

## A BRIEF OVERVIEW OF THE EFFECTS OF CONTRACTUAL IMPREVISION

I. Gânfălean, I. N. Gheberta

### Ioan Gânfălean

Faculty of Law and Social Sciences, Law Department  
"1 Decembrie 1918" University, Alba Iulia, Romania

\*Correspondence: Ioan Gânfălean, Faculty of Law and Social Sciences, 11-13, Nicolae Iorga St., Alba Iulia, Romania

E-mail: ioan.ganfalean@yahoo.com

### Ioana Nicoleta Gheberta

Faculty of Law and Administrative Sciences, the Law Department  
West University, Timisoara, Romania

\*Correspondence: Ioana Nicoleta Gheberta, Faculty of Law and Social Sciences, 11-13, Nicolae Iorga St., Alba Iulia, Romania

E-mail: [gheberta\\_ioanamicoleta@yahoo.com](mailto:gheberta_ioanamicoleta@yahoo.com)

### Abstract

*This study is aimed to review the provisions of article 1271 of the New Civil Code and, in particular, the effects of contractual imprevision. We have attempted to outline the possibilities that this relatively new institution which has appeared in the Romanian legal landscape makes available to the parties in view of restoring the contract equilibrium further to the occurrence of exceptional circumstances, namely the limits set for the subsidiary intervention of the court when negotiations fail.*

**Keywords:** *negotiation obligation, adaptation by negotiation, adaptation in court, termination of the contract, overcoming contractual risk.*

### 1. Introduction

The theory of contractual imprevision is a concept which arose vivid controversies, on account of the effects it produces. Initially, it was rejected under the Old Civil Code, taking into account the nominalistic principle, set in article 1578 in the matter of money lending agreements<sup>1</sup>; at a later time, it was proposed that this provision be interpreted as optional<sup>2</sup>, while some authors even wondered whether it had already become obsolete<sup>3</sup>.

All these disputes were ended by the New Civil Code, in article 1271<sup>4</sup>, which regulates the conditions and effects of contractual imprevision. In this text, the Romanian lawmaker aimed to align the domestic law to the standards promoted at European Union level, as the text relies on the provisions of article 6:111 of the Principles of European Contract Law<sup>5</sup>, and its

---

<sup>1</sup> This legal provision read: *The obligation arising from a money loan is always for the same value shown in the contract. Whenever the value of a currency increases or decreases, before the due date for payment, the debtor shall return the exact numeric amount it had borrowed and shall only return such amount in the specie in circulation at the time of payment.*

<sup>2</sup> R.I. Motica, E. Lupan, *Teoria generală a obligațiilor civile*, Lumina Lex Publishing House, Bucharest, 2008, p. 76; L. Pop, *Tratat de drept civil. Obligațiile. Contractul*, volume II, Universul Juridic Publishing House, Bucharest, 2009, p. 537.

<sup>3</sup> R.I. Motica, E. Lupan, *op.cit.*, p. 77.

<sup>4</sup> We mention that, based on Article 107 of Law no. 71/2011 for the application of Law no. 287/2009 on the Civil Code (published in the Official Gazette no. 409 of 10.06.2011), these provisions only apply to the contracts concluded after 1 October 2011, the date of coming into force of the Civil Code.

<sup>5</sup> Similar provisions are to be found in art. 6.2.1.-6.2.3. of the UNIDROIT principles of international commercial contracts.

## A BRIEF OVERVIEW OF THE EFFECTS OF CONTRACTUAL IMPREVISION

basis is represented by the concept of contractual justice<sup>6</sup>. In essence, imprevision or a posteriori prejudice<sup>7</sup> covers the prejudice incurred by one of the contracting parties further to a significant value imbalance which occurs between the performances of the two parties, in the course of contract performance, on account of currency value differences or other circumstances, provided that the generating effects do not make the contract unenforceable, but make the contract performance excessively onerous for one of the parties<sup>8</sup>.

