

# **Theory of imprevision from the economic and legal perspective of contract analysis**

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## **Abstract**

*The new realities of the 21<sup>st</sup> century ask for a revitalization of the economic and legal systems so as to overcome the effects of the economic crisis. The current economic crisis is at the same time a challenge for the scientific milieu which is called to find the best solutions for the reversal and adaptation of the main scientific institutions. For the legal system, the contract represents an essential factor both theoretically and practically so that the new legislative decisions appear to be as highly important. As a particular case study, we intend to analyse the theory of imprevision both from the theoretical viewpoint and the one of practical consequences that the regulation of this institution might generate in the domestic legislative environment through the provisions of the New Civil Code. Far from our affiliation to the opinions that vividly sustain or reject the regulation of this theory, this article intends to be an objective analysis of the theory of imprevision representing one of the greatest challenges for the New Civil Code.*

**Keywords:** *economic analysis of contract; imprevision; imbalance between the parties consideration; adaptation of contracts; the New Civil Code*

## **1. Economic analysis of contract. A special perspective on the theory of imprevision.**

### **1.1 Importance of the economic dimension of contract**

Besides the negative effects of the financial crisis, we cannot help noticing that this also represents a provocation for the contemporary specialists who will have to find out answers for each economic, legal or ideological issue raised by the current system.

The dilemma faced by most economies of the world states may be overcome through the creation of new solutions that are in harmony with the new challenges of the 21<sup>st</sup> century.

As for the legal system, legislators will have to adapt legislation to the new economic, social and political context.

In the current context, the economic issue appears to be extremely relevant for contracts.<sup>2</sup>

The contract seen as an indispensable element for the civil and commercial activity represents an essential issue of the exam that legal advisors and economists will take in front of the new challenges launched by the current economic and political context.

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<sup>2</sup> Jacques, Ghestin, *Traité de droit civil. La formation du contract*, L.G.D.J., Paris, 1998.

The law has never been regarded and so much the more it will not be regarded now as being independent from other sciences, but it will have to be integrated into the interdisciplinary system of the economic and social sciences.

In the universities from the USA, the study of law from the economic perspective has been a tradition for a long time, so that the graduates from the faculties of law are thoroughly familiar with the economic realities and not only with the legal ones.

This fact is essential in order to adapt the institutions of the law to the new requirements at society's level, a good example being the institution of contract playing a special role in the recovery after the bad consequences caused by the financial crisis.

Taking into account the financial crisis that has generated the instability of the economic factor, the contracting parties will have to analyse very rigorously the economic premises that the contract shall rely on so that the parties' agreement may be successfully made.

In the following lines, we will analyse a practical aspect of the economic dimension of contract that may have serious implications in terms of carrying out the contractual agreement, namely the theory of imprevision.

## **2. Theory of imprevision**

### **2.1 Short history of the theory of imprevision**

The theory of imprevision has canonic roots that may be found in the doctrine of the western church from the medieval period and it was reflected in the works of theologian Saint Thomas of Aquin from the 14<sup>th</sup> century, but it did not interest much the legal advisors of that time.

In the European legislation, the theory of imprevision (*rebus sic stantibus*) was applied only after the first world war when mankind, just like now, faced a serious financial crisis.

In Romania, though unregulated in the current Civil Code, imprevision was regulated in the draft of the New Civil Code, where several articles are addressed to it.

### **2.2 The legal regime**

The compulsory force of contracts means that the contracting parties must fulfill their contractual obligations thus ensuring the stability and balance of the economic relationships.

If either party fails to fulfill their obligations stipulated in the contract, contractual liability shall be assumed. As an exception, the party that was prevented from fulfilling their contractual obligations by objective reasons, exceptional and unpredictable situations may avail itself of the contractual liability.

Besides the abovementioned situations, there are also others causes that may lead to the non-execution of the contract by either party.

