ASPECTS REGARDING IMPREVISION IN EMPLOYMENT CONTRACTS

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Abstract

Imprevision was first regulated in the internal law by the current Civil Code in response to doctrine and jurisprudence appeals but also due to the new economic, social and political realities. Apart from civil agreements, due to the dynamics of economic activity, the question of the applicability of imprevision for other contracts is raised. In this study, we shall analyze the possibility of applying imprevision in individual and collective labour contracts.

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JEL Classification: K12, K31

1. Introductory Issues

1.1. Imprevision regulation

Imprevision is regulated for the first time in the Romanian legal system by the current Civil Code in art. 1271[2]. Considered an exception to the binding effect of contracts [3], imprevision was defined in doctrine as "the prejudice that one of the contracting parties undergoes as a result of severe imbalances of value that occurs between his benefits and the compensation of the other party during the course of the agreement, an imbalance caused by the economic situation, especially money fluctuations"[4].

Imprevision is applicable to onerous, commutative and successive performance agreements, including those affected by a standstill period of execution[5].

By the legal establishment of imprevision, the legislator has not given up to firmly regulate the principle of binding force of the agreement, regardless of the costs of execution, as stipulated by the Civil Code in art. 1271 para. (1).

However, exceptionally, if the performance of the agreement becomes excessively onerous because of exceptional cases that could not be foreseen by the parties when the agreement was concluded, forcing unjustly the debtor in the performance of the object of the agreement, the court may rule the adjustment of the agreement or even its termination.

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[2] Art. 1271 of the Civil Code states: "(1) The parties are bound to perform their obligations even if their execution has become more onerous, whether because of cost increases in the performance of their own obligations or due to decreased value of the benefit.
(2) However, if the performance of the agreement has become excessively onerous because of an exceptional change of circumstances which would obviously unjust the obligation of the debtor to comply with the fulfillment of the obligation, the court may rule:
a) adjustment of the agreement in order to distribute equitably between the parties both losses and benefits resulting from changing circumstances;
b) termination of the agreement, at the time and under the conditions it sets.
(3) Provisions of para. (2) shall apply only if:
a) change of circumstances occurred after conclusion of the agreement;
b) changing circumstances and extent thereof have not been and could not have been envisaged by the debtor reasonably at the time of conclusion of the agreement;
c) the debtor has not risked changing circumstances and could not reasonably be considered that he would have taken this risk;
d) the debtor tried within a reasonable term and with good faith, the negotiation of fair and reasonable adjustment of the agreement".

[3] See L. Pop, I. F. Popa, S. I. Vidu, *Curs de drept civil. Obligaţiile,* Universul Juridic Publishing House, Bucharest, 2015, p. 124.

[4] L. Pop, *Tratat de drept civil. Obligaţiile. Volumul II. Contractul,* Universul Juridic Publishing House, Bucharest, p. 533 – 534.

[5] L. Pop, *op. cit.*, p. 534.

Although the legal doctrine was notified of the danger of applying imprevision discretionary[6], our view is that the legislator intended to cover situations that may arise from the current economic context, which can lead to major imbalances in the execution of agreements.

The legal text governing imprevision, stand out the following conditions under which the institution becomes applicable: change in the existing circumstances at the moment of conclusion of the agreement; changes have been impossible to predict by the debtor reasonably at the moment of conclusion of the agreement; the debtor does not have assumed the risk of an event that would change the circumstances of performing the agreement; the debtor should previously have negotiated the fair and reasonable adjustment of the agreement.

Effects of imprevision, all of the legal text are either in adjustment to the agreement, or its termination, the decision is up to the court.

Imprevision differs from force majeure in that it does not presuppose an absolute impossibility of performance of contractual obligations, but only a significant difficulty due to unpredictable events[7].

1.2. Hardship clauses

The hardship clause is a legal instrument by which the parties can predict the occurrence of an unforeseeable event that could break the contractual balance. Through the hardship clause (which is part of the review clauses), the parties shall renegotiate the agreement and its adjustment to the new realities occurred during its execution, with the ability to establish the court or arbitrator that they will address if they will not reach a consensus to review the agreement.

Unlike the indexing clause, which becomes effective by law, without the need for intervention by the parties, the hardship clause is to give the parties the possibility of negotiating and adjusting the agreement so that the objective pursued by the parties to be fulfilled.

If the negotiations do not reach a consensus, the dissatisfied party will be able to address the court.

If the parties both clearly foresee the event that attracts the breaking the balance between their counter-provisions and how to it could be solved, we do not find ourselves in the presence of imprevision but becomes effective the binding principle of the agreement[8].

2. Applicability of imprevision in the sphere of labour contracts

2.1. The relationship between the rules of employment law and the rules of civil law

The dynamics of labour relations requires reporting them to the new realities including those of legislative common law, especially since the labour law, although as autonomous branch of law, is in a relationship of dependency to the civil law[9].