### 2. Adaptation by negotiation - the main objective targeted by the parties

In virtue of the principle of contractual freedom, the parties are entitled to “integrate the future”<sup>9</sup> by way of indexation or adjustment (hardship) clauses<sup>10</sup> by which, anticipating the unforeseeable event and the relevant costs, the parties agree on the manner of restoring contractual equilibrium: by way of indexation, two economic values are correlated in order to maintain over time the present value of contractual obligations, this indexation being applied automatically, as opposed to the second category of clauses, which involve an active involvement of the contracting parties, due to the express commitment to readjust, from time to time, the correspondent performances of the parties, given the changes in contractual circumstances. However, in such a case, the mechanism of imprevision cannot be applied, the parties relying instead on the mentioned clause, in virtue of the principle of the binding force of the contract, regulated by article 1270 of the New Civil Code.

Therefore, this study aims to identify the options that contracting parties have lacking such clauses, namely what measures can be ordered by a court called to revise a convention whose equilibrium was broken.

Any of the effects generated by contractual imprevision requires certain conditions included in paragraph 3 of article 1271 to be met; depending on their level of dependency on the activity of the parties, we may discuss a two-fold classification of such conditions<sup>11</sup>. Thus, it is necessary that an *exceptional external cause* occurs which affects a *validly concluded synallagmatic contract in progress* and which makes the performance *excessively onerous* and *obviously unfair for one of the parties* (objective conditions); there are two more *subjective conditions*: the debtor should not have expressly assumed the risk of changes in circumstances and such assumption cannot be reasonably inferred, namely the debtor should have attempted, in a reasonable time and in good faith, to renegotiate the contract.

The scope of this institution does not include unilateral legal acts and deeds, but only bilateral or unilateral contracts to be performed in time, with the exception of aleatory contracts by nature or by the will of the parties. This difference leads to practical implications, as in the case of unilateral contracts a party may only request the decrease of its performance or a change of the manner of performance, while synallagmatic agreements allow, in addition, the possibility to request the court, as provided by law, to order the termination of the contract<sup>12</sup>, proposals having also been made to only apply the theory of imprevision to commutative contracts and to contracts of successive performance<sup>13</sup>.

In what regards the imbalance prone to initiate a discussion on the concept of imprevision, it was shown that it may result either from an excessive disproportion between

---

<sup>6</sup>Cristina Elisabeta Zamșa in Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *Noul Cod civil – comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2012, p. 1331.

<sup>7</sup>L. Pop, I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile – conform Noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2012, p. 154.

<sup>8</sup>O. Lando, H. Beale, *Principles of European Contract Law. Parts I and II. Combined and Revised*, Kluwer Law International Publishing House, The Hague, 2000, p. 325.

<sup>9</sup>Y. Picod, *Le devoir de loyauté dans l'exécution du contrat*, L.G.D.J. Publishing House, Paris, 1989, p. 204.

<sup>10</sup>R.I. Motica, E. Lupan, *op.cit.*, p. 76; L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 155; P. Vasilescu, *Drept civil. Obligații – în reglementarea Noului Cod civil*, Hamagiu Publishing House, Bucharest, 2012, p. 455-456.

<sup>11</sup>P. Vasilescu, *op.cit.*, p. 457.

<sup>12</sup>D. Dobrev, *Impreviziunea, o cutie a Pandorei în Noul Cod civil?*, in Marilena Uliescu (coord.), *Noul Cod civil. Comentarii*, second edition reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2011, p. 212.

<sup>13</sup>*Ibidem*, p. 218.

the performances of the two parties or from the contract exhausting its usefulness<sup>14</sup>. Regarding the first aspect, we have to mention that the concept does not refer to a mathematical imbalance, but takes into account a series of criteria which, in aggregate, allow one to find that the items of the object of the contract no longer concur to the performance of the contract. In what regards the exhaustion of contract usefulness, this may be inferred from the disappearance of cause in the course of contract performance, as the continued existence of the cause is of interest in verifying the efficacy of contracts in time.

The doctrine issued prior to the entry into force of the New Civil Code claimed that imprevision shall determine the revision of the contract and that the relation between the two concepts - *revision* and *theory of imprevision* - is a whole-part relationship<sup>15</sup>. In a broad sense, contract revision includes imprevision in its content and also aims at other court or legal interventions or amicable settlements in the contract performance stage. In a restricted sense, revision involves, as the doctrine has emphasised<sup>16</sup>, a single effect: *change of quantity of performance*. In the opinion of the same author, the concept of revision (*lato sensu*) survives the entry into force of the New Civil Code, having a “peaceful” coexistence with the solution of *adaptation* of the contract mentioned in the contents of article 1271<sup>17</sup>.