These situations refer to the economic dimension and certain crashes of the national currencies, the significant depreciations of the foreign currencies, the financial crisis situation etc., facts that may change the structure of a contract and may put one party in the impossibility of executing the contract or, in case of execution, the party suffers from an important damage that was not anticipated upon the conclusion of contract.

Considered as an exception to *pacta sunt servanda* principle, the theory of imprevision represents the revision of effects of the juridical act due to the breaking of the contractual balance following the change of circumstances envisaged by the parties at the moment of conclusion of the juridical act, since they will notice that the effects of the juridical act are different from the ones the parties understood to establish as mandatory for them upon the conclusion of such act.<sup>3</sup>

Imprevision would apply to the onerous contracts, commutative contracts and the contracts with successive execution or affected by a suspensive term<sup>4</sup>.

Imprevision is due to problems of economic and financial nature that could not be foreseen by both parties.

At the same time, the prejudice that one party suffers from or is going to suffer from appears after the conclusion of contract<sup>5</sup>.

In the old specialized literature, two conceptions stood out to explain the legal nature of the theory of imprevision<sup>6</sup>. In the first opinion, which is also the majority opinion, the theory of imprevision appears as the result of change of the economic realities existing at the moment of conclusion of contract.

Taking into account that the change of the financial situation of either party may modify the purpose for which such party concluded the contract, in the situation of a clear disproportion between the initial dispositions of the contract and the ones appeared along the way, it is natural to revise the contractual dispositions so that the purpose of contract should be attained by both parties.

The second opinion presents the theory of imprevision as an extension of force majeure by assimilating the hypothesis of absolute impossibility to execute the contract to the hypothesis of the difficulty to execute it due to the clear disproportion between counter-performances appeared during execution, disproportion that was not foreseen upon the conclusion of contract.

On this ground again they sustain that “*actio de in rem verso*” introduced by the party accusing the clear disproportion between counter-performances would not be excluded.

Taking into consideration the new trends in the civil law, in the recent juridical literature there are other explanations for the theory of imprevision.

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<sup>3</sup> Gabriel Boroi, *Drept Civil, Partea Generală, Persoanele*, All Beck Publishing House, Bucharest, 2001, p. 156.

<sup>4</sup> Liviu Pop, *Drept Civil, Teoria generală a obligațiilor*, Lumina Lex Publishing House, Bucharest, 1998, p. 68-69.

<sup>5</sup> Liviu Pop, *Tratat de Drept Civil. Obligațiile. Volumul II. Contractul*. Universul Juridic Publishing House, Bucharest, 2009, p. 534.

<sup>6</sup> Gheorghe Beleiu, *Teoria impreviziunii-rebus sic standibus*, in “Dreptul” (Law) Journal no. 10-11 of 1993, p. 34-36.

Thus, in one opinion, the theory of imprevision was substantiated on the misuse of law by considering that if either party asks the other to execute their performance in conditions in which consequences might cause the debtor's serious prejudice, one may invoke the misuse of law from the creditor's part.

It has been also considered that the theory of imprevision relies on the principle of good faith and equity or that it relies on the need to ensure the balance between just as useful<sup>7</sup>.

Last but not least, we would like to mention that the supporters of the theory of contractual solidarism consider the theory of imprevision in full agreement with the idea of contractual solidarism because through it they may conciliate the interests of the contracting parties, which interests, though opposite, if attained ensure the purpose for which the contract was concluded<sup>8</sup>.

In the Romanian legislation, the theory of imprevision has not been regulated due to the consecration of the principle of currency nominalism by virtue of which the payment power of money stays constant not being influenced by the purchasing power that may vary depending on the economic context.

Based on this principle, it is considered that the debtor shall be forced to pay their debt towards the creditor with the nominal amount they have to pay.

This principle is regulated in art. 1578 from the Civil Code: "The obligation resulted from money loan shall be always for the same numeric amount mentioned in the contract.

