The Theory of Imprevision

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Abstract: The theory of imprevision is a very good example of the way in which traditional civil law concepts are called upon to demonstrate their correspondence to a certain economic reality. Both its generating causes and its effects on contractual relationships plead for the theoretical and practical importance of this theory. Imprevision prevails as an efficient legal instrument in solving legal situations having contractual origins, determined by a drastic and unpredictable change of the economic circumstances at the moment of executing the contract as compared to the date of its conclusion by the contracting parties. As for its domain of application, imprevision occurs in contracts with pecuniary obligations. The conditions of imprevision are the following: the obligation becomes excessively onerous as a result of a change in contractual circumstances, the moment of the changes in circumstances must be ulterior to the conclusion of the contract, the unpredictability of the change of circumstances at the moment of concluding the contract, the risk determined by a situation of imprevision shall not be within the category of risks that the debtor has undertaken at the moment of concluding the contract or that arise from the nature of the contract. This article analyses the problem of imprevision comparatively: in Romanian law, BGB and the project of the future European Private Code. The latter one may represent a starting point for both doctrine and jurisprudence in reconsidering the relationship between the principle of the mandatory force of contracts and imprevision. Finally, we will analyse the similarities and differences between administrative imprevision and imprevision in civil contracts.

Keywords: Imprevision, onerous, contract, adaptation, risk

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The theory of imprevision – in our opinion – is a very good example of the way in which traditional civil law concepts are called upon to demonstrate their correspondence to a certain economic reality. In its legal form that we propose to analyze, imprevision had appeared relatively recently in civil law, when the First World War broke out, and then it reappeared again after 1989.

Both its generating causes and its effects on contractual relationships plead for the theoretical and practical importance of this theory.

There are difficulties in accepting imprevision from at least three perspectives: from the point of view of its role and position within the framework of legal principles, especially regarding the mandatory nature of contracts (art. 969 of the Civil Code); from the point of view of proposed bases and last but not least from the point of view of the effects of its application to contracts.

Imprevision prevails as an efficient legal instrument in solving legal situations having contractual origins, determined by a drastic and unpredictable change of the economic circumstances at the moment of executing the contract as compared to the date of its conclusion by the contracting parties[1]. Concretely, there is an *excessive onerosity* of the debtor's obligation which he has not taken into account when concluding the contract, obligation which is not impossible to perform but which may result in a very difficult economical situation for the debtor or even bankruptcy.

Two requirements are necessary for imprevision to occur, namely: the change of contractual circumstances must not be due to any fault on behalf of the debtor and the contract must not contain any provisions related to the adaptation (indexing or renegotiation) to the new circumstances.

As for its *domain of application*, imprevision occurs in contracts with pecuniary obligations. Generally, contracts involving successive performances are likely to be affected by imprevision. As for contracts involving an uno ictu performance, this problem may arise in situations when its performance is ulterior to the conclusion of the contract and the unpredictable events occur within a significant period of time.

In principle, imprevision is also applied to *aleatory contracts*.

In French doctrine it has been sustained that in the case of these contracts we have to analyse the specialty of the *alea* event which occurs

[1] C. Zamşa, *Teoria impreviziunii,* in Revista română de Drept al afacerilor no. 4/2003, pp. 79-80.

in every contract by means of correlating it to the unpredictability of the event characteristic to imprevision and its effect on the contract in its entire economy. Personally, we agree with this appreciation, considering that imprevision may also occur in aleatory contracts.

There is no imprevision in obligational legal relationships arising from illicit civil acts, unjust enrichment or undue payment, when the previous situation of the parties is reinstated, for example after a contract is declared void, the price has to be recalculated according to the market value of the good returned.

In the following, we will comparatively analyse – in Romanian, German and Community law[2] – the *requisites and conditions* of imprevision, its way of *regulation*, the *substantiation* of imprevision in Romanian law and its *effects*.

At the end of the analysis of imprevision we will compare imprevision in civil and administrative contracts.

The first condition of imprevision is that the *obligation* is *excessively onerous* as a result of a change in contractual circumstances. Excessive onerosity may be due to an increase in the cost of the debtor's obligation or to a considerable decrease in the value of the counter performance of the other party.

Art. 6:111 of the „Principles ..." underlines, in relation to the fulfilment of this condition, that in the case of too onerous obligations the principle of the mandatory force of contracts remains applicable.