Prior to the adoption of the New Civil Code, the effects of the theory of imprevision have been proposed and analyzed in detail<sup>18</sup>: cessation of the contract by way of termination/rescission for cause of imprevision; contract suspension; extension of the contract duration; performance by anticipation of the debtor’s obligation; amicable conciliation of the parties; *stricto sensu* revision or direct court intervention with two options: for the purpose of setting limits to the revision of performance and for the purpose of exact determination of the value of performance; the establishment of an obligation to renegotiate the contract or direct court intervention; intervention of the lawmaker by way of regulation, in specific fields, of the limits of *stricto sensu* revision of performance.

By analysing the content of article 1271 of the New Civil Code, the current effects of imprevision may be deduced: adaptation of the contract by negotiation; contract termination by mutual agreement of the parties - both are *principal effects*, namely they have priority, as compared to contract adaptation or contract termination by court intervention - which are *subsidiary effects* of imprevision. At the same time, a party could previously claim a direct court intervention by setting an obligation to renegotiate the contract; however, currently, by corroborating paragraphs 2 and 3 of article 1271 of the New Civil Code, a conclusion may be drawn that the court intervention will always be subsidiary and subsequent to the attempt to amicably settle the dispute between the parties by way of negotiation [art. 1271 paragraph (3) letter d)]. The introduction of an obligation to negotiate prior to any court intervention is a proof of prudence on account of the lawmaker in what regards the amendment of a contract which is and needs to remain, first of all, the responsibility of the parties<sup>19</sup>.

Thus, the contracting parties should attempt to restore the contract equilibrium amicably<sup>20</sup>, which also triggers a *related obligation*<sup>21</sup>: the party aiming to invoke imprevision

---

<sup>14</sup> For details, see Anne-Sophie Laverfve Laborderie, *La pérennité contractuelle*, L.G.D.J. Publishing House, Paris, 2005, p. 396-399, L. Thibierge, *Le contrat face à l'imprévu*, Editura Economica, Paris, 2011, p. 368.

<sup>15</sup> Cristina Elisabeta Zamșa, *Efectele impreviziunii: adaptarea și încetarea contractului, între negociere și litigiu, prezent și viitor* in R.R.D.A. issue 7/2009, p. 36. The concept of *revision* is also included in the French doctrine; see Anne-Sophie Laverfve Laborderie, *op.cit.*, p. 103; R. Reviriot, *Le droit privé français et la théorie de l'imprévision: Essai sur un aspect de l'interprétation de la loi*, thesis, G. Mathieu Printing House, Nice, 1951, p. 93.

<sup>16</sup> C. Stoyanovitch, *De l'intervention du juge dans le contrat en cas de survenance de circonstances imprévues*, thèse, Marseille, 1941, p. 182 *apud* Cristina Elisabeta Zamșa, *op.cit.* (2009), p. 36.

<sup>17</sup> In supporting this idea, historical and legal arguments have been brought; in detail, see Cristina Elisabeta Zamșa, *op.cit.* (2009), p. 37.

<sup>18</sup> Cristina Elisabeta Zamșa, *Teoria impreviziunii. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, Bucharest, 2006, p. 180-230. For a brief overview of comparative law in the matter of imprevision, see E. Chelaru, *Forța obligatorie a contractului, teoria impreviziunii și competența în materie a instanțelor judecătorești*, in *Dreptul Magazine*, issue 9/2003, p. 52-53.

<sup>19</sup> O. Lando, H. Beale, *op.cit.*, p. 324.

<sup>20</sup> The adoption of such conduct is also encouraged by the editors of the Draft Code of European Contract Law; see, O. Lando, H. Beale, *op.cit.*, p. 324.

## A BRIEF OVERVIEW OF THE EFFECTS OF CONTRACTUAL IMPREVISION

shall have previously notified the counter party on the difficulties it encounters in the performance of the contract, in order to avoid prejudice-generating operations undertaken based on a false belief that the contract can be maintained.