Due to an increase or decrease of currency price before the time of payment, the debtor must return the numeric amount borrowed and they are compelled to return such amount only in the currencies in circulation at the moment of payment".

If at the moment of drawing up the current Civil Code the economic, social and legal reasons made the principle of contractual nominalism be regulated through a norm with imperative character, the current context seems favorable for a regulation by a suppletive disposition of the currency nominalism principle.

In this context, in our legislation there are certain situations where the theory of imprevision is regulated as such: for example, art. 43 paragraph 3 from the Law no. 8/1996 mentions that "in the case of a clear disproportion between the remuneration of the author of work and the benefits of the person that obtained the assignment of patrimonial rights, the author may ask the competent jurisdictional bodies to revise the contract or to increase the remuneration conveniently".

At the same time, Order 42/1997, in article 60 paragraph (2), stipulates that "the jurisdiction bodies may increase the conventional retribution accruing to salvagers if their merits were higher than the ones estimated in the contract, the saving conditions were harder and some expenses were higher than the estimated ones or if the salvaged party hid the real situation in which they were".

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<sup>7</sup> Jacques Ghestin, Christophe Jamin, Marc Billiau, *Traité de droit civil. Les effets du contract*, 3<sup>e</sup> édition, L.G.D.J., Paris, 2001, p. 408-409.

<sup>8</sup> Liviu Pop, *work cited*, p. 538.

In the draft of the new Civil Code, the theory of imprevision will be regulated in article 1271 and it is the first time it has been expressly regulated in the Romanian legislative environment.

According to the draft of the law for the enforcement of the Law no. 287/2009, article 1271 shall have the following content:

(1) The parties shall be held responsible to execute their obligations, even if their execution became more onerous due to the increase of costs for the execution of their own obligation or the decrease of the value of counter-performance.

(2) Despite all these, if the execution of contract has become excessively onerous due to an exceptional change of circumstances that might make clearly unjust the debtor's obligation to execute their obligation, the court may decide:

- a) to adapt the contract so as to equitably distribute between the parties the losses and benefits resulting from the change of circumstances;
- b) the termination of contract at the time and in the conditions established.

(3) The provisions of paragraph (2) shall apply only if:

- a) the change of circumstances has occurred after the conclusion of contract;
- b) the change of circumstances as well as its extent were not and could not be reasonably foreseen by the debtor upon the conclusion of contract;
- c) the debtor did not take the risk of change of circumstances and they could not be reasonably considered to have taken this risk;
- d) the debtor tried in good faith and within a reasonable time period to equitably and reasonably negotiate the contract.”

This new form of article 1271 wants to be an improvement of article 1271 from the Law no. 287/2009 (Civil Code) regulating imprevision in a way that is not spared of criticism and abusive interpretations.

Otherwise, in the specialized literature there have appeared opinions against the inclusion of the theory of imprevision in the New Civil Code by taking into account aspects related to the concrete consequences of regulating imprevision and details regarding the comparative law.

Thus, we consider that the application of the theory of imprevision and the hardship clauses will affect the mutual trust of co-contractors<sup>9</sup>.

At the same time, the same author wonders whether the application of the theory of imprevision might not have a negative impact on the credit institution<sup>10</sup>.

In accordance with the new legislative proposition, the theory of imprevision shall apply only if the debtor failed to take the risk of change of circumstances and they could not be reasonably considered to have taken this risk.

<sup>9</sup> Dumitru Dobrev, „Impreviziunea, o cutie a Pandorei în Noul Cod Civil?”, in *Noul Cod Civil al României*, Comments, 2<sup>nd</sup> édition revised and enlarged, Universul Juridic, Bucharest, 2011, p. 215.

<sup>10</sup> *Ibidem*, p. 219.

So, the risk of imprevision might be eliminated by the parties by putting in some indexation clauses in the contract.

Through the indexation clauses they automatically reevaluate performances depending on the variation of a reference index through the indexation clause or convention so as to cover the depreciation of the currency in which payment is made<sup>11</sup>.