Art. 313 BGB speaks about a „significant" change of circumstances which stayed at the basis of the contract, without specifying, however, a criterion for its evaluation.

The criteria for the evaluation of excessive onerosity has been discussed in Romanian legal literature over time and several variants have been proposed: double the value of the performance from the moment of execution as compared to the moment of concluding the contract, an *in concreto* appreciation or an *in abstracto* appreciation of the judge.

As far as we are concerned, we assert that an *in concreto* appreciation of each debtor's economic situation is required, as well as taking into consideration of the entire contract.

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[2] C. Zamşa, *Teoria impreviziunii,* in Analele Universităţii din Bucureşti no. 1/2003, pp. 82-83; 86-98. NOTE: We refer to the project of the future European Private Code entitled "Principles of European Contract Law", Kluwer Law International, Ed. De Lando, Hugh Beale, Hague, 2000.

The second condition is that *the moment of the changes in circumstances must be ulterior to the conclusion of the contract.*

According to the future European Private Code, if a certain modification in economic circumstances exists at the moment of concluding the contract, the problem of the debtor's error arises. In our opinion, this solution is correct.

The German Civil Code also assimilates to the modification of circumstances the hypothesis in which certain essential representations which have stayed at the basis of the contract proved to be false. The solution – which we do not agree with – seems to be justified due to the vision of the German law regarding lesion as a flaw in consent.

The Romanian civil law also requires the fulfilment of this condition, without an express provision, however.

The third condition is also expressly regulated both in the project of the European Private Code and in the BGB and it requires the *unpredictability of the change of circumstances at the moment of concluding the contract.*

Usually, the unpredictable situation is assimilated to the *inflation* phenomenon. Yet, the problem that arises is to verify the unpredictable character of the event occurred (war, revolution) and its consequences on inflation. We consider that each case should be separately assessed. For example, the serious and permanent inflation in Romania may no longer be considered an unpredictable circumstance. To this, we may add the information flow and the general information possibilities nowadays, and in this context, inflation as a result of the economic transition is unpredictable only for contracts concluded before 1989 or in the first years after this date.

Purely theoretically, the condition might be considered verified if the phenomena of price increase and the decrease in the purchasing power of money would be due to some other cause in the future, to the extent to which this would be possible from the point of view of economic science.

Similarly to the preceding conditions, the Romanian civil law also requires the fulfilment of this third condition, yet without an express provision in this sense.

The fourth and last condition – the risk determined by a situation of imprevision shall not be within the category of risks that the debtor has undertaken at the moment of concluding the contract or that arise from the nature of the contract.

Expressly regulated in the project of the European Civil Code and in art. 313 of the BGB, not regulated in the Romanian civil law, this con-

dition refers to the situation when there is an express provision by which the parties undertake any risk determined by the change in contractual circumstances. The presence of such a provision would be the expression of the parties' autonomy of will and it would not represent an aggravation of the debtor's responsibility. Unlike the provisions regarding the adaptation of a contract, which may act either automatically in the case of indexation or through the intervention of the parties if negotiations are held for the modification of the contract, the provision regarding the bearing of risks shall take effect directly and automatically, from the moment the new contractual circumstances arise.

The plus of BGB is the necessity to consider not only contractual risks but all the circumstances of the case which could impede the adaptation of the contract according to the mechanism of imprevision; they are probably certain circumstances or contractual provisions which may lead to the solution of maintaining the contract. In our opinion, it is not useless or wrong to take into consideration all the circumstances of the case, because we may arrive to different solutions according to the type of legal act concluded.

As a general observation related to the fulfilment of the conditions of imprevision, the opponents of this theory object that judges have too much power of assessment when verifying if the above mentioned conditions are fulfilled. We would rather say that this is not the only situation of this type, for example, it is also the court that establishes the existence or inexistence of force majeure – namely if the events invoked have been unpredictable and invincible or not. Thus, we do not consider that this could be an insurmountable argument in the application of the theory of imprevision.

As it results from those presented above, the theory of imprevision is expressly regulated both in the German civil law and the project of the European Private Code.

In the Romanian civil law there is no regulation of the imprevision but there are only cases in which it is applied, for ex. art. 32 of Law no. 219/1998 on the regime of concessions. We do not agree with the assertion that this application has the value of a legal principle. It is an exception, therefore it is of strict interpretation and we consider that it does not allow the application of the analogical reasoning.

