CONSIDERATIONS ON THE POSITIVE LAW INSTITUTIONS THAT MAY AFFECT THE EXECUTION OF CONSTRUCTION CONTRACTS

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Abstract

Considering the current COVID 19 pandemic, but not limited to this exceptional situation, contractors can experience different types of setbacks that may result in the impossibility to complete the works they have undertaken by a contract, either in due time, or at all. Positive law institutions, regulated in both common and continental law systems may help adjusting these conditions, taking into account particular situations that constructors might encounter. Thus, generally determined institutions, such as force majeure, hardship, imprevision, frustration or even the impossibility might lawfully intervene in such contracts, depending on the circumstances of each case, and also taking into account the positive law under which the contract is drafted. By this study, we aim to analyze the impact of the above-mentioned institutions on construction agreements, that in general imply a longer execution term and thus, must usually be drafted taking into account these clauses. The study mainly concentrates on the Romanian regulations in force, but also takes into account the international dimension, as we are also looking at common law institutions that are generally recognized by international practice.

Keywords*: construction contracts, force majeure, imprevision, hardship, frustration*.

JEL Classification*:* K12, K20, K23, K25

1. Introduction

As practice shows, construction contracts imply a certain degree of uncertainty relating to the final date of execution and the signing of the certificate of final acceptance of the works. This delay might occur in the current market, regardless of outside events that might delay even further the works and relate to bad weather conditions, short supply of workers or even economic or social events that might generate an unjustified increase in the prices of raw materials necessary for the construction.

Taking into account the current pandemic situation, one might ask how much this global epidemic will impact the construction contracts that were undergoing when the pandemic started. During these uncertain times, several states have taken different approaches towards addressing the virus: some have chosen to declare an emergency state and suspend all activities that suppose more than a handful of people getting together in a closed space, whereas others have taken into account the possibility that these activities continue but limiting the number of persons in the same space and asking them to work using other types of protection measures (i.e. wearing masks in closed spaces, gloves, or imposing the obligation to disinfect objects or tools that are used by several persons). In this context, some construction works have been stopped completely, whereas some construction sites have been experiencing difficulties in respecting contractual terms pertaining to the completion of works, as they have seen their general working conditions significantly altered or completely changed. Moreover, implementing a protocol that takes into account the different measures imposed by states in order to observe the social distancing conditions is proving to hard, in all fields of activity, not only in the construction business.

This issue pertaining to the completion of work is especially important in the construction field as this area isn't always treating with the interests of particulars, but also imply the interest of states when the contracts relate to infrastructure or buildings that have a national interest. In this respect, the construction contract may also be signed through the means of public procurement[2] and as such imply terms of execution that the contractor must uphold, under the penalty of usually paying important damages.

According to the general principle of contracts, *pacta sunt servanda*, any contract that is

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[2] On the implementation of public procurement Directives in Romania, see Ovidiu Ioan Dumitru, "A Critical View on the Implementation process of the European Public Procurement Directives in Romanian Construction Field", in *European Society of Construction Law, Conference Proceedings 2018*, (2018): 37-43.

validly concluded has the same effects between the parties as a law. Thus, constructors as well as beneficiaries have the obligation to uphold their obligations pertaining mainly to the execution of the works in due time, respectively paying the works according to the established delays.

As doctrine has shown, there are several risks involved in the execution of construction works, from risks pertaining to the nature of the soil to the effective execution of the construction work, such as risks determined by the construction materials used, or risks that involve works accidents[3]. These risks involve alongside the obligation of information (and as such, transparency of the information), the obligation of good faith that all contracting parties should uphold regardless of the nature of their contracts.

The main issue that we aim to treat in this article is the application of institutions regulated by the civil law, such as *imprevision* or *force majeure*, to construction contracts where the contractor is in the impossibility to either complete the work or complete it on time, due to events that are external to his will, and over which he has no influence. Similar institutions regulated in international law, such as hardship, or frustration regulated in the common law doctrine may also apply pertaining to the applicable law to the contract. As such, we consider it necessary to indicate their applicability to this type of contract. For the present study, we shall aim to analyze the Romanian regulation of the construction contract from the civil Code, but we underline that similar provisions are in force in most continental law systems. For the further chapters we shall analyze the applicability of the above cited institutions on the construction contract.