As noticed in recent doctrine<sup>22</sup>, the wording of article 1271 of the New Civil Code appears to leave the initiation of negotiations to the debtor, however we believe that the opinion according to which one cannot exclude the possibility that negotiations are initiated by the creditor, should the latter aim to maintain the contractual relation, is grounded<sup>23</sup>. Analyzing the content of article 1271 paragraph (3), the limit of the negotiation obligation becomes evident: *reasonable and fair adaptation of the contract, in a reasonable time*. Due to the various and complex situations which may be encountered in practice, no period was fixed for the parties to reach an agreement on restoring the contract equilibrium, the text only making reference to the concept of *reasonableness*. The court is left to judge on whether this requirement was met, as the court verifies whether the conditions to apply paragraph 2 of article 1271, by way of the court intervention in the contract, have been met.

A first item to be emphasized in this context is that *there is no need to send a notice of delay to the debtor*<sup>24</sup> as this would be against the logic of the imprevision mechanism, which does not involve the debtor being notified on its failure to perform, but, instead, the debtor playing an essential role, as the debtor usually proposes solutions on the contract's future existence.

The Romanian doctrine qualifies the negotiation obligation as *a diligence obligation*, arising from the loyalty and cooperation obligations deduced from the *principle of binding force of the contract*<sup>25</sup>. Recent French doctrine has brought certain detailed interpretations: on the one hand, it involves the achievement of a specific result, in what regards the conduct to be adopted by the parties, and the duty of best efforts, in what regards the purpose aimed at in the negotiations - to reach a compromise, the parties being held by good faith to make their best efforts to save the contract, without necessarily the negotiations resulting in an agreement; on the other hand, it was stated that it is preferred to use the concept of *duty of negotiation*, as any obligation involves a *debitum* and a *obligatio*, an active and a passive subject, and renegotiation cannot be a receivable for one of the parties and a liability for the other party, each party being able to be both the creditor and the debtor of the renegotiation obligation, and this duty is not subject to the general regime of obligations, as it cannot be assigned or enforced<sup>26</sup>.

The underlying principle of the renegotiation obligation - *the principle of good faith* - may be regarded as an ethical instrument allowing the existence of a general obligation to renegotiate. In this case, a court intervention could be possible, but only to verify whether a party's refusal to take part in the negotiations is a breach of the good faith obligation which could be sanctioned on grounds of contractual liability or not<sup>27</sup>.

The renegotiation obligation is the highest form of contractual solidarity<sup>28</sup>, but is not unlimited, as it ends where the debtor's obligation begins. The debtor shall be deemed to manifest a disloyal conduct and therefore act in bad faith when it asks for the adaptation of the contract, being aware that the contract equilibrium has been fully compromised and the only option is to terminate the contract<sup>29</sup>. At the same time, loyal renegotiation does not involve an obligation to maintain the contract, but an obligation to prove contract communion, as the creditor is liable only to make proposals allowing the alleviation of the imbalance, and cannot

---

<sup>21</sup>R. Reviriot, *op.cit.*, p. 117.

<sup>22</sup>Cristina Elisabeta Zamșa in Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit.*, p. 1331.

<sup>23</sup>L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 160. This is also mentioned in the commentary to Article 6:111 of the Principles of European Contract Law; see O. Lando, H. Beale, *op.cit.*, p. 326.

<sup>24</sup> Cristina Elisabeta Zamșa, *op.cit.* (2006), p. 191-193.

<sup>25</sup>L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 159-160.

<sup>26</sup> L. Thibierge, *op.cit.*, p. 448-450.

<sup>27</sup> F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 11<sup>th</sup> edition, Dalloz Publishing House, Paris, 2013, p. 522.

<sup>28</sup>Y. Picod, *op.cit.*, p. 213.

<sup>29</sup>*Ibidem*, p. 228.

be obliged to sacrifice its own interest; not lastly, the creditor cannot refuse in block all the debtor's proposals in an attempt to maintain the initial contractual situation, as this would represent a breach of the renegotiation obligation, in bad faith. Also, a party's conduct cannot be duplicitous or aim at delaying or fraudulent effects.

Based on the content of article 1371 of the Preliminary Draft on the Reform of the Law of Obligations and of the Law of Limitations (Catala Preliminary Draft)<sup>30</sup>, the French Doctrine<sup>31</sup> claimed the sanctioning of the party in breach of its obligation to negotiate in good faith the contract by payment of *punitive damages* in an amount to be established based on the benefits obtained by the respective party.