The fact that there are no express regulations may not lead to the conclusion that the theory of imprevision is not applicable.

The classical doctrine and jurisprudence do not admit as the basis of imprevision the principle consecrated in art. 969 of the Civil Code,

namely the principle of the mandatory force of a contract.

The present doctrine is contradictory in the sense that there are opinions for and against the theory of imprevision. There is however flexibility towards the *pacta sunt servanda* principle which represents the foundation for ensuring the stability and security of contractual legal relationships and the theory of imprevision is not viewed as a general theory of contract law, but as an exception, as an attenuation of the rule on the mandatory nature of contracts. We consider that it may also be viewed this way, appearing as a *conjunctural necessity*.

Personally, we agree to accepting this theory and in practice there are already solutions in this sense. In our opinion we have to consider the modern and economic social realities, as well as the aspects related to the social and political context at the moment of the elaboration of the Romanian Civil Code. Resorting to the teleological and historical interpretation we consider that the theory of imprevision may absolutely be admitted, even more, it should be expressly regulated in the Civil Code. Its foundation may be represented – as we shall argue in the following, even without a new regulation - by the notion of good faith in executing agreements - art. 970 of the Civil Code.

The way in which imprevision is regulated in the project of the future European Private Code (chapter. 6 art. 111) corresponds to the idea stated in the Introduction, namely to offer a basis for a uniform and viable European legislation. From the point of view of terminology, the expression *„change of circumstances*" has been chosen and when interpreting the text the term *„imprevision*", borrowed from French administrative law, has been preferred. Imprevision is regulated as an exception from the mandatory force of contracts, with reference to the idea of *„contractual justice*". This means, as it results from the comments to the text, to consider that in the absence of contractual provisions to this sense, the costs and expenses determined by an unpredictable situation should not be bared by only one party, and if the parties do not come to an agreement, the court decides on the allocation of these costs.

It follows – in our opinion – that the idea of *social utility* may be employed to substantiate an attenuation in the rigour of the mandatory force of contracts. Due to the lack of a general legislative framework in this matter the only rapid solution would be to adopt imprevision by way of jurisprudence.

In German law, in the first stage, the theory of imprevision has been applied by way of interpretation of the contract, based on art. 242 BGB. This method has been chosen because, although the German Civil Code

consecrates contractual imprevision, this theory is only applied to a category of contracts which have not been executed yet and, moreover, they refer to the situation of the creditor.

It is considered that the solution of accepting contractual imprevision has been arrived at due to the conception of German law regarding legal acts, which is different from the one of French and Romanian law, founded on the principle of the declaration of will and which allows judges a greater power of interpretation.

German doctrine, in order to justify the theory of imprevision, considers that the debtor finds himself in a legal impossibility to execute the excessively onerous obligation, which results from the application of the notion of good faith and custom.

Of *lege lata*, the general framework of the theory of imprevision is represented by art. 313 BGB and it is regulated in a practical manner. The emphasis is not on the foundation of imprevision – probably because the spirit of this solution results from the entire civil legislation – but exclusively on the fulfilment of the necessary conditions for a case of imprevision.

Art. 313 para. 2 assimilates the false representation of a reality that was at the basis of the contract, which represents an innovation as compared to the situation from the Romanian civil law or the project of the future European Private Code.

As for the substantiation of imprevision, several variants have been proposed in the Romanian civil law.

The first would be the one based on art. 970 of the Civil Code, according to which „conventions must be executed in good faith". Actually, art. 970 of the Civil Code has been analysed from different perspectives, both as the basis for the theory of imprevision and against it.

The supporters of the theory have interpreted good faith in a general sense, and as for art. 970 para. 2 of the Civil Code, which provides that „conventions oblige not only to what they expressly contain, but to all the consequences of an obligation that follow from equity, custom or law, according to its nature", they have tried to extend the sense of equity towards the theory of imprevision and the idea of just contract.

These arguments have been criticised, stating that the sense of equity may not be extended and in art. 970 para. 2 has to be interpreted in a double sense, namely that the debtor may not be obliged beyond „what follows from equity, custom or law, according to the nature of the obligation".