As per the relationship between the rules of employment law and the rules of civil law, the legislator has established the following:

Art. 2 para. (2) of the Civil Code provides that 'the current code is made up of a set of rules which is the common law for all areas covered by the letter or spirit of its provisions".

Art. 278 para. (1) of the Labour Code states that "the provisions of the current Code shall be completed by the other provisions of the labour law and to the extent not inconsistent with the specificity of employment provided in this Code, by the provisions of civil law".

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[6] D. Dobrev, *Impreviziunea, o cutie a Pandorei* in M. Uliescu (coord.) *Noul Cod civil. Comentarii, second edition revised and added*,, Universul Juridic Publishing House, Bucharest, 2011, p. 210 and subsequent.

[7] L. Pop, I. F. Popa, S. I. Vidu, *op. cit.*, p. 126.

[8] See L. Pop, I. F. Popa, S. I. Vidu, *op. cit.*, p. 130.

[9] I. T. Ştefănescu, *Consideraţii cu privire la autonomia dreptului muncii*, in the proceedings of the Conference „Aspecte controversate în interpretarea şi aplicarea prevederilor Codului muncii şi ale Legii Dialogului Social", In honorem Ion Traian Ştefănescu, Universul Juridic Publishing House, Bucharest, 2012, p. 13 – 33.

By the combination of the two legal texts it results that an institution of civil law, representing the common law in matters of private law, may be applied in the field of employment law in so far as the provisions concerned are compatible with the specific employment relationship.

2.2. In matters of individual labour contracts

The doctrine stated that the applicability of hardship to matters of individual labour contracts is possible, although rarely, when due to exceptional changes occurred during the labour contract, the employee's work has become excessively onerous in relation to his salary, originally agreed[10].

Moreover, the individual labour contract is, inter alia, an onerous, commutative and successive performance agreement, thus being included in the category of contracts where imprevision applies.

Furthermore, the legislator in art. 23 para. (2) of the Labour Code provided the possibility for the court, at the request of the concerned employee or the territorial labour inspectorate to mitigate the effects of the non-compete clause given that it has become extremely onerous for the employee. This is an example of judicial review of the employment contract for imprevision[11].

Apart from this situation expressly provided in the text of the law, imprevision can occur within labour relations and in specific situations characteristic to common law.

In the doctrine of civil law were set out specific situations that may generate applicability of imprevision. It is about *economic changes* (such as when inflation affecting mainly the lending institution), *changes in the policies* that could lead to crisis at international level following which the price of raw materials may increase significantly and *legislative changes* that could trigger significant changes in benefits of contracting parties by imposing additional charges[12].

From the examples above, we believe that cases of imprevision in individual labour contracts could be the following:

Exceptional economic change too high costs to execute an individual labour contract (by way of example, prices of materials for construction of a building grow significantly and unpredictably due to fluctuations in market prices, so that the execution of individual contracts becomes too onerous).

Changes in the legislation can generate application of imprevision when it comes to new taxes for the import of raw materials.

2.2.1. Effects of imprevision on individual labour contracts

Imprevision effects on individual labour contracts are identical to the effects that this institution produces within the common law. Thus, the Parties shall in the first instance renegotiate the labour contract, and if the negotiation does not ensure consensus of the Contracting Parties, they shall address the court, that following the contract review can decide either to adjust the contract and redistribute equitably the benefits of the parties, or to terminate it if the court considers that the unforeseeable event affects in a significant way the performance of the contract.

The court has discretion in ruling the term and conditions by which the contract is terminated[13].

Nonetheless, the parties are free to enter into the individual labour contract some hardship clauses to restore the contractual balance in the event of unforeseen circumstances that substantially affect the performance of the agreement.

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[10] I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, third edition revised and added, Universul Juridic Publishing House, Bucharest, p. 399.

[11] See M. Gheorghe, *Dreptul individual al muncii. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2015, p. 204.

[12] L. Pop, I. F. Popa, S. I. Vidu, *op. cit.*, p. 127.

[13] This option is valid, obviously, if the parties have not stipulated a review clause in the contract.

2.3. Imprevision and collective labour contracts

An important aspect of imprevision in the scope of the labour contracts, concerns the applicability of this institution to collective labour contracts.

In other words, is imprevision applicable only to individual labour contracts or it can be extended to collective labour law to collective labour contracts?

Regarding this issue, we feel that the answer should be affirmative.

This hypothesis would find applicability where such a serious imbalance between parties' benefits would intervene, caused by some financial problems of the employer, who would be in the position of not being able to honour his obligations under the collective labour contract.

Applicability of imprevision in this context would involve reducing pecuniary benefits of employees earned by means of the collective labour contract and adjust it accordingly, so that both parties can honour their obligations.

