The Unpredictability Theory - A Response To The Needs Of Current Economic Environment Or Removal Of The Binding Force Of The Contract?

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Abstract: Social progress is determined, among other things, of economic growth, thus implicitly reducing the budget deficit. The measures adopted by the Government in this regard and legal framework must provide solutions that relationships developed by economic agents to be placed on an upward trend since, of course, the current economic and social context. On this regard, its execution must be carried out according to the principles of solidarism and of contractual balance so that both sides involved to profit. Also, under these guidelines, the losses should be borne by both contractors, in order to avoid creating an imbalance between benefits leading to unjustified enrichment of one party and to the bankruptcy of the other. However, some obligations undertaken in the context of 2007, before the global crisis, have undergone substantial transformation, becoming particularly onerous for the borrower. In this context, the legislator, in current Civil Code explicitly consecrates the unpredictability theory, opening the way to renegotiate and to adaptation of contracts.

Keywords: adaptation of the contract, negotiation, hardship, unpredictability.

1. The economic crisis, whose effects continue to perpetuate even now, is a reality requiring the adoption of effective strategies to overcome this stalemate. Projected in this reality, the activity of economic agents is imperiled, given the drop in purchasing power of money and the exaggerated overgrowth of prices for services and goods. These factors determine that between each obligation assumed by the signers of a convention intervenes a serious imbalance, likely to cause economic ruin for a party and the enrichment of the other contractor.

Therefore, the unfavorable conditions generated by the economic, political or social change, have determined the necessity to expressly stipulate in national legislation the unpredictability theory, as a compromise solution between the rule of binding force of the contracts and modification of conventions by virtue of the principle of equity, during their execution.

The applicable rules, as it consecrated by art. 1271 par. 1 Civil Procedure Code, implies that *"parties are bound to perform their obligations, even if it has become more onerous, either due to increased costs of performance of their obligations, either due to decrease value of the other contractor`s obligation."*

According to these provisions, each party in the contract must carry their duty in accordance with the terms of the contract, even when their own obligation became more onerous than seemed to be at the date the contract was signed, thus affecting the balance between the initially presumed mutual benefits.

However, par. 2 of the same article provides also an exceptional situation, namely *"if the execution of the contract has become excessively onerous because of an exceptional change of circumstances that would make manifestly unjust the execution of debtor`s obligation"* the court may intervene in contractual relationships, providing or adapt the contract to distribute equitably between the parties losses and benefits resulting from changing circumstances or termination of the contract at the time and on terms appreciated according to the actual situation.

In such circumstances, changes in economic, political or social reality that have affected the monetary stability of the state, the selling market, inflation rate, unemployment and so on, are important factors that require adjustment clauses to these new realities.

2. Starting from a practical case, we observe that the parties have signed in 2007 a lease of a commercial space. Rent set at that time reflected a favorable financial environment, but currently, this obligation of the lessee made him unable to honor the deal assumed. Accounting statement revealed that, compared with 2007, in 2014 sales dropped 60%, the net revenue being lower than the costs, therefore putting the tenant in economic collapse.

In this situation, it is necessary to identify viable solutions to reconcile the interests of both contracting parties, renegotiation clauses being the only solution for the safeguarding of the commercial relations, especially given that he is not able to unilaterally denounce the contract.

Also relevant is the fact that the landlord, covered by penalty clauses stipulated in his favor, being able to execute the guarantees offered by the lessee in the form of indemnity bond, has no interest to substantially reduce the rent amount.

We consider salutary the express provision of the theory of unpredictability, considering the fact that the contracting parties have assumed obligations in consideration of certain circumstances and economic realities, considered at that time reasonable for both subjects, envisioning a real chance of winning, but by the time of the agreement to present days, the obligation assumed by some has become excessively burdensome as a result of exceptional change of circumstances since the negotiation and the signing of the convention.

Nevertheless, given that the convention was concluded before the current Civil Code, the question arises whether this institution applies to contracts that emerged under the former law.

Under the previous legislation, unpredictability theory was not expressly stated, being primarily a creation of doctrine, which came out from interpretation of article 970 in former Civil Code. In agreement with these provisions, *"conventions should be executed in good faith. They bind not only to what is explicitly provided within themselves, but to all the consequences which equity, custom or law gives to the obligation by its very nature."*

Practical application of this guideline, compared to preceding provisions, specifically the lack of internal rules to establish this theory, have resulted in controversies both in doctrine and in legal practice.

Thus, in terms of its inapplicability in specialized literature[1] it is considered that this theory was not explicitly regulated because of the consecration of the principle of nominally currency meaning that paying power of money is constant and not influenced by purchasing power which can vary according to the economic context. Therefore, according to article 1578 paragraph 1 of former Civil Code *"obligation arising from a loan for the same amount of money is always numerically shown in the contract."*

Another argument in this regard is based on the principle of the binding force of the contract, a principle that has led some authors[2] to consider that Romanian law condemns unpredictability theory.