We may observe that a part of the present jurisprudence has tran-

scended this stage of exegetic interpretation of the Civil Code, and there are solutions to update prices according to the inflation rate in the absence of an express provision.[3]

According to another substantiation, in order to admit the theory of imprevision the classical theory of force majeure and acts of God, without the creation of a new one. Thus, as for the difference between imprevision and force majeure (excessive onerosity), it is considered that there is a quantitative difference, not a qualitative one, because the nature of the events is the same for both the classical theory of force majeure and that of imprevision.

We do not agree with this. In our opinion, the classical theory of the acts of God and force majeure shall be maintained as initially defined in art. 1083 of the Civil Code „No damages are due when – because of force majeure or acts of God, the debtor was seized to give or do what he had undertaken or had done what he was seized to*".*

Another author[4] lays the foundation of the theory of imprevision on the idea that in a contract judges shall not assess the individual will expressed by the parties, but „what should have been their will if they judgement was rational". Personally, we find that this theory is farfetched, therefore we also consider it incorrect.

The literature has also proposed[5] a double foundation of imprevision: *social utility* and the *lack of will* with respect to the *unpredictable effects* of a contract. Analysing the interpretation of will in French and Romanian law, the system of autonomy, as well as the system of the declaration of will in German law, it is sustained that they are identical because in both systems it is carried out in accordance with social utility and the legal will is correlated with the circumstances and the social environment every time. In our opinion, the different systems of interpreting of legal will lead to different legal consequences.

Reference has also been made to the *abuse of law* in order to substantiate the theory of imprevision. This foundation has been criticized – rightfully, we assert – taking into consideration that the justification of a theory is attempted through an older one. Moreover, there is also the obsolete character of the regulation of the abuse of law in Decree no.

[3] Decision no. 445/1996, Supreme Court of Justice, Commercial Section, cited in C. Zamşa, *Teoria impreviziunii,* Revista română de Drept al afacerilor nr. 4/2003*,* p. 91.

[4] *M. Djuvara.*

[5] The opinion of *V. Pompiliu.*

31/1954, as well as the contradictory nature of the two theories: the abuse of law is a subjective theory, while imprevision an objective one.

Art. 1085 of the Civil Code which reads: „The debtor is only responsible for damages that were foreseen or could have been predicted at the conclusion of the contract, when non-performance of an obligation is not the result of deceit on his behalf", has also been employed as a foundation for the theory of imprevision.

In our opinion, the starting point stating that „the law does not want to find out why an obligation has not been fulfilled" is erroneous. In reality, this text refers to setting a limit to the debtor's responsibility, and it is a subjective matter, while imprevision is based on the hypothesis of the debtor's lack of fault in non-performing the excessively onerous obligation. Therefore, the theory is not correct.

The *lack of cause* has also been invoked as a foundation of the theory of imprevision, proceeding from the idea that the objects of obligations from a synallagmatic contract have to be equivalent and the object of an obligation is the cause of the other one. It has been asserted that when equilibrium is destroyed we may speak about a lack of cause of the obligation.

We may reproach to this theory that it does not differentiate between the notion of cause and that of equivalence of obligations, formula contradicted by the situation of gratuitous contracts where the cause of the donor's obligation is *animo donandi.*

Before our attempt to justify the theory of imprevision, we shall state that after 1989 the Romanian doctrine is unanimous in considering that *respecting the nominal value* of pecuniary obligations is mandatory irrespective of the fluctuation of their real value in time[6].

We consider that the incidence of monetary nominalism does not represent an impediment in the application of the theory of imprevision because monetary nominalism is not of public order.

After a synthetic analysis of the attempts to substantiate the theory of imprevision, we propose a foundation which is based a combination of ideas, namely: *the progressive conception of the social function of contracts, the systematic interpretation of the provisions of art. 969 – 970 of the Romanian Civil Code and a certain meaning of good faith.*

[6] I. Albu, *Probleme actuale privind reevaluarea judiciară a creanţelor,* in Dreptul no. 1/1994, pp. 44-47; D-R., Răducanu, *Reactualizarea creanţelor ca urmare a fluctuaţiilor monetare,* in Dreptul no. 8/2003, pp. 47-75.

We appreciate that from a historical point of view the function of contracts has been different throughout the evolution of society. At the beginning of the 19th century, liberal individualism dominated, which also represented a point of reference for the lawmaker of the time and the jurisprudence, of course. The emphasis was on the intangibility of a contract, also an expression of the stability of the civil circuit.