We believe that the applicability of imprevision to collective labour contracts is a desirable solution, especially since employees are the ones taking advantage of it, primarily by saving jobs[14].

Obviously the social partners may include in collective labour contracts some provisions on wage indexation or provisions regarding eventual full liability by the debtor where unpredictable events occur, so imprevision can no longer find applicability.

The social partners may include in the collective labour contract the hardship clause, which would follow the same legal regime as in the common law.

2.3.1. Situations when imprevision does not apply to labour contracts

Given the specificity of labour relations and issues of common law on the legal regime of imprevision, our view is that imprevision does not apply in the following situations to individual and collective labour contracts:

a) *for employees in the public sector*. Given that the legal status of employees in the public sector is regulated by special laws, including with regard to the remuneration, the institution of imprevision may not find applicability in their case. Certainly this is true for the case of civil servants that have a precise legal regime established by the laws.

b) *in situations that are incompatible with the provisions of labour law in the field.* There are certain exceptional circumstances occurring after the conclusion of the labour contract, after which the debtor (employee) can not execute his duties properly. For example, certain outstanding personal problems affect him so he can not perform the work at the level that he engaged towards his employer. While this may be considered as having an exceptional character which could not be foreseen by the parties when the contract was concluded, imprevision can not be invoked in this context because the Labour Code stipulates that in this situation are applicable the legal provisions regarding the dismissal for professional inadequacy (art. 61 let- d) of the Labour Code), these provisions prevailing as special rules.

c) *where in the labour individual or collective contracts are included wage indexation clauses.* Wage indexation is a measure of prevention of imprevision and contractual imbalance[15]. Indexing has been defined as "the process of revaluation of full right, automatic, of benefits in relation to the evolution in a benchmark index set by the indexing clause or convention, to cover the depreciation of currency in which settlement of wage is made"[16]. As per the wage indexation clauses, it is judiciously appreciated that they are legal and do not violate public order and morals and are aimed at adjusting

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[14] Regarding applicability of imprevision in collective labour agreements see R. Ş. Pătru, *Contractele şi acordurile colective de muncă,* Hamangiu Publishing House, Bucharest, 2014, p. 214 – 215.

[15] See I. T. Ştefănescu, *Tratat…..op. cit.,* p. 639-640. Radu Răzvan Popescu *Dreptul muncii. Legislaţie internă şi internaţională. Doctrină şi Jurisprudenţă*, Universul Juridic Publishing House, Bucharest 2015, p. 282.

[16] L. Pop, *op. cit.* p. 534.

the labour contract (in terms of salary/compensation) to the economic and monetary context realities[17].

d) *where the debtor has assumed the risk of occurrence of an unforeseeable event and in general to the extent that the parties had stipulated in the agreement that even if situations that could be described as unpredictable might intervene, these shall not lead to the enforcement of the effects of the Civil Code,* operations possible under the principle of freedom of will of the parties.

3. Conclusions

It is noteworthy that by the emergence of the current Civil Code, any possible discussion regarding the application of imprevision in terms of agreements, discussions that have existed otherwise in the legal doctrine and judicial practice, have ceased. If an event of such unforeseeable situation, the party that is unable to execute the obligations may invoke art. 1271 of the Civil Code. Imprevision may find applicability in the field of labour contracts, whether individual and collective contracts where the incidence of this institution is in line with the labour law and the provisions of the Civil Code in the matter.

Accepting the applicability of this institution is in line with the trend of more flexible labour relations, including at the legislative level, contributing to the fulfilment of the objectives set by the parties when concluding the contract.

Parties may meet some unforeseeable events, by setting some contractual clauses to ensure the continuity of the contract for cases of manifest disproportion between their benefits, occurred during the execution of the agreement.

The inclusion of the review clauses and the adjustment of labour contracts (the hardship clause) when looming the danger of occurrence of unforeseeable events is meant to enhance the understanding of the parties and ensure effective enforcement of contracts.

In summary:

- Imprevision is applicable to labour contracts, except for situations incompatible with the labour law and the common law in this matter.
- The institution of imprevision can be applied in matters of collective labour contracts, obviously with the same general conditions relating to compliance with specific labour legislation and common law.
- It is preferable that the parties, as a proof of diligence, when the specificity of labour contracts requires, to include in the individual and collective labour contracts some provisions on reviewing and adjusting the contracts so that the occurrence of an unforeseen event do not lead to its termination.

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[17] M. Gheorghe, *op. cit.,* p. 204.

Relevant Legislation

1. Constitution of Romania
2. Civil Code
3. Law no. 53/2003 (Labour Code), with subsequent amendments and completions
4. Law no. 62/2011 (on Social Dialogue), with subsequent amendments and completions