In this regard, it is noted that even the case law was inconsistent, prevalent solutions being that it is not allowed to review the effects of a contract on the basis of hardship in the absence of a text specified by law.[3]

So, the majority of the judiciary practice claimed that courts do not have jurisdiction to rule on reviewing contracts on the grounds of unpredictability, this concept being based on the same principle of nominally currency.

Contrary to the claims that judicial review of a contract for the unexpected is inapplicable, there are authors[4] who reveal an opposite view. In this respect, it is argued that the effects of the legal act may be revised due to rupture of the contractual balance because of changing circumstances

considered by the parties at the signing date of the legal act, as these so-called institution of unpredictability -rebus sic non stantibus- meaning the "circumstances which are not the same" as they were, implying the need to revise the original terms of the act in order to restore the equilibrium value of the obligations.

Also, contrary to the majority opinion expressed in the case law according to which reviewing contracts could not be the privilege of a judge, some courts scrutinized the scope of this theory.

Therefore, is retained in practice[5] that "for the application of the principle of equality of co-owners when dividing the goods it should be considered the assets value at the time of the judgment and not the value existing when co-ownership started. Thus, diminish of the market value of the property, as the increase of its value - not the result of any of the co-owners actions - is charged with the rights of all owners or on the contrary is in advantage of all, and not to a single one of them. This solution is accepted by the doctrine that, in principle, accepts the theory of unpredictability, which resides on the search of a proper balance between the benefits from a convention in a changing economic environment (as a requirement of commutative justice)."

In the same regard, it is noted[6] that "the theory of unpredictability should be recognized to the extent that contractual obligation is not liable to execution, when circumstances in which it had to be performed are radically different from that assumed by in the contract. In this respect, it should be considered if the obligation has lost its identity, checking if changes in circumstances were not integrated in counterparty risk. Variation of the circumstances and therefore, new tasks affecting the execution, are part of the contractual risk that will incur for the debtor of the obligation impossible to be executed, in the absence of contrary provisions."

In our opinion, the unpredictability theory operated even in the past, with the legal basis provided by article 970 Civil Code, which stated that all contracts must be performed in good faith and in accordance with equity. In such conditions, it can be inferred that the parties assume an obligation given a particular economic environment that will remain unchanged during the execution of the contract. On the other hand, the execution of an obligation that is disproportionate to the obligation of the contracting party, thus leading to his economic ruin is contrary to both fairness and good faith.

Also, given that contractual imbalance is caused by objective factors, insurmountable, that exceeds the will of the parties or actions it can be assimilated by analogy with a case of force majeure.

Present Civil Code, which came into force on 1 October 2011, has removed these controversies, expressly stating the unpredictability theory in article 1271 paragraph 2.

In the doctrine[7] it is considered that the role of contractual unpredictability is to restore the interest for execution of the contract under the new circumstances by adapting it, and if the contracted goal cannot be achieved to reach cancellation of the contract, by equitable distribution of risks between partners.

Therefore, we can state that the institution of unpredictability is a legal instrument that aims at nurturing the contractual partner unfairly affected by the unexpected evolution of the economic and financial context and to practically divide risks between both contracting parties.

We note that the legislator has regulated relatively in detail the conditions required to be met in order to reconsider the contractual clauses and under which can operate the judicial review for unpredictable circumstances.

The substantive conditions that must be fulfilled in this regard are provided in article 1271 paragraph 3 of the Civil Code: "the change of circumstances occurred after signing the contract and these changes and their extent were not and could not be considered reasonably by the debtor at the time of signing.

Another condition requires that the debtor has not assumed the risk of changing circumstances, nor could reasonably be considered to have assumed the risk. Not least, in order for the legal text to be operable, it requires the debtor to have tried within a reasonable time and in good faith the negotiation of fair and reasonable adaptation of the contract.

As noted in the specialized literature[8], theory of unpredictability usually address synallagmatic, commutative and with successive execution contracts, but we consider that it could address even a contract with uno ictu execution, to the extent that the circumstance interrupting the contractual balance occurs thereafter, but before the time that obligations of the parties had to be executed. However, this theory is compatible with some unilateral contracts because in their case it would be possible to address the problem of equitable distribution of losses that would result from an outside fact that caused the performance to become excessively onerous for the debtor.

Returning to the conditions imposed by the legislature for this legal construction to be operational, we notice that is required that the event which generated the imbalance between benefits have occurred after the signing of the contract, otherwise, if disproportion exists at this time, we are in the realm of the lesion, the vice that affects the validity of the contract.

In the consideration of this aspect, changes incurred should have a major impact for the development of contractual relations, the text thus removing the possibility that if it was only a mere monetary fluctuation or unimportant economic variation, to be able to call in abusively to this rule.

Thus, the obligation assumed initially must be radically different, became injurious to the party which obliged itself under the implied condition that the economic situation existing at the time of the contract will remain the same throughout the execution.

Therefore, if the debtor is placed in a very difficult economic position, and maintaining the contract in this form anticipates the company entering into insolvency, it is a case in which this institution will apply.

