Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 9 (58) No. 1 - 2016

THE THEORY OF UNPREDICTABILITY "NON HAECIN FOEDERA VENI"

R. MATEFI[1] L. CERNEA[2]

Abstract: *The present paper presents the institution of unpredictability, one of a great impact within the actual economic context, introduced by the 2011 Romanian Civil Code. Before the coming into force of the present Civil Code, there was no general regulation within this area as the previous regulations contained only few particular ways of applying this theory. The need to regulate this theory was generated by the fact that, while a contract is in effect, the circumstances that existed when the parties concluded it, could suffer substantial changes and, as a result, it needs to be adjusted. The regulation of this institution should be regarded as a step forward, not an impediment, both theoretical and practical in its application by the court. It is without doubt in the context of the economic crisis, this institution had to find its legislative consecration.*

Key words: *unpredictability, contract, enforcement, risk, fluctuation, equilibrium, circumstances.*

1. Preliminary Issues

In analyzing the theory of unpredictability, we must begin by considering the "*pacta sunt servanda*" principle, one which represents the basis of each contract.

Based on this principle, each party fulfills its obligations in good faith by relying on the counter performance of the other party or parties. Stability and trust are essential elements which must govern the execution of contracts.

According to the doctrine "the principle of *pacta sund servanda* requires that agreements must be kept. However such rule is not absolute. When performance of a contractual obligation becomes impracticable, i.e., considerably more burdensome (expensive) than originally contemplated –albeit physically possible- due to an unexpected event, this would lead to adaptation of the contract to the changed circumstances or to avoidance of the contract.

In the law and economics literature, impracticability has been substantially studied to figure out who should bear the risk of impracticability; and what would be the efficient remedy for such breach of contract" (Aksoy, 2014).

"If all contracts were generally reviewable, the confidence of the economic agents would vanish, and it is confidence that is fundamental in any economic system. In any case, the idea that, as a general rule, contracts are binding and, therefore, in the case of

[1] Law Department, *Transilvania* University of Braşov, roxana.matefi@gmail.com.
[2] Student within Law Department, Transilvania University of Brasov.

non-performance there would be some kind of responsibility, it is a necessary condition for the efficient functioning of the economic system" (Velencoso, 2014, p.138).

However, we must consider the fact that while a contract is in effect, the initial circumstances which were considered can change substantially, to the disadvantage of one or the other party.

Thus, some kind of adjustment is necessary. This is the reasoning which caused the theory of unpredictability and the need to regulate it in law.

2. Notion and Origin of Unpredictability.

According to doctrine, unpredictability is „the prejudice suffered by one of the parties as a result of the severe unbalance which intervenes between the obligations of the parties during the execution of the contract, an unbalance caused by the economic circumstances, especially currency fluctuations" (Pop, 2012, p.534).

According to another definition, the theory of unpredictability is „a conception according to which the parties which enter a long term contract assume the condition that economic circumstances are approximately the same throughout the execution of the contract, thus if there are any unpredictable changes of these circumstances which considerably increase the value of one of the parties' performance, by breaking the monetary equilibrium of the contract, the party which is affected by this change is entitled to demand a revision of the terms of contract, in order to reestablish the equilibrium, or even demand a dissolution of the contract" (Costin & Costin, 2007, p.939).

According to the same authors, the theory of unpredictability became clear at the beginning of the 20th century in France and other European countries, "in some cases, the lawmaker applied the theory of unpredictability, by obliging or encouraging the revision of the terms of contract in agreement with the economic circumstances, in case of war, economy crises or other such circumstances".

In international commerce contracts of medium to long duration, such a clause of revision is often found in contract, thus allowing for the price to be readjusted as a means to adapt to the new circumstances which occur" (Costin & Costin, 2007, p.939).

The origin of this theory is found in Roman law. However, throughout time it has been modified and readjusted by considering the specificity of each time. It is currently generally regulated in our internal law.