Parties may also introduce certain hardship clauses in the contract ensuring the reevaluation and revision of the contractual situation.

The hardship clauses are those conventions by virtue of which the contracting parties undertake to revise their contractual obligations if the contractual balance is affected by certain objective circumstances of economic or currency nature.

### **2.3 Moment of imprevision**

The moment of clear disproportion between counter-performances justifying the invocation of the theory of imprevision has a special role since through it they make the difference between imprevision and other juridical institutions such as lesion.

As we have already mentioned, disproportion appears during the execution of contract and not at the moment of its conclusion, a fact that differentiates imprevision from lesion.

### **2.4 Proof of unpredictability**

If the court is asked to adapt the contract, first of all they will have to prove the fact that the contractual dispositions were significantly influenced by certain objective aspects that could not be foreseen by the parties.

The modification must be remarkable for the economic dimension of contract and it must not be limited to a simple currency fluctuation or an insignificant variation of some economic circumstances.

In the second stage of administering the evidentiary matters, they will have to prove that the unbalance between parties' counter-performances could not be foreseen.

In this situation, they will also be able to invoke presumptions by taking into account the "bonus pater familias" principle by which the parties must prove a maximum diligence in terms of negotiating some juridical acts that are sources of liabilities.

These two circumstances taken into account, we still consider that the court's mission will not be easy since they will have to decide for every case separately. For instance, in a service contract, if the price of equipment raised by 50%, the question is in what conditions the supplier could have anticipated this

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<sup>11</sup> Liviu Pop, *work cited*, p. 534.

aspect and when they cannot be blamed for the non-anticipation of the evolution of market price.

A last aspect that will have to be proved and which, in our opinion, will be the hardest to prove is the excessive obligation for one of the parties.

It is unquestionable that in their activity, tradesmen may have both profits and losses, otherwise they are considered as good or bad tradesmen depending on the manner in which they manage their profit and loss balance.

Taking into consideration the multitude of contracts and the variety of the sums of money making the object of contracts, it is really impossible to establish some margins within which we may affirm that the contractual obligation has become excessive for one of the parties.

As in the previous case, the court will analyze separately whether the circumstances leading to the consideration that a contract must be negotiated due to a major and unpredictable increase of obligations towards one party are met.

In the specialized literature, an obligation is considered as excessive when it is clear that either party had not contracted if they could have foreseen this situation before the conclusion of contract.

Thus, we may affirm that the prejudice suffered by either party will have to be a major one so that the court should adapt the contract or even decide its termination.

### 3. Final considerations

The regulation of imprevision in the New Civil Code surely represents one of the great challenges brought by the legislator in the Romanian civil legislation.

Without siding with the enthusiastic supporters of this theory<sup>12</sup> or the ones who contest it energetically<sup>13</sup>, we consider that the theory of imprevision will take its efficiency exam from the angle of decisions of jurisprudence, decisions that will be made in cases that will allow for the application of this theory.

Used as a means of harmonization of the economic and juridical realities to the new provocations of the 21<sup>st</sup> century, the theory of imprevision intends to be a viable solution for the finalization of many contracts whose execution is affected by a major unbalance between parties' counter-performances occurred after the moment of conclusion of contract.

Despite all these, the adaptation of the theory of imprevision to our law system is not going to be an easy one since the implementation of this theory will superpose the juridical regime of other judiciary or economic institutions, such as the credit, a regime that must not be impaired.

We consider that this will be a test for both the participants in the economic and juridical life and the law courts that will have to decide with impartiality and professionalism when called to appreciate the adaptation of contracts.

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<sup>12</sup> Cristina Elisabeta Zamsa, *Teoria imprevizunii. Studiu de doctrină și jurisprudență*. Hamangiu Publishing House, Bucharest, 2006.

<sup>13</sup> Dumitru Dobrev, *work cited*.

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