Therefore, good faith needs to exist for the entire duration of negotiations, in order to avoid a result potentially opposite to the desired one, by worsening the debtor's position further to the creditor obtaining additional unjust gains. The foremost purpose of negotiations is to restore the parties in a relatively balanced position. In order to achieve this, the parties have a wide range of possibilities available, as they may adapt the contract in terms of the performance due, by the way of decreasing or increasing their quantity or by rescheduling the performance, for example by extending the initial term of performance.

The result of negotiations shall be included in an *addendum* to the initial contract<sup>32</sup>, and it would be impossible to claim that a novation took place, lacking an agreement between the parties to the contrary, given the provisions of article 1610 of the New Civil Code: *Novation is never presumed. The intention to novate should be unquestionable.* At the same time, the effects resulting from this manner of changing the obligation - settlement of guarantees, loss of exceptions or remedies arising from the initial contract - could not have been considered by the parties at the time of negotiation of the contract, as the parties aim to salvage the initial agreement, all its elements included. In fact, as the doctrine suggestively calls it, a "double fungibility" takes place<sup>33</sup>: the substitute object is fungible for the initial object, and the cause, understood as contract purpose, is not changed.

Should the parties fail to remedy the imbalance which has occurred, and the contract purpose has been completely exhausted, the contract having become "sterile"<sup>34</sup>, the parties may find the contract terminated by *contrarius consensus*<sup>35</sup>.

### 3. Limits of court intervention in terms of imprevision

The revision of the contract in court, on grounds of imprevision, expresses a change to its contents, by court intervention, at the request of one of the parties, in order to reassess the mutual performances of the parties whose equilibrium was broken<sup>36</sup>; it relies on the *principle of good faith*, plus the *demonstrative principle of contractual solidarity*<sup>37</sup>.

The court intervention in contracts was long regarded with reluctance<sup>38</sup> both by the doctrine and in practice, and the supporters of this possibility have tried to ground their opinion on the

---

<sup>30</sup>This article provides that: *A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the court may in its discretion allocate to the Public Treasury. A court's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages must not be the object of insurance.*

<sup>31</sup> L. Thibierge, *op.cit.*, p. 472.

<sup>32</sup> L. Thibierge, *op.cit.*, p. 464.

<sup>33</sup> A. Ghozi, *La modification de l'obligation par la volonté des parties*, thèse, préf. D. Tallon, L.G.D.J., 1980, p. 33 *apud* L. Thibierge, *op.cit.*, p. 465.

<sup>34</sup> L. Thibierge, *op.cit.*, p. 493.

<sup>35</sup> As it was shown, this wording is to be preferred over *mutuus dissensus*; see, Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Drept civil. Obligațiune*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 395.

<sup>36</sup> L. Pop, *op.cit.*, p. 536.

<sup>37</sup> *Ibidem*, p. 540.

<sup>38</sup> Reluctance in granting the court the power to analyze a contract affected by unforeseeability is surprisingly found even in drafts aiming to reform the matter of obligations; thus, article 1135-1 from Catala Preliminary Draft provides that: *In contracts whose performance takes place successively or in instalments, the parties may undertake to negotiate a modification of their contract where as a result of supervening circumstances, the original balance of what the parties must do for each other is so disturbed that the contract loses its point for one of them.* As it can be observed, the role of the court is limited to the possibility to order the negotiation of the contract between the parties and to sanction a failure of such negotiations.

## A BRIEF OVERVIEW OF THE EFFECTS OF CONTRACTUAL IMPREVISION

rediscovery of an already existing principle – *the principle of good-faith performance of the contract*<sup>39</sup>, which relied on the content of article 970 of the Civil Code (1864)<sup>40</sup>.

The possibility of *adaptation* of the contract *in court* has been expressly provided in the current article 1271 paragraph 2 letter a) of the New Civil Code, thus putting an end to past discussions according to which it would introduce a factor of legal uncertainty and would give way to arbitrary interpretations<sup>41</sup>.