For a long time, unpredictability was regulated only in certain areas of our laws. In continuing with our analysis, we will discuss the current regulation, which is not unified, although such a measure is needed, especially given the context of the worldwide economic crisis.

J. Ghestin claims the theory of unpredictability is founded on an inexact postulate: it emphasizes a phenomenon, while the effect it causes over the equilibrium of the contract must essentially be considered, as the objective unbalance between the performances of each party allows for the question of whether the contract must be maintained or revised; thus, no new and unpredictable circumstances occur.

Doctrine makes a clear distinction between unpredictability and other legal institutions which might generate confusion, as lesion or a case of emergency.

Thus, despite the fact that the theory of unpredictability "raises the question of the unbalance between the performances of the parties, such as lesion, there are however two separate notions.

Lesion implies an unbalance which occurs at the time of entering the contract, while unpredictability refers to the unbalance which occurs during the execution of the contract as a result of a change in circumstances" (Llules, 2012, p.397; Baudouin et al, 2013, p.381).

As for the distinction between unpredictability and the case of emergency, "in the matter of unpredictability, the obligation is not impossible to execute, but it becomes excessively onerous to one of the partiers. The case of emergency makes the obligation impossible to execute" (Dobrev & Uliescu, 2016, p.243).

3. The Regulation of Unpredictability in Romanian Law

The unified regulation of the theory of unpredictability was achieved once the 2011.Civil Code came into force; before this moment, both doctrine and legal practice had been uneasy about applying this theory. As it was stated by doctrine, the cause for this approach was that "the old Romanian Civil Code (1865-2011) was a copy of the Napoleon Code of the second half of the 19th century, containing a few improvements and adjustments made in the context of the socio-economic status of Romania.

As most of the famed people who practiced law in the Unified Principality were formed by attending the French school (...) they were followers of the theory of the autonomous will and the currency nominalism, thus rejecting the theory of contractual unpredictability" (Dobrev&Uliescu, 2016, p.243). The previous regulation contained some particular ways of applying the theory of unpredictability, without a general regulation in this area.

Thus, we can mention article 43 third alignment of Law no 8/1996 regarding copyrights and connecting rights, with subsequent changes, which states that „in case there is some obvious disproportion between the payment given to the author and the benefits of the person who was transferred the use of patrimonial rights, the author can demand the revision of his contract or the increase of his payment".

At the same time, according to article 54 of the Government Emergency Ordinance no 54 of 2003 regarding the transfer of public goods „contract relations between the parties are based on the principle of financial equilibrium and the achievement of equality between the rights which are granted to each party and the obligations which each party has".

The provisions of article 14 of Law no 195/2001 regarding volunteering, states that „if during the execution of the volunteering contract, regardless of the will of the parties, a situation occurs and it is likely to aggravate the obligations of the volunteer, the contract will be renegotiated. If the situation makes the execution of obligations impossible, the contract becomes dissolute by effect of law".

4. The Enforcement of the Theory of Unpredictability. Conditions and Purpose.

We must mention that, in agreement with the provisions of Law no 71/2011 regarding the enforcement of the Civil Code, the theory of unpredictability will not apply to the contracts which are signed before the date of October 1st, 2011.

However, by way of exception and by applying the provisions of article 102 second alignment of the Civil Code, in case the contract is changed after October 1st, 2011, if the

change does not impair on the performance of one of the parties, the theory of unpredictability can be applied.

The purpose of unpredictability is that of saving the debtor from ruin, as these unpredictable events are likely to ruin one of the parties of the contract and enrich the other party, thus reestablishing the balance between the performances of the parties.

The prejudice suffered by one of the parties as a consequence of the severe unbalance between the contracting parties during the execution of the contract, as a result of the excessive and unpredictable increase of prices is, in fact, unpredictability, thus resulting in the reestablishing of the equilibrium which had existed at the moment of signing the contract (Adam, 2011, p.343).

Article 1271 second alignment of the Civil Code regulates the effects of unpredictability, by stating that if the execution of the contract becomes extremely onerous because of an exceptional change in circumstances, the court can rule on:

a) adjusting the contract in order to evenly distribute the losses and benefits which result from the change of circumstances;

b) the dissolution of the contract, under the conditions established by the court.