Later on, under pressure from the economic environment, it has been established that economic data from the moment of the conclusion of the contract have to be also taken into consideration in establishing the rules regarding the execution of agreements.

We shall not forget that law serves life and not vice versa. It follows that a contract may not be viewed as an aim in itself, but it is an *instrument of economic life* and it is intangible inasmuch as it can attain the aim it has been concluded for. This would be, in fact, the correct interpretation, we assert, of the provisions of art. 969 of the Civil Code.

The provision of art. 969 – 970 of the Civil Code must be interpreted systematically, taking into consideration, evidently, the aim of the parties and in the sense that good faith means honesty and justness in the execution of contracts. Good faith has to be viewed through the economic function of contracts, observing that „any interpretation should preferably make maximum justice in the application of law" .

As for the *effects* of imprevision, from a practical point of view, these are: *adaptation* (modification of the contract), *suspension* and *termination* of the contract.

We shall begin with the first effect, namely the modification of a contract, because in our opinion this is the optimal variant for the realization of the consequences of imprevision. The adaptation would take place upon common agreement and in case of failure, through the intervention of the court.

This is also the idea expressed in community law: the obligation to negotiate is the task of the parties, while the role of the court is subsidiary (art. 6:111 para. 2 of the *„Principles ..."*).

Art. 313 BGB also proposes this solution, but as opposed to community law, it does not stipulate it as an obligation of the parties, only as a possibility, as the German regulation proceeds from the precondition of trust between contractual partners. We consider that this trust does not exist in our legal system yet because in the case-law published so far the claimant requires the court to *recalculate the price* and never to oblige the other party to *renegotiation.*

As for the suspension of the execution of the contract, this is only a

provisional measure which may be adopted in the case of a temporary, unpredictable event and when there is certitude that the situation from the moment of the conclusion of the contract may be restored after a reasonable period of time.

The third effect – the termination of the contract – appears as an exceptional solution which depends after all on the interests of the contracting parties. In our opinion, any of them would suffer a greater loss were the contract terminated rather than renegotiated.

Art. 313 BGB regulates the termination of a contract when none of the parties may be required to adapt it, in the sense that no modification of the contract would be possible.

As a conclusion to all of the above, we consider that the way imprevision is regulated in the project of the future European Private Code may represent a model for the Romanian lawmaker as well, and not only that, it may represent a starting point for the doctrine and jurisprudence in reconsidering the relationship between the mandatory force of contracts and the theory of imprevision.

Finally, we shall analyse the similarities and differences between *administrative imprevision* and *imprevision in civil contracts.*

Both types of imprevision are due to certain external factors which are independent of the will of parties and which affect the financial balance in a contract; they may only occur during the execution of the contract; imprevision, both administrative and civil, may occur in contracts involving successive execution; the main consequence for both types of imprevision is that a subjective right of the contracting party affected by the unpredictable event to require from the other party the financial rebalancing of the contract is born.

Unlike imprevision in civil contracts, caused solely by monetary depreciation, administrative imprevision may also occur due to „administrative hazard", which results from the exercise by the public authority of its prerogatives against the co-contracting party.

The presence of civil imprevision in a contract does not exclude administrative imprevision, because there may be situations in which the financial unbalance of the contract is the result of both monetary fluctuation and decisions of a different nature of public authorities.

Administrative imprevision is expressly consecrated in art. 32 letter a) of Law no. 219/1998. According to this law, the concessionaire shall not be obliged to bear the increase of tasks related to the execution of his obligations if this increase is the result of an action or measure taken by a public authority.

Administrative imprevision only occurs in administrative contracts because the contracting public authority shall ensure the continuity of a public service and, consequently, it shall help the co-contracting party in this respect if an unpredictable event should occur only in administrative contracts.

Imprevision in civil contracts operates automatically and covers entirely the loss caused by the depreciation of money, while administrative imprevision due to a decision of a non-contracting public authority does not ensure complete reparation for losses suffered. In the French doctrine it has been established that in this case 90-95% of the losses will be repaired. In the case of civil imprevision, complete reparation for losses is required in order to rebalance the performances of the parties, while administrative imprevision, as pointed out in the French doctrine, may be attributed to the preoccupation to satisfy the requirements imposed by the principle of the continuity of public services[7].

[7] I. Avram, *Contractele de parteneriat public-privat,* Dreptul nr. 12/2004, pp. 181-182.