2. The regulation of the construction contract in Romania

2.1. The regulation of the construction contract in the Romanian civil Code

The construction contract is regulated by the Romanian civil Code as a species of the general contractor agreement, in articles 1874-1880. The regulations of the general contractor agreement are also applicable to the construction contract if the first are compatible with this type of contract. The construction contract is defined in article 1874 as the contract by which the contractor is obliged to execute works that, according to the law require a construction permit.

As it was shown in doctrine, the construction contract is the most frequent and known form of the general contractor agreement, in over-ground as well as underground works, and usually involve important and valuable projects, and as such generate complex and costly litigations[4].

It was noted that construction works don't only refer to constructing a new immovable good, but might also concern reconstruction, consolidation, modification or extension works[5] and may concern other types of immovables except buildings (such as: communication ways, underground facilities, enclosures etc.), as well as works pertaining to installations and repairs to constructions (including activities of designing construction works)[6]. We consider that the definition given by the civil Code, in which a construction contract is the contract for which the beneficiary must "obtain a construction permit" is just, as it limits the works done by this contract to works that require a permit given by the respective state authority in accordance with the provisions of Law no. 50/1991 regarding the authorization of the execution of construction works, republished.

The construction works contract implies the following main obligations for the contractor, according to the legislation in place: to procure the materials for the work, unless otherwise stated by the parties, to inform and council the beneficiary, to execute the works in due time, to allow the beneficiary to control the state of the works during their execution and to guarantee for any vice that the construction might have. In return, the beneficiary must procure all the necessary authorizations

[3] Mangu Codruța, "Riscurile în contractele de antrepriză în construcții – factor generator de răspundere civilă și obiect al obligațiilor de informare, de consiliere și de securitate", in *Acta Universitatis Lucian Blaga*, issue no. 1 (2012): 130.
[4] Titus Prescure, *Curs de contracte civile*, (Bucharest: Hamangiu Publishing House, 2012): 160.
[5] The construction work agreements sometimes concern a historical monument and as such are subjected to specific regulations. See Andreea Stoican, "Observații juridice legate de intervenția asupra monumentelor istorice", in *New Perspectives of construction law*, third edition.
[6] Liviu Stănciulescu, *Curs de drept civil contracte*, (Bucharest: Hamangiu Publishing House, 2014): 356.

for the works, take all necessary and appropriate measures if he is informed by the constructor that there are certain events that might affect the normal execution, the lasting of the works, or its use in accordance to its purpose (article 1859 of the civil Code), to allow the constructor to use all access ways, installations and other utilities in order to complete the works, to do the final acceptance and any intermediate ones of the works and to pay the price.

The constructor's obligation to inform the beneficiary extends mainly to the materials that the beneficiary procured for the constructor, inadequate instructions given by the beneficiary and the presence or emergence of circumstances for which the constructor is not liable. In the final category we might include any natural or human event, that doesn't fall within the constructor's liability, such as pandemics, natural disasters, wars, economic or social measures taken by governments etc. The parties may extend the obligation of information to other situations[7]. The beneficiary in this case must decide upon the circumstance and the actions required, in order for the contract to continue. This article swifts the responsibility from the constructor to the beneficiary, and the following article sanctions the beneficiary's lack of response, by letting the constructor choose whether to terminate the contract or to continue the contract on the beneficiary's risk, informing the latter in accordance. Where the continuation of works would threaten the health or physical integrity of the workers, the constructor is obliged to ask for the termination of the contract, under the sanction of taking the risks upon himself.