Thus, the court of law is entitled to appreciate if the contract must be adjusted, by considering the particular circumstances. It also has the possibility of ruling on the dissolution of the contract, if the circumstances require it.

The primary condition is that, while at first the contract had been in the advantage of both parties, during the execution, a major disproportion occurred which changed the initial balance (Florea, 2012, p.43).

The third alignment of the previously mentioned text regulates the conditions which are to be fulfilled in order for the court to rule on one of the previously mentioned solutions:

a) the change occurred after the contract was signed;

b) the change in circumstances as well as the extent of the effects could not have been considered by the debtor at the time of signing the contract;

c) the debtor did not assume the risk of the changing circumstances and he can't be reasonably held for assuming such a risk;

d) the debtor tried, within a reasonable period of time and in good faith, to negotiate the just and reasonable adjustment of the contract.

As for active legal quality, the Civil Code does not establish who can file such a complaint, that of readjusting the terms of contract as a result of unpredictable circumstances. If we were to analyze this matter, the debtor is the one who would be interested in filing such a complaint. However, the lawmaker does not forbid the creditor to file such a complaint.

On the other hand, if the debtor raised the exception of lack of interest, this situation would not profit him.

A similar provision is to be found within Art. 357 of the Polish civil code, which reads as follows: "*If, due to extraordinary change in relationship concerning fulfilling the obligation, it were connected with undue hardship or one party were at a risk of a gross loss and which was not foreseen by the parties while concluding a contract, the court may, having considered the interests of both parties and in accordance with social coexistence, decide on the manner of performing the duty, the amount of compensation or even decide on terminating the contract*" (Robaczyński, 2016, p.207).

5. The Time of Enforcement of the Theory of Unpredictability. Principles which Govern this Matter

As for the time enforcement of the theory of unpredictability, article 1271 of the Civil Code provides that the new law should be immediately applied, according to the provisions of Article 6 the fifth alignment of the Civil Code.

As a consequence, the contracts which are subsequent to the coming into force of the new Code are subject to the provisions which regulate the theory of unpredictability, as the court can apply the theory.

However, if the contracts are signed before the date of October 1st, 2011, the legal provisions regarding unpredictability are not to be applied.

Thus, we will corroborate the provisions of article 102 of Law no 71/2011 regarding the coming into force of Law no 287/2009 regarding the Civil Code according to which „the contract is subject to the provisions which were in force at the time it was signed in regard to signing the contract, interpreting it, the effects it produces and its dissolution" with those of Article 107 of Law no 71/2001 which clearly states that „the provisions of article 1271 are to be applied only to contracts which are signed after the coming into force of the new Civil Code". In the case of the latter, the principle is that of the ultra-activity of the old civil law.

By considering the regulation of unpredictability in the current Civil Code, we note that the Romanian lawmaker aligned Romanian law with European law, despite the fact that this regulation is likely to be adjusted and improved.

„Given the close connection between the two institutions, we must corroborate unpredictability with conventional revision, as the latter is achieved by:

- *rebus sic standibus* express terms of contract whereby the parties state that each can demand a revision of the contract should economic circumstances change;
- automated variation terms which refer to the indexing of values;
- hardship terms of contract" (Adam, 2011, p. 350).

As for the indexing clause, its role is to maintain equilibrium between the nominal value and the real value of money, in order to preserve the real value of currency.

Economic indicators of payment are the daily rate of a foreign currency or the price which is valid at the time of payment. As an effect of the indexing clause, the old price is replaced with a new price, according to the designated benchmark.

As for the hardship clause, it represent the clause of a long term contract whereby the parties are obliged to promptly and reasonably adapt the contract, by renegotiating or by reconciling, in case extraordinary circumstances occur thus affecting the contract equilibrium (Albu, 1994, p.33).

