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Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice

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Abstract

It is very difficult to conceive a legal system that may not contain the principle according to which legal conventions concluded have the power of law between the contracting parties. Keeping one's word is one of the pillars of all current legal systems and of the Roman one or even others considered as more primitive. As any legal principle, it has certain limits that are equally important as the principle itself. Among these limits, the principle of binding force of the contract, pacta sunt servanda, there is one recently introduced in the Romanian legal system, namely the theory of imprevision, a legal mechanism by which they follow, above all, the restoration of contractual justice. Imprevision, which is the less visible and contradictory part of the pacta sunt servanda principle, is generated by a social-economic reality appeared following some drastic and unpredictable changes of the conditions in which a contract is to be executed with respect to the aspects envisaged by the parties upon the conclusion thereof. The theory of imprevision aims at answering the debtor's situation if any unpredictable events that bring prejudice to the balance of services should occur, balance that was considered by the contracting parties upon the conclusion of contract when the agreement was formed. As a principle, before the coming into effect of the New Civil code, the Romanian courts refused to enforce the theory of imprevision, except for some cases related to the reevaluation of rents. This principle adopted both by the law courts relied on the strict interpretation of contractual provisions and the inexistence of some express legal provisions that might allow the judge to intervene in a contract, and arguments from the practice of international commercial transactions are brought to support the enforcement of the theory of imprevision.

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1. Introduction

The principle of imprevision is enshrined in the Romanian by way of the adage *omnis conventio intellegitur rebus sic stantibus*, according to which all conventions are considered valid if the circumstances under which they were concluded remain unchanged. (Beleiu, 2003, 32-33) A convention or a contract is a legal document having a fundamental purpose, namely to civilise countries, peoples, persons, representing the basis for life in any community (Josserand, 1933, 138). Article 1270 of the new Romanian Civil Code (art. 969 of the 1864 Civil Code) has a wording identical to Article 1134 of the French Civil Code, according to which, *the conventions lawfully entered into take the place of the law for those who have made them.* It is difficult to conceive a legal system that does not contain such a principle. Keeping one's word (Supiot, 2011, 138) is one of the pillars of all current legal systems and of the Roman law one also, as well as of other systems that are deemed to be more primitive, and, just as any principle of law, it has limitations just as important as the principle in itself.

The word given by way of will exteriorisation (Djuvara, 1999, 138) under any contract is represented by the legal document development, which results in the defining thereof as manifestation of will with intent to produce legal effects - to create, amend or terminate a legal relation – and it consists in three notions (Deleanu, 2005, 249): it is a manifestation of will, this will being that of a reasonable person, as a result of such person's reflection; in order to be effective from a legal perspective, the will is to be manifest, i.e., externalised; the manifestation of will is aimed at causing legal effects (Pop, 1994, 60), with a view to creating, amending or terminating a specific legal situation. However, if between the time of contract conclusion and contract execution, unpredictable events occur that fundamentally changed the economic or other kind of circumstances existing at the time of the initial agreement between the parties, thereby rendering significantly more difficult either's party performance, the principle of the binding power of the contract is no longer applicable, and the competent body is entitled, independently from the existence of such a contractual provision, to proceed to contract redrafting according to the new circumstances and, alternatively, to terminate the contract and correspondingly eliminate the debtor's liability. (Sitaru, 1996, 77)

The role of the parties during contract execution, which derives from the solidarity relation, is to adapt the behaviour thereof with a view to meeting the interests of each of them and obtain a result as similar as possible to the one envisaged upon contract conclusion. Otherwise, the contractual solidarity allow conduct correction following the action of external elements, courts of law included. The requirements of contractual solidarity are visible when difficulties occur in the execution of the undertaken obligations. When such are specific to one of the contractual party, the other one has the obligation to be tolerant, this being aimed at preserving the initial contractual balance, and being mainly accomplished by the suspension /deferral of the performance deadline or the decrease in the extent of the debtor's debt. When the difficulties are a result of external circumstances, including economic phenomena such as monetary fluctuations, the parties have the obligation to adapt the contract. Furthermore, even when the contract is not executed, the contractual solidarity involves selecting the prerogatives available to one of the parties and implementing them as remedies for the existing situation, but not for the purposes of sanctioning he debtor. Considering this, the contractual imprevision relates, at least in theory, to the legal techniques, which are sought to become fairer, more equitable, as contractual relations set-up by way of mechanism parallel to those included by the parties in their convention, if any. The contractual imprevision was defined by the doctrine (Pop, Popa, Vidu, 2012, 534) as "the prejudice suffered by one of the contracting parties as a result of a severe imbalance in value between the parties' performance and counter-performance during the contract execution, such imbalance being caused by the economic circumstances, monetary fluctuations in particular". Therefore, imprevision relates to a severe imbalance subsequent to the conclusion of a contract providing successive execution in time or execution at different times of the obligations between the parties, such imbalance occurring between the contractual performances (Stark, 1972, 75) as a result of an event unpredicted upon contract conclusion and which results in the obligations of one of the parties becoming too onerous.

2. Imprevision in the Current Legislation

The Romanian legislation acknowledges imprevision as a general principle under the new Civil Code adopted by Law 287/2009 (published in the Official Journal no. 511 of the 24th of July 20099). Therefore, Art. 1271, provides as follows: "*(1) The parties shall be bound to execute their obligations even when such execution has become more*