We consider that usually, the construction work contract is not an *intuitu personae* contract, because the constructor is usually a company and as such the death of the owner may not affect the continuation of the works contracted. In case the contractor was engaged because of his personal qualities and undergoes the construction as a natural person, or if the company for any reason is dissolved, without the fault of the contractor, the contract will be terminated by law. If such is the case, the beneficiary will be obliged to receive the part of the work that is executed, if he may use it, and pay the amount of works executed in accordance with the general price established for the whole construction. The beneficiary is also entitled to ask for the materials and plans that are to be executed and pay an adequate indemnity[8].

Another aspect that we want to underline in this study is the obligation of the contractor to finish the works in due time. As doctrine has pointed out[9], the written form of the construction work contract is only necessary *ad probationem*, and as such the contract is perfectly valid if the parties have a verbal agreement in which they establish all the essential elements of the contract. Nevertheless, parties may omit to establish a specific term for the delivery of the construction work; practice, as cited by doctrine, has established that in this case, a reasonable term of delivery will be enforced. In a case only the term for the commencement of the works was provided, and no final term of execution or other intermediate terms, the court established a simple presumption that the works were to be done quickly based on the relatively short payment terms established in the contract (90 days), basing its decision on the synallagmatic character of the contract as well as the fact that usually, in the lack of any contrary provisions of the law or of the contract, the obligations of the parties are to be executed simultaneously and correlatively[10]. This is why, according to the legislation in force[11], the beneficiary has the right to obtain the termination of the contract (either by rescission or cancellation) if the constructor, without justification, fails to uphold the contract and the termination of the works in due time becomes obviously impossible. The constructor however can't be held accountable if the delay is not due to his own fault, but to an external event such as cases provided in the *force majeure*, fortuitous case or the fault of the beneficiary[12]. The national legislation in force

[7] Gheorghiu in Flavius-Alexandru Baias, Eugen Chelaru, Ioan Macovei, Rodica Constantinovici (coord.), *Noul Cod civil: comentariu pe articole*, second edition, (Bucharest: C.H. Beck Publishing House, 2014): 2023.
[8] See article 1871 of the Romanian civil Code.
[9] Florin Moțiu, *Contractele speciale în Noul Cod civil*, second edition, (Bucharest: Universul Juridic Publishing House, 2011): 209.
[10] Court of Appeal of Cluj County, second civil section, civil decision no. 173 of the 21 of March 2017 *apud* Vasile Nemeș, Gabriela Fierbințeanu, *Dreptul contractelor civile și comerciale: teorie, jurisprudență, modele*, (Bucharest: Hamangiu Publising House, 2020): 236.
[11] See article 1872, letter a), of the Romanian civil Code.
[12] Gheorgiu in Baias, Chelaru, Macovei, Constantinovici, *op. cit., Noul Cod civil*, 2029.

only expressly regulates for the construction work contract as situations that prevent the execution of works mistakes or gaps in the design/engineering works[13].

Regarding the beneficiary's obligation to pay the price of the construction work, it may be established in three ways: an estimated price, a price per quote, established for each part of the construction or a flat-rate for the whole construction. In the first case, the price can be increased if two cumulative conditions are met: the first one concerns the justification of the increase of the price in front of the beneficiary by the constructor, and the second aims at conditioning this increase only if it results from works or services that the constructor couldn't have foreseen at the conclusion of the contract. In lack of these two conditions, the beneficiary can't be obliged to withstand the price increase[14]. Regarding the other type of establishment of pricing, the price per quote, the constructor will be obliged to inform and give account for the stage of the works, the services that have been rendered as well as the expenses made. This type of agreement presents the advantage for the constructor of suppressing his risk to withstand the cost of works he didn't predict. As such, the final cost of the construction will be determined at the end of the work, and any lack in the obligations above-mentioned of the constructor will result in his liability to pay damages towards the beneficiary[15]. In the last case of establishment of the price of the contract, the flat-rate pricing option, the beneficiary may be in an advantage in case there are changes that intervene during the construction, as he can't be obliged to agree to an increase of the general price of the construction, but may also be at a disadvantage as he can't demand that the price be reduced in accordance with the real price paid for the construction. The only possibility in this case in order to level the party's obligations, in virtue of the execution of the contract with good faith, would be a convention on the modification of the initial price, taking into account the circumstances and eventually additional costs incurred[16].