This clause establishes the circumstances under which it operates. Given the long term duration of the contract, the parties admit that any omission might create unpredictable difficulty when signing the contract (Albu, 1994, p.23).What is specific to hardship clauses is that it operates by the effect of law.

6. Area of Enforcement of Unpredictability

If we were to discuss the area of enforcement of the theory of unpredictability, we will consider, as a rule, the onerous contracts, which are commutative, reciprocal and with successive execution.

The theory is incident in case of *uno ictu* contracts, provided that the circumstance which generates it occurs after the contract is singed but before the obligations are executed. Unpredictability can also occur in case of unilateral contracts when, as a result of an exterior circumstance; the debtor's obligation becomes extremely onerous.

The theory of unpredictability can also be applied in case of a donation contract, when the execution of the contract is affected by a suspense term.

Thus, article 1006 of the Civil code states that „if, as a result of unpredictable situations which are not caused by the beneficiary and which occur after the donation contract is signed, fulfilling the conditions or executing the contract becomes extremely or excessively onerous for the beneficiary, he can demand the revision of the contract or its conditions".

As for the ruling on the complaint of revising the contract or its conditions, article 1007 of the Civil code states that the court of law „must respect the will of the parties and can rule on making changes in regard to the conditions of the contract.

The court can authorize the partial or total selling of the object of the contract and the price will be used for the purposes decided by the parties, as well as any other measures which consider the will of the parties". In case the reasons which caused the revision of the contract no longer exist, according to the provisions of article 1008 of the Civil Code, the concerned party can ask for the removal of the effects of the revision.

The institution of unpredictability, a necessary tool in the context of economic crisis or other such factors which affect economic stability, must keep its exceptional character, as the rule is the mandatory force of contract; as stated by doctrine, unpredictability is an extreme solution during the execution of contract (Dobrev, 2011, p.15).

Unpredictability, by its nature, is meant to protect the efficiency and the security of contract when both parties could not foresee facts, elements and circumstances which are likely to affect their convention. In the contrary hypothesis, we can assume the parties had knowledge or stated express terms regarding the revision of the contract, thus assuming the risk of severe fluctuation of the value of counter performances (Viorel, & Viorel, 2012).

We must point out that the regulations of unpredictability are not to be applied in case the parties stated indexing clauses in their contract. In this case, the judge will apply the provisions of the contract, as by stating such terms in contract, the parties allowed for a revision of the contract.

7. Conclusions

The paper was meant to emphasize the importance of the newly introduced theory of unpredictability, which has a general application due to the regulations of the new Civil Code.

The work is divided into seven sections, namely: Preliminary issues; Notion and origins of unpredictability; The regulation of unpredictability in Romanian Law; The enforcement of the theory of unpredictability. Conditions and purpose; The time of enforcement of the theory of unpredictability. Principles which govern this matter; Area of enforcement of unpredictability, and in the last part conclusions are drawn.

The institution of unpredictability is incidental when, during the execution of a contract, one of the parties suffers a prejudice caused by the substantial changes of the initial circumstances of the agreement.

We should not make any confusion between unpredictability, on the one hand and lesion or a case of emergency, on the other hand, as each of them is a separate institution with a specific regime.

If we are looking for the origin of this theory, it is to be found in Roman law, being modified throughout time and readjusted according to the specificity of each period.

Unpredictability is not just an exception to the binding force of the contract, but it is a real exception from the rule of assuming a more onerous task by performing the obligations.

As for the possibilities that the court has in case of unpredictability, they are limited to two: adaptation or the termination of contract.

The exceptional fact that generates the application of the unpredictability institution is subsequent to the contract so that the changing of circumstances had not been nor could it have been envisaged by the debtor. Otherwise, it means that the risk was assumed and, as such, the unpredictability could not be successfully invoked.

The debtor had not assumed the risk of changing the circumstances and could not reasonably be considered that they would have taken this risk.

The provisions governing unpredictability shall not be applied when the parties have inserted in their contracts indexation clauses, since the stipulation of such clauses has the significance of providing the parties the possibility of revising the contract, the judge doing no more than applying the contractual provisions.

