

## SHORT CONSIDERATIONS ON MANIFESTATIONS OF AUTONOMY OF WILL: CONTRACTUAL NEGOTIATION AND IMPREVISION

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**Abstract:** *Considered in the past a mandatory phase before the conclusion of any contract, the negotiation seems to have lost its importance with the spread of adhesion contracts that seem to fit with the demands of an increasingly dynamic society, where human time and resources are placed on a pedestal, and the real will of the parts is placed in a shadowy cone. As one of the components of contract formation, negotiation, at least as far as consumers are concerned, seems to have taken the form of the right to information of any party wishing to enter into a contractual relationship or to be limited to refusing to contract and looking for another co-contractor that can get closer to what is envisaged by each future party of an unformed contract. Although these are certainly manifestations of autonomy of will, it is easy to note that the classical scheme of the contract has undergone some changes, adapting to the new social realities. At the same time, by imposing itself as an exception from the "pacta sunt servanda" principle, the theory of imprecision, around which lies jurisprudential uncertainty, proposes, under certain cumulative conditions, the solution to the adaptation of conventions affected by a contractual imbalance. The same remedy solution for the adaptation of the contracts is provided, this time as an alternative, and in the case of error as a vice of consent, the parties being able to choose in favor of the "survival" of the invalid concluded contract.*

**Key words:** *contract negotiation; imprecision theory; error; autonomy of will.*

### Preliminaries

Negotiation, as the distinct contractual phase and precursor to the conclusion of the contract, is the opportunity for the parties to be free to manifest their highest degree of autonomy of will, by making known to the other parties, most of the times directly, their expectations, the aim pursued, the desired execution method and the refiguration of the contractual clauses.

Often of a confidential nature, which may also impact the determination of the purpose that the parties have pursued for contracting, this pre-negotiation phase tends to be less and less present, and even to be missed if we consider the relative number high adhesion contracts.

The lack of the negotiation phase sometimes leads to hardships in the development of the contractual relationship, which is why both institutions, that of vice of error and imprecision play an important role, as they have in common a circumstance or circumstances that were not taken into consideration by the contracting parties at the time of expressing the agreement of will, assisting the

parties in adapting the contract and reviewing certain legal effects, thus putting highlights on the principle of autonomy of will and giving the parties the chance to maintain their contractual relations, but in a manner consistent with the purpose pursued since the conclusion of the convention.

Although in terms of the representation that the parties had in mind at the time of contracting, the two concepts can be difficult to differentiate, they are subject to distinct conditions and they have their own characteristics, which allows them, under a careful analysis, to be distinguished.

## **1. Negotiation and formation of contracts**

Obviously, on the occasion of the contractual negotiations, the agreement of the will of the future contracting parties is not yet reached, so that we are in the presence of the consent, but they bring the way the will is to be given into discussion.

It has been judiciously shown in the specialty literature that the existence of consent, a condition for the validity of contracts, is not terminologically given by the meeting of two concordant wills, but it must consist of true statements of intent (to contract), known as offering and acceptance. (Zimmermann, 1996: 554)

Although, as we have shown, the autonomy of the parties will regain importance once they are placed at the negotiating table, but it is not to be interpreted as meaning that the parties are free to adopt behavior that is not circumscribed by certain requirements.

Thus, the current civil coding imposes from this pre-contractual phase the principle of conducting the negotiations in good faith, stemming from the need for mutual trust (Juanita, 2008: 16), the will of the parties being censured in the sense that they will not be able to limit or exclude this obligation, even if all contractors would express their agreement in this respect, art. 1183 par. 2 the final sentence of the Civil Code being an imperative norm.

Conduct contrary to the principle of good faith will not remain unsanctioned, even if it occurs prior to the actual formation of the contract, the present regulation stipulating that the party acting in the sense prohibited by law may be required to repair the damage caused.

The new civil code takes over the doctrine (Maurie & Aynes & Stoffel-Munk, 2009: 247-248) and jurisprudence of French origin, where previously it was suggested that it would be a prejudice in this respect, among other things, the unreasonable rupture of negotiation relations.

We appreciate that, in the absence of the conclusion of a convention, which strictly deals with the negotiation phase, being in the pre-contractual realm, in this case the tort liability of the parties will be attributed, and the intention, the unlawful act, the damage caused as a result of its existence and the causal link must be proved.

Another opinion was issued (Radu, 2010: 126), taken from German law, that if we are in a situation of a pre-contractual obligation, in case of violation, it would give rise to an obligational legal relationship.