As such, we may say that the parties have the liberty to choose whichever type of price determination they think will better suit their agreement, but choosing such a price at the conclusion of the contract, without adding indexation clauses may lead to one of the contracting parties suffering a loss. The national legislation exonerates the constructor for the *force majeure* case as well as for the fortuitous case. The national legislation divides the liability of the parties according to three criteria: (i) according to the moment of the acceptance upon completion of a part of the work or of the final work, (ii) according to the total or partial destruction of the works, which can be attributed to the beneficiary, or the constructor or fortuitous cases that can't be attributed to either party, or (iii) depending on the obligation of the constructor to procure the materials needed for the construction as opposed to the constructor working with the beneficiary's materials[17].

2.2. Considerations on the national legislation and the FIDIC regulation on risk distribution in the construction works contract

A similar element between the two regulations is apparent as both distribute the risk of the construction depending on the moment of the acceptance upon completion of the work. However, the FIDIC clearly establishes that even partial acceptances of the work transfer the liability to the beneficiary. Furthermore, the FIDIC contract doesn't classify, as the national legislation does the risk of the loss of the good depending on the procurer of the materials necessary for the construction.

Instead, the FIDIC regulation expressly and limitative establishes the risks of the construction between the beneficiary and the constructor. As such the constructor will be liable for any events that will take place before the acceptance of the completion of works, that are not provided for under the

[13] See article 1887 paragraph 1 of the Romanian civil Code.

[14] Codruța Mangu, "Riscul solului în contractul de antrepriză de construcții", in *Annals of the West University of Timisoara – Law series*, issue no. 1(2011): 159.

[15] Gheorghiu in Baias, Chelaru, Macovei, Constantinovici, *op. cit., Noul Cod civil*, 2026.

[16] Codruța Mangu, *op. cit.,"*Riscul solului în contractul de antrepriză de construcții", 156.

[17] Oana-Ruxandra Gherghina, "Riscul pieirii fortuite a lucrărilor de construcții. Comparație între contractele internaționale FIDIC și contractele naționale de antrepriză de lucrări de construcții", in *International Conference of Law, European Studies and International Relations*, issue no. IV (2016): 193.

beneficiary's liability (clause 17.3) or don't fall under the provisions of clauses 4.12. (Unforeseeable[18] Physical Conditions) or *force majeure* (clause 19[19]).

In the situations listed by the FIDIC guide books the fortuitous risk is attributed to the beneficiary, the latter granting the constructor the right to recover damages and losses suffered, an extension of the execution duration if appropriate and the payment of additional costs under the condition of transmitting a prior notification to the engineer[20].

As such, we consider that the FIDIC guideline regulation is more appropriate to a larger variety of contracts as it imposes less variables in order to transfer the liability of the constructor to the beneficiary. Nevertheless, the Romanian regulation in force is also well drafted but takes into account a lot more predefined conditions in order to transfer the risk of the contract.

3. Institutions that may influence the execution of the construction work contract and may change the liability of the parties

During this section, we aim to analyze the different civil and common law institutions that may limit the liability of the parties or exempt the parties of their liability completely. The institutions that we shall concentrate upon are: the *force majeure* and the *imprevision* as defined by the continental law system, the hardship institution determined by the international soft law regulation and the frustration institution as defined by the common law system.

The *force majeure* is defined by the Romanian civil Code as "any external, unpredictable absolutely invincible and unavoidable event". The liability of the party is prevented/voided in this case, unless otherwise stated by the law or by a convention of the parties[21]. Doctrine has underlined the main characters of the *force majeure* as provided by the regulation in force: (i) the externality of the event, is it must not be caused by the action or inaction of the party or by the object in its watch, (ii) the unpredictability of the event, concerning both the objective impossibility of the event's prediction and the prejudicial effects that it caused, (iii) the absolute invincibility and inevitability of the event, as being totally irresistible and insurmountable, that must be met cumulatively, representing specific traits of the *force majeure*, as even if the event could have been anticipated, objectively, its occurrence and effects couldn't be avoided even if the debtor would have taken all the appropriate measures[22].

