the conclusion of the contract, it must be external to the debtor, and it must cause a very important change in the contractual benefits. This theory was harshly criticized by most of the French civil doctrine of the 19th and 20th centuries, who criticized it for both its artificial character and the fact that it exaggerates the role of the judge. The main criticism that has been brought to this theory, starts from the fact that it is based on the theory of autonomy of will, trying to find the common will of the parties where it does not exist.

Force majeure as the foundation of unforeseeability. The similarity between the legal institution of force majeure and the theory of unforeseeability made it possible, in the context of the First World War, to find arguments that would have justified the application of the latter theory by referring to the legal provisions that regulated the effects of force majeure. Relatively recently, in French law, starting from the jurisprudential changes that have occurred over time with regard to the classical conception of force majeure, an attempt was made once again to anchor the theory of

unforeseeability in the institution of force majeure. This evolution of the conditions that an event must meet in order to be considered constitutive of force majeure brings the theory of unforeseeability closer to force majeure. The fact that it is no longer necessary for the event to cause an absolute impossibility of execution and that it is accepted that force majeure exists even when the debtor is faced with abnormal execution difficulties independent of his will, constituted sufficient arguments to justify the application of the theory of unforeseeability following its foundation on force majeure.

These doctrinal considerations did not have broad support, being applied in practice in isolation, the respective opinions being criticized because they confuse an institution well-defined in doctrine and jurisprudence, such as that of force majeure, with a new institution, the features of which are only beginning to take shape.

The foreseeability of the damage as the basis of unforeseeability. Some authors have tried to see in the legal provisions regarding the foreseeability of the damage, according to which "the debtor is only liable for damages that were foreseen or that could have been foreseen when the contract was made, when the failure to fulfill the obligation does not arise from his malice", the basis for the application of the theory of unforeseeability.

According to this theory, when the question of the performance of an obligation resulting from a contact affected by unforeseeability arises, the creditor would be obliged, according to the provisions of Article 1.150 of the French Civil Code (in the numbering prior to the amendment in 2016) or Art. 1085 of the Romanian Civil Code (1864), to accept a limitation of his claim to the maximum foreseeable value of the gain that he could hope for at the time of concluding the contract. This theory has been criticized both for the fact that it would bring an original interpretation of the legal provisions mentioned above, and because of the effect it has on the contract, in the sense that it leads to its suppression and not to its maintenance, possibly in another form.

Abuse of law as the foundation of unforeseeability. For some authors, admitting the application of the theory of abuse of law when rights are exercised abusively, presupposes accepting the application of the theory of unforeseeability. Thus, the creditor who requests his debtor to perform a contract under conditions that are much more onerous than those that the parties could have considered at the time of concluding the contract may be considered to be committing an abuse of law, since he is trying to exercise his right abusively. Abuse of law involves the exercise of subjective law in disagreement with the economic and social purpose appreciated at the time of execution. Since unforeseeability presupposes the existence of such a disagreement, it would result that the basis of the theory of unforeseeability is found in the abuse of law itself.

In French law, the supporter of this foundation was considered to be G. Ripert, and at the national level the promoter of this theory was identified as H. Aznavorian[5]. The foundation of the theory of unforeseeability on the abuse of law has been criticized on a doctrinal level, and jurisprudence has not agreed with such an approach.

Good faith as the basis of unforeseeability.

Starting from the provisions of art. 1134 para. 3 French Civil Code (in the numbering prior to the 2016 amendment) respectively from the similar provisions of the Romanian Civil Code (1864), mentioned in art. 970, in French law as well as in Romanian doctrine that emerged under the rule of the Civil Code of 1864, good faith was appreciated by most authors as the only real and viable foundation for admitting the theory of unforeseeability.

Regarding the meanings of the notion of good faith, most doctrine considers that it has a double meaning. The first refers to loyalty in conventions and concerns the behavior that the contracting parties must have, and the second meaning would be understood as erroneous and excusable belief, protected as such by law, equivalent to a right, and which concerns third parties in good faith, who are and can be defended from the consequences of the irregularities of a legal act.

In the doctrine, four so-called active functions of good faith have been identified: the interpretative function, the complementary function, the limiting function and the adaptive function. The complementary function establishes a series of rules of conduct in the execution of the contract, establishing obligations of cooperation, loyalty, information or security on the part of the parties. This function is related to the issue of unforeseeability as it allows and explains the establishment of the obligation of collaboration and its derivatives consisting of the obligation to renegotiate or facilitate the execution of the contract in the event of a change in circumstances. The adaptive function of good faith compels the parties to adapt the concluded contract in the event of an unforeseen event, its connection with the theory of unforeseeability being obvious.

Regarding the content of the notion of good faith, in terms of the effects that this principle has on the execution of the contract, in the classical Romanian and French doctrine two main duties or obligations incumbent on the parties have been identified: the duty of fidelity or loyalty and the duty of cooperation or collaboration.