The impact of these changes will be considered by the judge specifically, however, we consider that it was appropriate for the legislator to draw some criteria by which to determine the severity of change or to define explicitly what implies the exceptional nature of the change.

Leaving this requirement strictly at the discretion of the panel of judges, there will be conflicting solutions in practice because in assessing a criterion obviously it intervenes a subjective shade, and what may seem serious for a judge, may be considered an assumed risk by another.

Thus, we make a legislative proposal to establish a criterion expressly stated in the law according to which imbalance of the benefits is considered unpredictable in order to avoid a contradictory interpretation that will generate a variable case law.

Subsequent and complementary to the prior condition is the requirement set by the legislator that the debtor does not assume the risk of changing circumstances or cannot be reasonably assumed that he foreseen such a risk.

Although the reasonableness and good faith of contract are concepts open and lacking in tradition in Romanian law, the doctrine reported that the meaning of the term reasonable shall be assessed abstractly, as a bonus pater familias, and not related to the personal characteristics of the debtor[9].

Therefore, the contractual obligation of one party is not liable to execution, given the circumstances in which it should have been executed are radically different from those assumed in the contract, compared to the financial crisis whose effects are perpetuated from 2009 until present.

The financial crisis, a situation otherwise unpredictable, was not and could not be considered reasonably, upon the signing of the convention, is undoubtedly a cause that generates the necessity of adapting the contract.

It is necessary, as shown in the interpretation of the law, that debtor does not have assimilated, for example, the responsibility for force majeure, or have accepted the execution of the contract even in case of occurrence of an unforeseeable event.

In the event that the debtor had the possibility of changing the circumstances at the time of signing the contract, the conditions expressly stipulated by article 1271 of the Civil Code are not met, context in which the party is bound to execute the new obligation, even if it appears to be clearly more burdensome than originally assumed.

The text of the law becomes inoperative in the situation where the parties have provided a hardship clause, as named in Anglo Saxon law and international trade law.

As appreciated in the specialized literature[10], hardship means the obligation of the parties to renegotiate in order to adapt the contract, or to resort to a third party if during execution of the contract there is a circumstance whatsoever and without fault of any of parties, which seriously affects contractual equilibrium with substantial impairing effect of the execution of the contract for at least one of the parties.

We see therefore that, in the situation where parties have inserted a clause that commits to revise its contractual obligations due to major economic or monetary changes, contractual balance can be reinstated.

Finally, for unpredictability to operate, it is necessary that the debtor attempted in a reasonable time and in good faith the negotiation of fair and reasonable adaptation of the contract. In this sense, it is highlighted the consequence of loyalty and contractual cooperation, obligations derived from the very principle of binding force of the contract.

Relative to this condition, the debtor has the obligation to notify the creditor about the incidence of unpredictable events that essentially transforms the obligation and to attempt to amiably resolve the repositioning of the convention.

In specialized literature[11] it is considered that the contract adaptation occurs through negotiations conducted in good faith, at the request of the party invoking hardship. This party can propose methods of adjusting the contract and the other party may make counter proposals. When the parties agree on the existence of hardship and on the methods to adapt the contract to the new conditions, the relations between the parties continue in the new terms agreed. If the parties are unable to agree on the existence of hardship, or on how their obligations should be adjusted, then the dispute will be settled according to the contract, or in the absence of express provisions, by the competent court.

In the event that the conditions provided by law are met, the unpredictability clause results in the adaptation to the new circumstances or contract termination, at the time and under the conditions determined by the court.

Pursuant to Article 102 paragraph 1 of Law no. 71/2011 “the contract is subject to the law in force at the time it was signed, in all respect of the interpretation, effects, execution and termination of it.” Furthermore, article 107 of Law no. 71/2011 expressly provides that the provisions relating to unpredictability from article 1271 of Civil Code applies only to contracts concluded after its entry into force.

However, the interpretation of article 102 of the cited Act provides that the modification of the contract will be achieved in compliance with all requirements of the law in force at the date of modification.

In this regard, the parties have the opportunity to sign an addendum by which to give efficiency to the unpredictability theory in accordance with the law.

Despite the text of the law that requires certain improvements, as noted above, there were opponents[12] of this legal construction that considered this solution is inadequate and vanguard, in consideration of that positive laws of states with kindred law system are hostile to this institution, and legal propositions treats the institution of unpredictability with some reluctance and with a little more pragmatism.

The same author proposes as model the New French Civil Code, according to which “if there is a change in circumstances, unpredictable and insurmountable that converts the obligations for one

side in a way that makes the execution unduly onerous and it did not assumed that risk, this party may require a renegotiation of the contract, but must continue to perform its obligations during the renegotiation. In case of refusal or failure of renegotiations, the judge may, if the parties agree, proceed to the adaptation of the contract or to terminate it at the time and under the conditions laid down by the court."

Although it is difficult to accept the intervention of the court among the terms set by the parties, given that the obligations defeat the principle of contractual equilibrium, this solution is essential to avoid bankruptcy of one party and the enrichment of the other.

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