The debtor tried within a reasonable time the negotiation of fair and reasonable adaptation of the contract. In this case, the court sanctions the party that refuses the conventional contractual review of the treaty.

Civil Code provisions do not provide expressly who is the initiator of the action in which the court has to revise the contract on account of unpredictability. As a consequence, any party to the agreement may address the matter to court.

References

Adam, I. (2011). *Drept civil. Obligațiile. Contractul* [Civil law. Obligations. The Contract.]. Bucharest: C. H. Beck Publishing House.

Aksoy, H.A. (2014). Impracticability. *Encyclopedia of Law and Economics*, Springer, Available at: http://link.springer.com/referenceworkentry/10.1007/978-1-4614-7883-6_244-1 Accessed: 20-03-2016.

Albu, I. (1994). Probleme actuale privind reevaluarea judiciară a creanțelor, indexarea convențională a obligațiilor pecuniare şi indexarea dobânzii [Current issues in the legal reevaluation of debts, conventional indexing of pecuniary obligations and indexing interest]. *Law Magazine*, Bucharest, no.1.

Costin, M.N., & Costin, C.M. (2007). *Dictionar de drept civil de la A la Z* [Civil law dictionary from A to Z]. Bucharest: Hamangiu Publishing House, p. 939 and following.

Dobrev, D. (2011). *Impreviziunea, o cutie a Pandorei in Noul Cod Civil? Comentarii*. [Unpredictability, a Pandora's Box in the new Civil Code? Comments], Second revised edition. Bucharest: Universul Juridic Publishing House.

Dobrev, D., & Uliescu, M. (2016). *L'imprevision dans le Nouveau Code Civil roumain enfante par la crise economique mondiale* [The unpredictability in the New Civil Romanian Code generated by the global economic crisis], Springer, p. 243 and following. Available at: http://link.springer.com/chapter/10.1007/978-3-319-27256-6_14#page-1. Accessed: 20-03-2016.

Florea, B. (2012). Impreviziunea şi incidenţa acesteia asupra contractului,cu referire specială privitoare la contractul de cesiune a unei opere literare,artistice sau ştiinţifice [Unpredictability and its occurrence in contracts, with special reference to the transfer contract of a literary, artistic or science work]. *Law Magazine*, Bucharest, no.11

Llules et Moore (2012), no 803, p. 397, Baudouin et al (2013) no 274, p. 381 in Elise Charpentier, E. & Vezina, N. (2016). *Les effets exercés par les crises financières sur la force obligatoire des contrats: certitudes et incertitudes du droit québécois en matière d'imprévision* [The effects exercised by the financial crisis on the binding force of contracts: certainties and uncertainties of the Quebec law in matters of unpredictability], Springer, p. 7., Baudouin et al (2013) no 846, p. 1054 in Charpentier, E. & Vezina, N. (2016) *Les effets exerces par les crises financières sur la force obligatoire des contrats: certitudes et incertitudes du droit québécois en matière d'imprévision* [The effects exercised by the financial crisis on the binding force of contracts: certainties and uncertainties of the Quebec law in matters of unpredictability], Springer, p. 60.

Pop, L. (2012). *Tratat de drept civil, Obligatiile* [Civil law treaty, Obligations]. Volume II. Bucharest: Universul Juridic Publishing House.

Robaczyński, W. (2016). *The Effects of Crises on the Binding Force of Contracts: Polish Solutions*, Springer, p. 207. Available at: http://link.springer.com/chapter/10.1007/978-3-319-27256-6_12. Accessed: 20-03-2016

Velencoso, L.M. (2014). *European Perspectives of the Common European Sales Law*, Springer, p. 138. Available at: http://link.springer.com/chapter/10.1007/978-3-319-10497-3_8 Accessed: 20-03-2016.

Viorel, L., & Viorel, A.G. (2012). Configuratia impreviziunii în noul Cod civil [The configuration of unpredictability in the new Civil Code]. *Law Magazine*, Bucharest, no.2.