The duty of fidelity or loyalty is incumbent on both the debtor and the creditor. As regards the debtor, this translates into the fact that he must execute his obligations assumed despite the more or less serious difficulties that may arise during the execution. The creditor's duty of fidelity or loyalty consists in the fact that he must refrain from any conduct that would make the execution of the contract more difficult or even impossible. We would be in the presence of a breach of the duty of

[5] Hovhannes Aznavorian, *Droit Civil Arménien*, Ed itura Universul Juridic, București, 2006;

loyalty when the creditor, requesting ad litteram execution, imposes on the debtor considerable burdens, clearly disproportionate to the usefulness of the concluded contract. From the content of the duty of loyalty, the existence of the obligation to negotiate was deduced, which is activated when an imbalance occurs as a result of a change in economic circumstances.

The duty of cooperation or collaboration is a constant of contract law, being present at all stages of contractual life, from the preparations or negotiations undertaken in the pre-contractual phase, continuing in the execution phase and until its termination.

During the execution of the contract, the obligation to cooperate is the expression of a minimum of loyalty between the contracting parties, taking into account the need to facilitate the realization of the interests of the contracting parties. The duty of cooperation between the parties also manifests itself in the situation where one of them encounters difficulties during the execution of the contract. Thus, the parties must not remain passive because, when one of the parties encounters difficulties, the obligation of cooperation also includes in its content the duty of tolerance in the exercise of rights towards the other party.

In addition to these duties in art. 1184 of the Romanian Civil Code (2009) explicitly regulates the duty or obligation of confidentiality which would represent the third element of contractual good faith, specific especially to the pre-contractual phase.

Nationally, good faith has been identified as the foundation of the theory of unforeseeability, starting from the content of this principle which includes the obligations of loyalty and cooperation, proposing a systematic interpretation of the provisions of art. 969 and 970 of the Romanian Civil Code (1864) relating to the binding force of conventions and the obligation to execute them in good faith. The consequence of such an interpretation would be that art. 969 of the Romanian Civil Code (1864) cannot be applied in isolation, as it is inseparably linked to art. 970 of the Romanian Civil Code (1864), so that execution in good faith appears as a corollary of the binding force of the contract. In case decisions in which the application of the theory of unforeseeability was admitted, its foundation was indicated as good faith in the execution of the contract, regulated by art. 970 Romanian Civil Code (1864). In this regard, we recall decisions no. 96/1994 and no. 421/1994 of the Bucharest Court of Appeal or civil sentence no. 3576/22.05.2008 (unpublished) pronounced by the Arad Court in file no. 1234/55/2007.

French legal doctrine, which actually represented the source of inspiration for the national one, was the first to see in the principle of good faith the foundation for the application of the theory of unforeseeability and advocated for an interpretation in this sense of the provisions of art. 1134 of the French Civil Code (in the numbering prior to 2016). The obligation of loyalty was seen as a component part of the principle of good faith, so that compliance with this duty by the contractual

partners requires them to rebalance the contract in situations of unforeseeability. French jurisprudence has also applied, in several case decisions, the principle of good faith in order to sanction the creditor who does not comply with the obligation of cooperation or renegotiation of the contract.

The reception and development of the principle of good faith in the domestic law of states occurred as a result of the influence of international trade law, which gives an important place to the concepts of good faith and contractual loyalty. Even before these notions were enshrined in the UNIDROIT Principles[6] and the Principles of European Contract Law, their recognition was made by the lex mercatoria and by arbitral tribunals.

The idea of developing international principles applicable to international contracts, without mandatorily imposing their acceptance and application, was materialized by the drafting of the UNIDROIT Principles by the International Institute for the Unification of Private Law, in 1994. Within them, good faith occupies a central place, fulfilling several functions. Also, within the Principles of European Contract Law, developed by the Lando Commission, good faith was appreciated as the "common core" of contract law, developed in various European states.

The current Romanian Civil Code, in accordance with the new trends manifested in international law presented above, has placed particular emphasis on the good faith with which civil legal relations must be conducted, ensuring it a new regulation. As long as the principle of good faith is recognized as having a fundamental importance in contract law, as having the purpose of being the guiding beacon of the conduct of the contracting parties, it is impossible to reject the theory of unforeseeability, since the obligations of cooperation and loyalty that are part of the content of good faith, require the parties to work together to restore the seriously damaged contractual balance. Both within the Principles of European Contract Law 2002, at art. 6:111, and within the UNIDROIT Principles, at art.6.2.1-6.2.3, regulations that place particular emphasis on good faith, the theory of unforeseeability has found its natural consecration.