## **2. Application of the rebus sic stantibus rule – still an innovative concept in Romanian private law**

The "pacta sunt servanda" principle, on which civil law is based, implies that the parties engaged in contractual relations have to respect the clauses to which they have adhered with the binding force of law, since deviations from the performance of a contract are not permitted in the absence of a new agreement of will.

Exceptions have been made to this rule as regards both the extension, beyond the will of the parties, of the effects of a contract and their restriction as well.

The theory of imprevision implies that each contract has a tacit clause (or an implicit subsequent condition) that ends or modifies the binding force of the contract whenever a substantial change in state from the moment of contracting would cause its execution to be unfair (Rossen, 2015: 85).

Provided as an exception to the extension of the effects of contracts, the theory of imprevision, *rebus sic stantibus*, a concept that has been used in the public international law, began to make its presence known as a way to review the effects of conventions (Boroi, 2012: 212).

On the other hand, an institution with tradition in Romanian private law, around which practice and doctrine are already settled, the error, regarded as a vice of consent, is a cause of invalidity of the concluded contract and is provided under the sanction of nullity.

The idea that the effects of a contract could be changed without the need for a new agreement of the parties on this issue emerged from Roman law, so tributary to the principle of *pacta servanda*, where the breach of a promise (contractual) was difficult to conceive.

It has been taken into account that the expression of the will to contract is related to a certain set of circumstances and has been formed on the basis of certain assumptions, so that, if these were wrong, it would seem excessive that the part is still held by the same clauses (Zimmermann, 1996: 581).

Thus, the Roman philosopher Seneca (*De Beneficiis*: 3) is the one who envisions the idea that was later to be conceptualized into the theory of imprevision, which was also shared by Cicero in his work *Of officiis* (3, XXV, 95), which admitted that as a result of the occurrence of certain conditions during the performance of a contract, the debtor may no longer fulfill his obligation as contracted.

The theory is taken over by canonists in the 12th-13th centuries, and then Bartolus, under the name "*rebus sic se habentibus*", was the one who puts this notion in civil law, and this was taken up in other fields and used frequently for centuries.

Subsequently, imprevision enters a shadow cone, from where it is brought to light after World War I, in the context of which, due to the economic imbalance produced, difficulties arose in carrying out long-term contracts. The theory enters

both the European space, where it is incorporated in some codifications as well as in more remote territories, such as Brazil or Argentina.

In Romania, the theory of imprevision is regulated only in the current codification, starting with 2011, but even before this moment it enjoyed jurisprudential and doctrinal recognition, although it is not often used either as an argument in legal conflicts or as the basis of judgments, although including the supreme court, in a ruling (the Supreme Court of Justice - Decision No. 591 of 06 December 1994) states that it is "as a matter of principle that at the date of conclusion of the contract the parties have assumed obligations only in the extent of the consequences that they might have at the time".

Nowadays, with the entry into force of the new Civil Code and the explicit regulation of imprevision, the national courts, regardless of degree, proceeded to capitalize on the "rebus sic stantibus" theory, especially in lawsuits on the principle of monetary nominalism, where they considered that the overestimation of a foreign currency in relation to the national one directed the applicant to adjust a credit agreement.

Also, without further developing on the ontological dimension of the notion (Novak-Marcincin, Nicolescu, Teodorescu, 2015: 140-145), one should not ignore the approach of the Constitutional Court in Decision no. 623/2016, published in M. Oficial no. 53/18.01.2017, a binding decision for the courts, where in paragraph 96 it is stated that "the determination of the circumstances justifying the application of the unpredictability, a concept derived from the good faith that must characterize the performance of the contract, must be made taking into account the idea of contract risk. It should be analyzed from a bivalent point of view when it materializes; the contract itself entails an inherent risk assumed voluntarily by the two parties to the contract on the basis of their autonomy of will, a principle which characterizes the matter of the conclusion of the contract and an over-addendum which could not be in concreto the subject of foreseeing by none of them, a risk that goes beyond the foreseeing power of the contracting parties and which involves the intervention of elements that could not be considered at the time of a quo".

As regards the field of application, the theory of imprevision may be applied to onerous, commutative and of successive execution or affected by a suspensive term of execution contracts (Beleiu, 1993: 34-36), which in comparison with error, as a vice of consent, represents a much narrower field, by this means the legislature willing to protect the security of contractual relations, so that imprevision cannot be invoked in an abusive way, jeopardizing the trust people must bear when deciding to enter into contractual relations.