The *force majeure institution* has its origins in the French law[23] and was adopted by most legal systems in continental law, but common law still lacks such an institution. But, regarding the regulation in the French legislation, the *force majeure* lack of liability can't be removed by agreement of the parties as it is the case in the Romanian law, and gives no rights to additional payments from the parties. Under the French law for the event to be considered *force majeure* it has to fulfill the following criteria: (i) make the performance of the contract impossible, not merely unpredictable, (ii) have been unforeseeable at the time the contract was made, (iii) have been "irresistible" in the sense that the event could not have been avoided or surmounted by the party affected, and (iv) be external

[18] Clause 1.1.6.8. defines the term "Unforeseeable" as "not reasonably foreseeable by an experienced contractor by the date for submission of the Tender".

[19] Clause 19 of the Red and Yellow FIDIC reads: "In this Clause, "Force Majeure" means an exceptional event or circumstance: (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided overcome, and (d) which is not substantially attributable to the other Party. Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied: (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors, (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."

[20] Oana-Ruxandra Gherghina, *op. cit.,* "Riscul pieirii fortuite a lucrărilor de construcții": 196.

[21] See article 1351 paragraphs 1 and 2 of the civil Code.

[22] Boilă in Baias, Chelaru, Macovei, Constantinovici, *op. cit., Noul Cod civil*, 1491-1492.

[23] Regulated now by article 1218 of the French civil Code.

to the party invoking it[24]. However, over the last decades, the French courts have attached less value to the foreseeability requirement, in comparison to the requirement of the unavoidable and insurmountable character of the contingency. In a number of decisions of the last years, including those of the highest civil court, the *Cour de Cassation*, foreseeability as test is dropped altogether, where it is established that the event was irresistible for the debtor[25].

According to its original meaning, the *force majeure* entitles compensation in favor of the contractor, but only limited to the prejudice directly attributable to the *force majeure* event and not extended to lost profit or losses caused by the demobilization of the equipment and personnel[26]. Even so, the *force majeure* usually clears both beneficiary and constructor of their respective responsibilities.

However, seeing the differences in the regulation of this institution, one must always be advised to either study the institution in the applicable legislation to the contract and insert clauses in accordance with it, or subject the contract to a different type of regulation or an international standardized type of contract.

Regarding the *imprevision* theory, it is inspired by the German unpredictability theory, and was neither regulated in the Romanian or the French civil Codes until recently[27]. Even so, doctrine[28] and jurisprudence[29] in both countries invoked this institution, and determined its traits based on the hardship institution determined in common and international commerce law. Since the entry into force of the Romanian civil Code[30], the institution of *imprevision* is regulated by our national legislation; the legislation in force provides that the parties are obliged to execute their obligations, even if the execution has become more onerous, either due to the increase of costs of their own obligation, or due to the decrease of the value of the counterpart. The court may therefore intervene in order to either adapt the contract in order to redistribute in an equitable manner the losses and benefits of the parties or terminate the contract on the moment and conditions that it sees fit. The fundament of this regulation was the idea of contractual justice, meaning that in lack of a contract provision, the costs and expenses generated by an unpredictable situation shouldn't fall in charge of a single party[31]. The application of the *imprevision* mechanism assumes the verification of the conditions mentioned in paragraphs 2 and 3 of article 1271; from the formal analysis of the legal text, we are in the presence of a premise (an execution that is excessively onerous), of a single condition (an exceptional change in circumstances) that, in turn, must meet several sub-conditions regarding: the moment of the intervention of changes in circumstances, the reasonable unpredictability of the change in circumstance and the un-assumption of the risk by the aggrieved party; moreover, the prior negotiation of the contract becomes a condition of submitting a request in front of the court, and not a distinctive effect of the *imprevision*[32].