Particular attention shall be paid to assessing the risk which was or was not previously taken by the debtor. This situation may be overcome in two ways<sup>42</sup>: either by the occurrence of an event which involves a risk that was not taken, or by the importance attached to the risk taken, in virtue of usual foreseeing rules being circumvented by the circumstances of its actual manifestation. The extent of the risk the debtor should have rationally assumed can only be inferred from the entirety of circumstances existing at the time of conclusion of the contract, taking into account the speculative nature of the contract (the higher it is, the more important will the risk be presumed to be), the situation of the parties, the potential initial imbalance between the performances and each party's attitude (for example, the performance of obligations without reserves, the conclusion of new contracts, the initiation of offers to change the agreement, as the debtor is the best "judge" of its own risk)<sup>43</sup>. As opposed to the adaptation by negotiation, whose purpose or content is left to the discretion of the parties, the mentioned text introduces *expressis verbis* the purpose of contract adaptation in court, with reference to the criterion of *fairness*.

In addition, other four sub-criteria were proposed<sup>44</sup> in order to provide guidance to courts in distributing losses and benefits: the criterion of *equivalent performance*, the criterion of *mutual performance*, the criterion of *commutativity*, plus the criterion of *proportionality*, which has been long debated by the French doctrine as well<sup>45</sup>. The correction ordered by the court in view of adapting the contract should aim at the "absorption" of the gap between the usual profit resulting from the differences in the "risk sphere" to which the parties have consented and the undue profit generated by imprevision<sup>46</sup>. Thus, in order to achieve an equitable distribution of benefits and losses, it is necessary that the debtor bears the portion which reduces its profit margin to zero, and the creditor bears the portion which exceeds the cost of performance<sup>47</sup>.

In the same context, we believe the solutions proposed in the comments to the Principles of European Contract Law useful, as they attempted to provide milestones in order to avoid slippages in the case law<sup>48</sup>:

- - dismissal of the request to revise the contract when the "remedy" proposed would be worse than the already existing imbalance; for example when, further to revision, a *hardship* is created for the contracting party which was not initially affected by imprevision;
- changes to contract clauses should ensure the restoration of the contractual equilibrium so that the additional cost generated by the unforeseen circumstances be shared equitably;
- extension of the performance period, increase or decrease of the price, quantities;
- if the core objective - to maintain the contract - can no longer be reached, the court should take into account such obligations that were already performed when setting the contract termination date;

---

<sup>39</sup> Cristina Elisabeta Zamșa, *op.cit.* (2009), p. 44.

<sup>40</sup> The legal text provided: "(1) Agreements must be performed in good faith. (2) They shall bind the parties not only to their express provisions, but to all consequences which the respective obligations arise, according to their nature, in equity, custom or law".

<sup>41</sup> For a presentation of the case law discussing contract unforeseeability prior to the adoption of the New Civil Code, see E. Chelaru, *op.cit.*, p. 55-57.

<sup>42</sup> R. Reviriot, *op.cit.*, p. 93.

<sup>43</sup> *Ibidem*, p. 94-95.

<sup>44</sup> Cristina Elisabeta Zamșa, *op.cit.* (2006), p. 211-213.

<sup>45</sup> Laurence Fin-Langer, *L'équilibre contractuel*, L.G.D.J. Publishing House, Paris 2002, p. 367.

<sup>46</sup> L. Thibierge, *op.cit.*, p. 455.

<sup>47</sup> *Ibidem*, p. 454.

<sup>48</sup> O. Lando, H. Beale, *op.cit.*, p. 326-327.

- the payment of an indemnification for a certain period and finding the contract terminated upon the expiry of the agreed deadline; not lastly, the court may order the payment of additional amounts<sup>49</sup>.

However, there is a limit imposed on the court, which cannot be ignored: further to the approach taken in order to restore the “balance” of contractual performance, the parties cannot be obliged to accept a different contract. The “correction” applied to the agreement cannot be a novation, as the purpose is not to settle the initially provided obligation and then create a new obligation; at the same time, there is no *animus novandi*, the contractual relationship is not broken but, on the contrary, the parties’ will is for it to be maintained<sup>50</sup>.

Whenever the unforeseeable event cannot be qualified as *ominous*, but as *nullifying*<sup>51</sup>, there is no option for the court but to order the termination of the contract, at the time and under the conditions it establishes [article 1271 paragraph (2) letter b)]. On the other hand, termination may be triggered by the parties’ failure to reach an agreement and upon the express request of at least one of the parties for the court to order the termination of the contract. For this last effect of imprevision to be put into practice, the court needs to pay particular attention to the distribution of losses so that, after ordering the termination of the agreement, such termination is not fully borne by the party not affected by the change in the contractual circumstances, as the other party shall bear the normal risk arising from the performance of its obligations.