Comparing the way in which the "change of circumstances" is regulated in the Principles of European Contract Law, the "hardship" in the UNIDROIT Principles and the "unforeseenness" in the Romanian Civil Code (2009), we cannot fail to notice both the similarity of the respective legal texts in lexical terms and the ideological identity from a legal point of view. All three regulations begin by affirming the principle of the binding force of contact, then refer to the occurrence during the execution of the contract of events that produce a significant change in the contractual balance by the fact that the execution of the obligation by one of the parties becomes much more onerous/excessively onerous.

[6] Sir Roy Goode, *The UNIDROIT Principles of International Commercial Contracts*, Editura Hamangiu, București, 2007;

The conditions regarding the event that occurred are the same: it must have occurred after the conclusion of the contract, the event could not have been reasonably foreseen by the debtor, and the debtor must not have assumed the risk of such events occurring. The parties are also obliged to try to adapt the contract and restore its balance, through negotiations conducted in good faith, and in case of failure of the negotiations, the court is empowered to intervene and, finding the incidence of unforeseeability, may order, identica[illegible] *Adrian Bacoș* [illegible]ns, either the termination of the contract on the date and under the conditions it will establish, or its adaptation. As within the Principles of European Law and in the UNIDROIT Principles, good faith has a wide application, being the consequence of the explicit regulation within them of the theory of unforeseeability, we can say that the emphasis placed by the Romanian Civil Code (2009) on the good faith exercise of contractual rights and obligations, forced the legislator to enshrine the theory of unforeseeability, a theory that has its foundation in the principle of good faith.

Equity as a foundation for unforeseeability.

Apparently paradoxically, although most authors who studied the theory of unforeseeability considered that the idea of justice and equity would justify the admission of the theory of unforeseeability, the conclusion they reached, by referring to the provisions of the French Civil Code and the Romanian Civil Code of 1864, was that equity cannot represent a foundation for the admission of unforeseeability, being a notion that is either too vague, too broad or too imprecise, or could offer a subsidiary foundation alongside good faith.

The fact that "equity" was taken into account by the legislator when regulating art. 1271 Civil Code (2009), also results from the fact that, when establishing the criteria for adapting the contract by the judge, in para. 2 letter a), which represents the main paragraph of the entire text, reference is made to equity. Given the fact that in the text of art. 1271 explicitly refers to the principle of equity, we appreciate that this also represents in the current regulation, along with the principle of good faith, the foundation for admitting the theory of unforeseeability. This is natural since equity completes the concept of contractual good faith.

The binding force of the contract, contractual solidarism and the theory of unforeseeability.

The principle of the binding force of the contract was considered to represent one of the three basic pillars of the legal regime of the contract, together with the principle of contractual freedom and the principle of relativity of the effects of the contract. The intellectual source of the principle pacta sunt servanda was and continues to be disputed by the supporters of two concepts that still confront each other: voluntarism and legal positivism. Legal voluntarism identifies the intellectual source of the binding force of the contract in the autonomy of the parties' will. Legal positivism rejects the idea that autonomy of will is the intellectual support of the principle of the binding force of the

contract, and according to this trend, the sources of the pacta sunt servanda principle are objective, found in the law. Subsuming the positivist trend[7], several theories have been developed in an attempt to justify the binding force of the contract outside the autonomy of the will of the parties. According to the theory of contact - objective legal situation, the contract is nothing more than a legal situation to which the law attaches legal effects. Another theory belonging to the positivist trend[8] is the one that substantiates the contract by relating it to the common good and equity or to the principles of social utility and commutative justice. Commutative justice starts from the idea that in the absence of a fair balance between the debtor and the creditor, between the benefits that they owe each other, the contract appears to be unjust and, consequently, unacceptable.

Conclusions

Alongside these theories, another theory has recently been developed, namely the theory of contractual solidarity based on concepts such as proportionality or contractual balance, coherence or disruption of the economy of the contract (frustration, in British law), etc., and is the reason for a large-scale doctrinal and jurisprudential movement to rethink and re-establish the foundations of the contract on moral grounds. This conception does not deny the importance of the role of the legal will of the contracting parties, but it also adds an objective element and states that the foundation of the contract is the will of the contracting parties but, at the same time, it is also the interest of the contracting parties.

The principle of contractual solidarity starts from the premise that the interests of the parties to a contract, in practice, are rarely identical. The reconciliation of interests consists in the fair distribution of the losses and profits of the contracting parties, resulting from the contract, which must be in at least a relative balance, both at the conclusion and during the existence and execution of that contract. In order to truly reconcile the interests of the parties, it is argued that it is necessary to comply with two principles, one guiding and the other correcting the content of the contract: the principle of proportionality and the principle of coherence.