The theory of *imprevision* appears as an exception to the general principle of *pacta sunt servanda*, and must be recognized if the contractual obligation is no longer susceptible of execution, where the circumstances in which it must be executed are radically different than the circumstances in which it was assumed[33]. Concretely, we are in the presence of an excessive onerous obligation of

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[24] Lukas Klee, *International construction contract law*, (Oxford: John Wiley&Sons, 2015): 39.

[25] Jan van Dunné, "The change of the guards. *Force Majeure* and frustration in construction contracts: the foreseeability requirement replaced by normative risk allocation", *International Construction Law Review*, issue no. 20 (2) (2002): 171.

[26] Lukas Klee, *op. cit., International construction contract law*, 38.

[27] The *imprevision* theory was regulated in Romania by its introduction into the civil Code that entered into force in October 2011, and in France by the modification of the article 1195 of the civil Code by Ordinance no. 2016-131 in February 2016.

[28] See Andreea Lisievici, "Clauza de impreviziune", in *Law review*, issue no. 6 (2010): 103-109.

[29] The French courts recognized the imprevision theory even in the early 1900, as the French Administrative Court, the *Conseil d'État*, recognized hardship in the case of *Gaz de Bordeaux*, and adapted the contract in order to avoid the bankruptcy of the company that supplied gas in the city of Bordeaux (Conseil d'État, décision du 30 mars 1916, S 1916.III.17). The first application of the theory of imprevision was made by the Romanian courts in 1920 in the case of Lascăr Catargiu vs. Bercovici Bank. After 1990, they admitted the application of this concept to rent agreements, the adjustment of prices for delivered but unpaid merchandise, royalty fees for authors, concessions as well as voluntarism.

[30] See article 1271 of the Romanian civil Code.

[31] Zamșa, in Baias, Chelaru, Macovei, Constantinovici, *op. cit., Noul Cod civil*, 1409.

[32] *Idem*, 1409-1410.

[33] Georgeana Viorel, Liviu Alexandru Viorel, "Configurația impreviziunii în Codul civil (Legea nr. 287/2009, republicată)", in *Law Review*, issue no. 2 (2012): 35.

the debtor that he didn't take into account when concluding the contract, obligation that isn't impossible to honor, but that can place the debtor in a difficult economic situation, even bankruptcy[34]. As such, *imprevision* doesn't mean unimaginable; doctrine has established that a massive depreciation of the swiss franc, the sudden increase of oil price, the changes in environmental legislation, changes in the fiscal legislation, a war, a cataclysm, are events that can be imagined, at least from an abstract point a view by most people, and might even be predicted by some, but do not limit the application of the *imprevision* for the latter needs to be characterized by a change in circumstance, which is the premise of the *imprevision*, that is fundamentally a relative and not an absolute concept[35].

The court may intervene in the initial agreement of the parties and modify it or terminate it according to the circumstances of the cause. This doesn't mean however that the court can pull away from the initial consent of the parties, from the ways in which the parties understood to attribute one-one-other obligations during their contractual relations. In other words, the equity that the court must have in mind is the one that the parties had in view at the moment of the initial conclusion of the contract (i) in regards to that moment, but also (ii) regarding the execution in time of the contract[36]. The *imprevision* can intervene concretely when it applies to an obligation that has become "excessively onerous"; the term was defined by doctrine as it lacks specific means to determine its extent in the legal text. As such, three criteria were taken into account, the first concerning the material impossibility to complete the works, the second concerning the legal impossibility to complete the works and the third the economic impossibility; the latter was deemed the most important as it best exemplifies the *imprevision* theory[37].

Doctrine has further analyzed the institution and has deemed that the termination of the contract shall intervene only when the contract can no longer be adapted in the sense of equitably dividing the benefits and losses between the parties. Furthermore, the moment of the termination of the agreement can be placed before the definitive ruling of the court or simultaneous to the latter. Referring to warranties pertaining to the contract under revision, the court is not in the right to dispose over juridical acts that are not under discussion, even under the *imprevision* institution[38]. Given this acknowledgment, we consider that in construction works contracts that usually suppose warranties the *imprevision* theory can help but is not going to liberate the contractor or beneficiary of the warranties that they had prepared in order to generate the execution/commencement of the contract. Even so, this institution may help constructors and beneficiaries alike, as during unpredictable events (such as a global pandemic) or uncertain times (such as the everchanging regulations imposed by state governments in order to fight the global pandemic), in can at least relieve the parties of a contractual terms that, taking into account the circumstances have become unfair.