#### 4. Conclusions

Long repudiated, always controversial, *the theory of imprevision* seems to have won in doctrine and case law arguments, finding legal consecration in article 1271 of the New Civil Code. In this study we were concerned, in particular, about paragraph 2 of this text, making an analysis of the effects that the mechanism of imprevision may generate should the conditions of its application be met.

It is natural that the foremost effect remains the *adaptation by negotiation*, to the extent to which the contract may be salvaged, as it allows safeguarding the connection between the effectiveness of an agreement and the requirements imposed by moral or equity. By default, *court intervention* is only an *ultima ratio*, when the contract equilibrium cannot be restored amicably.

Due to its novelty, contract imprevision will continue to represent the source for new debates, therefore the subject remains open not only in terms of the effects it entails, but also in terms of its conditions and scope, and for this purpose the practice will play an overwhelming role.

#### Bibliography

1. F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 11<sup>th</sup> edition, Dalloz Publishing House, Paris, 2013
2. L. Pop, I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile – conform Noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2012
3. P. Vasilescu, *Drept civil. Obligații – în reglementarea Noului Cod civil*, Hamagiu Publishing House, Bucharest, 2012
4. Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *Noul Cod civil – comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2012
5. Marilena Uliescu (coord.), *Noul Cod civil. Comentarii*, second edition reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2011
6. L. Thibierge, *Le contrat face à l'imprevu*, Editura Economica, Paris, 2011

---

<sup>49</sup> This last option may be chosen by the court whenever the party affected by unforeseeability is the creditor, and not the passive subject of the obligation relation. This is consistent with the logic of article 6:111 of the mentioned Principles, as it refers to “parties”; therefore, in applying *ubi lex non distinguit, nec nos distinguere debemus*, the European lawmaker intended to apply the mechanism of unforeseeability to both contracting parties, as opposed to the Romanian text which only covers the situation of the debtor.

<sup>50</sup> G. Piette, *La correction du contrat*, Presses Universitaires d’Aix-Marseille Publishing House, Paris, 2004, p. 599.

<sup>51</sup> This “scale” of intensity belongs to the French doctrine; see L. Thibierge, *Le contrat face à l'imprevu*, Editura Economica, Paris, 2011, p. 441.

*A BRIEF OVERVIEW OF THE EFFECTS OF CONTRACTUAL IMPREVISION*

7. Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Drept civil. Obligațiile*, Wolters Kluwer Publishing House, Bucharest, 2010
8. L. Pop, *Tratat de drept civil. Obligațiile. Contractul*, volume II, Universul Juridic Publishing House, Bucharest, 2009
9. Cristina Elisabeta Zamșa, *Efectele impreviziunii: adaptarea și încetarea contractului, între negociere și litigiu, prezent și viitor* in R.R.D.A. issue 7/2009
10. R.I. Motica, E. Lupan, *Teoria generală a obligațiilor civile*, Lumina Lex Publishing House, Bucharest, 2008
11. Cristina Elisabeta Zamșa, *Teoria impreviziunii. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, Bucharest, 2006
12. Anne-Sophie Laverfve Laborderie, *La pérennité contractuelle*, L.G.D.J. Publishing House, Paris, 2005
13. G. Piette, *La correction du contrat*, Presses Universitaires d'Aix-Marseille Publishing House, Paris, 2004
14. E. Chelaru, *Forța obligatorie a contractului, teoria impreviziunii și competența în materie a instanțelor judecătorești*, in Dreptul Magazine, issue 9/2003
15. Laurence Fin-Langer, *L'équilibre contractuel*, L.G.D.J. Publishing House, Paris 2002
16. Lando, H. Beale, *Principles of European Contract Law. Parts I and II. Combined and Revised*, Kluwer Law International Publishing House, The Hague, 2000
17. Y. Picod, *Le devoir de loyauté dans l'exécution du contrat*, L.G.D.J. Publishing House, Paris, 1989
18. R. Reviriot, *Le droit privé français et la théorie de l'imprévision: Essai sur un aspect de l'interprétation de la loi*, thesis, G. Mathieu Printing House, Nice, 1951