### **2.1. The necessary conditions for the intervention of the theory of Imprevision**

Seen as a means of aligning the economic and legal realities with the new challenges of the 21st century (Patru, 2011: 6), for the intervention of the theory of imprevision it is necessary for certain conditions resulting from the regulation of

the notion to be cumulatively fulfilled, thereby discouraging the abusive invocation or prevalence of it.

Thus, it is necessary that the contractual imbalance occurs after the conclusion of the contract, that this was not or could not have been reasonably foreseen by the debtor, at the time of conclusion of the contract, and that the debtor did not assume the risk of changing circumstances or can not be reasonably considered as such (Boroi, 2012: 214).

It is clear from the enunciation of these conditions that it is the essence of the imprevision that the circumstances that cause the contractual imbalance to occur after the conclusion of the convention, because in this case we are considering a will agreement that respects all the substantive and formal conditions in force.

Changes occurring during the performance of the contract must be external, objective, independent of the will of the parties (Tandareanu: 1), at the limit of force majeure, but without interfering with this notion, although there are theories in this respect.

### **3. Juxtapositions between error as vice of consent and the theory of imprevision**

Both the error as vice of consent, and the imprevision, aim at an erroneous interpretation by the debtor of the circumstances at the time of the conclusion of the contract.

However, in the case of error, the false representation of reality falls upon a decisive element at the conclusion of the contract, an aspect which implies its invalidity, whereas in case of imprevision the debtor concludes a valid contract in substance and form, but is "in error"-fails to predict the dynamics of external circumstances that could affect the performance of the contract exactly as it was taken into account at the time of the conclusion.

Since both institutions target psychological issues, in practice there may be probatory difficulties, which is probably one of the reasons why the legislator offered the possibility of adapting the contract in both cases.

Unlike the case of the error where the adaptation of the contract may also take place after the moment when the court is notified, in case of imprevision, the debtor is to try, as a prerequisite for the filing of the petition to sue, within a reasonable time and in good faith, to negotiate the adaptation of the contract, thus prevailing the will of the parties.

If the negotiation of the parties remains ineffective, the current legislation gives the debtor the possibility to go to the court in order to adapt the contract, but it was judiciously noted that it is not an identity with the adaptation of the contract under art. 1213 NCC, according to which, in order to avoid the invalidity of the error, a party declares that it understands to execute the contract as it was understood by the misleading party, but that it is actually a modification of the contract so that

losses and benefits resulting from changing circumstances are fairly distributed between parties (Tandareanu: 1-2).

We are witnessing one of the few cases where the legislator gives the courts the possibility to intervene in the parties' agreement and to modify it, in which case the device and the considerations of the decision will concretely show how the contract is changed.

Alternatively, as in the case of an error of consensus, if it finds that all the conditions of the imprevisión are fulfilled, but considers that it is not possible to adapt the contract, the court will be able to order the cessation of the contract, with all the subsequent consequences, including the eventual return of benefits.

Unlike the error, where the nullity penalty will operate retroactively, in case of imprevisión, the cessation of the contract will take place at the date and under the conditions set by the court.

## **Conclusions**

Of overwhelming importance, stemming from the principle of contractual freedom and autonomy of will, the pre-contractual phase of the negotiations, in the current socio-economic context that imposed a fulminant increase in the number of adhesion or standard contracts, seems to be present in the relations between natural persons, where most often there is no dominance by one of the parties, or between professionals when the presumptive contracts are intended to deal with other matters than those of daily use.

In the legal relations in which consumers are involved, the lack of negotiation, which is far from being equivalent to information on contractual provisions, is already a notorious fact, as the obligation to comply with new requirements related to the negotiation of contractual clauses, already transposed into our internal law, is imposed on our states at the European level.

In this context, the theory of imprevisión, although not a novelty in the Romanian legal system, still requires time to crystallize, but is welcomed in the context of current geo-political and financial insecurity, helping to maintain a climate of stability.

By regulating a jurisprudential and doctrinal creation related to the old codification, the legislator, with the express provision of imprevisión, offered the possibility of renegotiating the contract even during its execution, thus avoiding, on the one hand, an unfair solution regarding the abuse of a part dominant, and on the other hand, a new valence of the principle of autonomy of will. In this way, coming out of a cone of shadow, the principle of autonomy of will is rendered useful in the pre-contractual area, precisely where its manifestation was the most obvious.

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