As pertaining to the hardship institution, it is perceived as a civil law remedy as defined by international soft law (such as by the UNIDROIT principles) as well as several national legislations. Hardship clauses, developed in the 1970's for the offshore industry, hit by oil crisis, presently is a common figure in long-term contracts, including building contracts. The English term is now widely accepted, also in French and German legal practice; furthermore, it also goes under the name of: 'clause d'adaptation', 'clause de sauvegarde', and 'Anpassungsklausel'. Despite its popularity, doctrine has shown it is somewhat hard to find uniformity in these clauses.[39] The common traits of the hardship clauses involve the renegotiation in case of hardship and the element of lack of foreseeability, that applies in the same manner as for the *imprevision* institution.

The German civil law establishes the hardship institution in article 313 of the civil Code, and was introduced in the regulation after long-term case laws. German courts have been consequently describing fundamental circumstances to be "perceptions shared by both parties as evident at the closing of the contract, or perceptions of one party, discernible to and not objected to by the other

[34] Cristina-Elisabeta Zamșa, "Teoria impreviziunii", in *Annals of Bucharest University*, issue no. I (2003): 80.
[35] Vladimir Diaconiță, Adrian Baias, "Standardul, impreviziunea și riscul în materia obligațiilor contractuale. Scurt exercițiu de corelare", in *Romanian Review of Private Law*, issue no. 3 (2019): 174-175.
[36] Georgeana Viorel, Liviu Alexandru Viorel, *op. cit.*, "Configurația impreviziunii": 37.
[37] See Vladimir Diaconiță, Adrian Baias, *op. cit.*, "Standardul, impreviziunea și riscul": 177-181.
[38] See Georgeana Viorel, Liviu Alexandru Viorel, *op. cit.*, "Configurația impreviziunii": 38-39.
[39] Jan van Dunné, *op. cit.*, "The change of the guards": 182-183.

party, of the existence, present or future, of certain circumstances that form the basis of their willingness to contract".[40] The institution of the hardship is regulated in the same manner as the *imprevision* one, in the sense that whereas circumstances that stood upon the basis of the contract have changed fundamentally, in such a manner that the parties wouldn't have concluded the same contract if the circumstances had arose before its conclusion, the parties have the right to request an adaptation of the contract regarding the distribution of risks or its termination. The second paragraph of the German approach clearly states that essential assumptions which have become the basis of the contract turned out to be wrong are equivalent to change in circumstance. In this aspect, the German law places a lot more considerate on the view and understanding of the contract by the parties, than on the events or circumstances that generate the necessity of the review of contractual terms.

As doctrine has shown[41], UNIDROIT principles define that where a party claims hardship, it is entitled to a renegotiation of terms and, in the absence of agreement, to rescind the contract or to amend it on 'just terms' wherever possible. The hardship must be quite substantial, though not as severe as would be required for the application of the common law doctrines of impossibility or commercial impracticability[42]. Doctrine has pointed out that in negotiating a hardship clause one must establish (i) the nature of the causes that might determine the review of the contract and what are the external events to the will of the parties, that the latter couldn't reasonably foresee and that substantially affect the initial contract balance, (ii) the nature of the negative effects that this change in circumstance must lead to and (iii) to indicate the type of remedy that will lead to the restoration of the contracts balance by its review[43].

The frustration doctrine is specific to the common law system and defines this institution where a supervening event or change in circumstances occurs which renders performance of the contract radically different from what the parties contemplated when they made their contract and for which the contract does not expressly allocate the risk or imply that, the contract is automatically 'frustrated' and the parties are discharged from further performance of it[44]. The fact that the obligations have become more onerous, on its own, doesn't constitute the necessary elements to invoke the frustration of the contract. The frustration doctrine is the equivalent of hardship in the common law system.