By referring to the principle of the binding force of the contract, the promoters of the solidaristic doctrine consider the fact that a contract, once validly concluded, must be executed exactly, according to the clauses agreed upon by the parties. In addition, it is considered that a first limitation of the binding force of the contract is related to the reconciliation of the interests of the parties, since the achievement of such a reconciliation is a condition of the very existence of the contract. In order to verify this condition of the reconciliation of interests, we speak of the static

[7] John Austin, *The Province of Jurisprudence Determined,* reeditată, Editura Hamangiu, București, 2007;
[8] Hans Kelsen, *Reine Rechtslehre" (Teoria pură a dreptului),* Editura Academia Română, București, 1993;

vision and the dynamic vision of the content of the contract. The first refers to the moment of conclusion of the contract, while the second analyzes the stage of its execution. Thus, if during the execution, the contract no longer meets the requirement of the reconciliation of interests, the principle of binding force requires the execution of the contract differently from its letter, so that its content is modified in order to reconcile the interests of the parties.

Through the current Romanian Civil Code, the legislator has further given a main role to the autonomy of will, as long as in art. 1270 under the title of "Binding Force" it stated: "the validly concluded contract has the force of law between the parties".

However, the influences of the theory of contractual solidarity cannot be denied since the very regulation of the theory of unpredictability can be seen as a legislative takeover of the obligation to adapt, about which solidarists claim that, together with the obligation of fidelity, the obligation of cooperation, the obligation of information, the obligation of security and the obligation of coherence contribute to achieving the reconciliation of the interests of the parties.

Analyzing the way the provisions of art. 1270 and 1271 of the Romanian Civil Code (2009) are structured, we believe that the legislator wanted unpredictability to be seen as an exception to the principle of the binding force of the contract, whose main resource it sees, further, as the manifestation of the will of the parties. Thus, after art. 1270 paragraph 1 and art. 1271 paragraph 1, the principle of the binding force of the contract and the need to execute it according to the initial understanding are affirmed, even if the execution has become more onerous, unforeseeability is legislated as an exceptional situation, which derogates from the rule of binding force, a fact that results from the use of the phrase "however, nevertheless" at the very beginning of the text of art. 1272 paragraph 2, from where the regulation of unforeseeability itself practically begins.

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IMPREVIZIUNEA CONTRACTUALĂ. FUNDAMENTUL JURIDIC AL TEORIEI IMPREVIZIUNII

Rezumat:

Dacă dreptul roman mai degrabă a ignorat teoria impreviziunii, nu același lucru l-au făcut și filosofii romani, care au manifestat un interes viu pentru această teorie. Din punct de vedere istoric, teoria impreviziunii își trage seva din vechiul adagiu latin „*rebus sic standibus*", care la rândul său își găsește originile în scrierile lui Cicero și Seneca. În secolele al XII-lea și al XIII-lea, sub influența filozofilor romani Cicero și Seneca, opiniile lui Gratian, Bartolomeo de Brescia și Sf. Toma d'Aquino, cei mai de seamă autori dinaceastă perioadă eclesiastică a dreptului, nu au diferit prea mult de părerile celor doi filozofi romani.

Legislația civilă ce a fost aplicată în spațiul național anterior intrării în vigoare a Codului civil de la 1865, nu a fost străină de teoria impreviziunii.

În dreptul civil și al contractelor, principiul general este că părțile trebuie să își îndeplinească obligațiile conform termenilor contractuali. Cu toate acestea, în anumite cazuri, legea poate oferi o excepție în caz de impreviziune contractuală. De obicei, există anumite criterii care trebuie îndeplinite pentru a invoca impreviziunea contractuală:

1. Evenimentul imprevizibil: situația care a condus la incapacitatea de a îndeplini contractul trebuie să fie cu adevărat imprevizibilă și să nu poată fi prevăzută de părți la momentul încheierii contractului.

2. Inevitabilitatea: evenimentul trebuie să fie inevitabil și să nu poată fi evitat de către partea afectată.

3. Imposibilitatea executării contractului: evenimentul imprevizibil și inevitabil trebuie să conducă la o imposibilitate reală de a îndeplini obligațiile contractuale.

Dacă aceste criterii sunt îndeplinite, legea poate permite modificarea sau chiar rezilierea contractului în temeiul impreviziunii. Unele jurisdicții pot avea reguli specifice referitoare la impreviziunea contractuală, iar aplicarea acestui principiu poate varia în funcție de legislație și jurisprudență.

Dacă am încerca să explicăm „impreviziunea” pornind de la sensul literal al cuvintelor „imprevizibil”, „imprevizibilitate” sau „neprevăzut” am ajunge, pe de o parte, să restrângem excesiv de mult situațiile în care s-ar putea aplica teoria impreviziunii, având în vedere ideea de absolut pe care o degajă primele două cuvinte, iar pe de altă parte, s-ar putea extinde nepermis cazurile de aplicare, la acele situații în care schimbarea circumstanțelor putea fi prevăzută de părți cu o minimă diligență, însă nu au făcut acest lucru.