The basis of this institution is not the possibility to foresee the event, or to expect it, but it simply concerns arising of a circumstance that changes the situation of the parties, and for which the latter made no provision in their contract. This circumstance must change the situation of the parties in such a manner that it would be unjust to hold them accountable for the obligations they assumed when concluding the contract. As such, the frustration might be defined as an important change in circumstance, that fundamentally changes the situations of the parties, and for which there are no provisions in the contract. The English doctrine of frustration not only emphasises facts over the parties' intentions, but also has a broader reach than the continental approach to hardship, dealing also with cases of impracticality and temporal or partial impossibilities[45]. It is to be mentioned that under the common law system, the parties are the only ones capable of amending their contract, courts being restrained to do so. As such, we might note another fundamental difference between the institutions of frustration and hardship or *imprevision*, that is the impossibility to have the contract reviewed by the court.

Doctrine has noted that frustration consists in an unpredictable event but surmountable, that doesn't prevent the execution of obligation, but makes it extremely onerous for the debtor, as his corresponding right no longer bears the significance, importance or value that it held at the conclusion

[40] Andrei Drăgan, "European conceptions on hardship – A comparative study on German, English and French law", in *Romanian Journal of Comparative Law*, issue 1 (2016): 78-79.
[41] Ovidiu Ioan Dumitru, "Short overview on the Romanian construction legal framework", in *International Journal of Social Science and Economic Research*, volume 5, issue 8 (August 2020): 2299.
[42] Lukas Klee, *op. cit., International construction contract law*, 39.
[43] Adrian Severin, *Elemente fundamentale de drept al comerțului internațional*, (Bucharest: Lumina Lex Publishing House, 2004): 40
[44] Lukas Klee, *op. cit., International construction contract law*, 40.
[45] Andrei Drăgan, *op. cit.*, "European conceptions on hardship": 82.

of the frustrated contract[46]. Payments under the frustrated contract are governed by the provisions of the *Law Reform (Frustrated Contracts) Act* (1943) that generally provide for payments made for which no benefit has been received to be repaid and for benefits received for which no payment has been made to be paid for[47].

4. Conclusions

As we have seen, the construction work contract is currently regulated by the civil Code as the general provisions in the matter, but several other laws bear an incidence to its completion. Furthermore, parties are free to choose the applicable law to their contract, as well as apply an international regulation such as the FIDIC.

The question of this study was to analyze how institutions such as *force majeure*, *imprevision*, hardship or frustration are applicable to the construction contract, especially after the occurrence of events that render the provisions of the contract sometimes impossible to uphold.

As such we have seen that the *force majeure* is an external, unpredictable absolutely invincible and unavoidable event that renders the contract terminated in the Romanian legislation, unless otherwise stated by the law or the parties. In the same respect, the French legislation always renders the contract terminated, even if defining the institution in the same way.

The *imprevision* theory, a newly developed institution in the continental law system based on the hardship institution differently qualifies the type of events and circumstances of the parties that have to change in order for the contract to de revised by the parties (or by the court), or in a last instance to be terminated. The last institution that we have analyzed is the frustration one, specific to the common law system, that places more regard to the party's contract, and especially the provisions within. If a contract becomes frustrated, then it will always be terminated.

Of course, the parties always have the obligation of mitigation of damages, an institution specific to the international law, but always present within national law systems[48]. But where such obligations are not met, the courts must take into account first the behavior of the parties and second the remedy that is most adapted to the contract, mainly depending on the contractual terms and on the applicable law to the construction work agreement.

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[46] Adrian Severin, *op. cit., Elemente fundamentale de drept*, 41.
[47] Lukas Klee, *op. cit., International construction contract law*, 39.
[48] See Ovidiu Ioan Dumitru, Andrada-Laura Tarmigan, "Contractor's obligation to mitigate damages", in *Perspectives of law and public administration*, volume 9, special issue (September 2020): 76-82.

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