

## Contractual balance in the context of the post-economic crisis and the new Romanian Civil Code

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**Abstract:** The contractual imbalance is based on two different types of causes: either the inequality of the contractual partners (uncommon clauses and lesion), or the occurrence, throughout the performance of the contract, of certain events that make such performance extremely onerous, according to the terms initially assumed by the parties (theory of imprevision). The importance of the manner in which the Romanian legislator envisaged, through flexible legal provision, the re-balancing of a contract, which is imbalanced from its creation or which becomes imbalanced during its duration, , represented our essential concern in this study, which sought to present actual legal institutions, which will have a significant practical impact in the following years. Imprevision represents a legal institution which may arise in a situation of an economic crisis, as the one Romania also experienced, alongside with other European states. On the other hand, the inequality between the contractual partners in the business environment caused the Romanian legislator to adopt flexible regulations, such as those regarding the uncommon clauses. By means of this institution, the legislator imposes certain conditions, which the consent of the weaker party must observe, when issued in respect of such clauses. Lesion, which is regulated for the first time in case of persons of age as a defect affecting the consent, subject to the distinctions we performed, has a practical importance, especially when it has for premise a contractual imbalance based on the economic inequality of the parties.

**Keywords:** *Contractual imbalance, economic inequality of the contractual partners, uncommon clauses, lesion, crisis, theory of imprevision*

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## 1. Introduction

In the classical legal doctrine, based on the theory of autonomy of will, the legal equality between the parties is a premise for the binding force of the contract. Without denying the legal equality between the contracting parties as a principle, we consider that in very few business contracts there is a real economic equality between the parties. Or, the contracts where the parties are not in a position of economic equality have an important particularity with respect to their formation, in the sense that, in many cases, the stronger party imposes contractual clauses, without any negotiation, to the other party.

This aspect, as well as other aspects, caused the Romanian legislator, under the influence of European regulations, to establish institutions, in the new Civil Code, for the protection of the weaker party, even when such party is not a consumer. Some regulations are explicit, while other protective situations are implicit and derive from the interpretation of certain legal norms. The causes of the contractual imbalance may be caused either by the inequality of the contractual partners (uncommon clauses and lesion) or by aleatory events arising throughout the performance of the contract (imprevision).

## 2. Contractual imbalance at the conclusion of the contract

### 2.1. Uncommon contractual clauses

#### 2.1.1. General considerations

Considering that the concept of uncommon contractual clauses derives from the concept of abusive contractual clauses specific for the consumers' protection sector, it is founded on the same intellectual basis.

A first theoretical support is the one related to the **procedural justice**, which is based on negotiation and information procedures. Considering as a starting point the concept of autonomy of will, as a legitimate basis for the binding force of a contract, it is inequitable that a party be bound to observe contractual terms, which it has not read and which content it is not aware of. The purpose of a regulation based on the theory of procedural equity aims to protect the internal will (the true will) of the parties. The legal provisions enacted in this respect focus mainly upon the procedure leading to the formation of the contract and, to a lesser extent, upon the content of the contract (Wilhelmsson, 2008).

A second approach concentrates upon the content of the contract and not upon its formation. In contractual law, equity regards the balance between the parties, including from the perspective of the content of the contract, since there must be a

balance between the rights and obligations undertaken by the parties. From the perspective of the contractual balance, the concept of uncommon contractual clauses falls under the paradigm of **commutative justice**.

Also, there is a third concept of **distributive justice**, which requires that certain rules must be developed, which should protect vulnerable groups of the society. An example in this respect may be the rules for the consumers' protection (Wilhelmsson, 1990). The most legal systems developed rules that contain both procedural elements and content-related elements.

### **2.1.2. Applicable Law Concept**

The concept of uncommon contractual clauses is regulated by the new Civil Code in Article 1203. Article 1203 of the Civil Code provides: *„Standard clauses that provide the limitation of liability, the right to terminate unilaterally the contract, the right to suspend the performance of the obligations to the benefit of the party or which provide to the detriment of the other party for a waiver of rights or a waiver concerning a term, as well as the limitation of the right to raise exceptions against the other party, the limitation of the freedom to contract with third parties, the silent renewal of the agreement, the applicable law, arbitration clauses and derogations from the norms regarding the competence of the courts of law do not produce their effects unless they are expressly accepted, in writing, by the other party.”*

Uncommon clauses mean those categories of standard clauses which present significant derogations from the usually applicable regulations (Oglindă, 2012). While defining the concept of uncommon clauses under Article 1.203 of NCC, the legislator preceded with non-limitative (declarative) enumeration of such clauses. Thus, uncommon clauses are those standard clauses which provide to the benefit of the proponent party: the limitation of liability; the right to terminate unilaterally the contract; the right to suspend the performance of obligations; clauses which provide to the detriment of the other party a waiver of rights or a waiver concerning a term; which provide for the limitation of the right to raise exceptions (defences) against the other party, which limit the freedom to contract with third parties, which provide for the silent renewal of the contract, which establish the applicable law, and arbitration clauses which derogate from the rules regarding the competence of the courts of law (Baudouin and Renaud, 2007).

Protecting the weaker contractual party by means of this type of procedural formality represents a purpose for the majority of modern law systems (Study Group on a European Civil Code and Research Group on EC Private Law Principles, 2009), and, as a consequence, similar concepts with the one analyzed in this study were created, such as: Article 2.1.20 Unidroit Principles, Article II.- 1:110 and II. – 9:103 Draft Common Frame of Reference (DCFR) or Article 1341 of the Italian Civil

Code. The Romanian Civil Code takes *ad litteram* the regulation from the Italian Civil Code regarding the uncommon clauses as contained in Article 1341.

The doctrine raised the question whether the clauses provided under Article 1203 have an exemplificative or a limitative nature. In a first opinion (Pop *et al.*, 2012), it is considered that this legal institution follows the model set out by Unidroit Principles in Article 2.1.20 and should be construed in light of the guidelines presented by Official Commentaries of Unidroit Principles (Unidroit, 2004), in the sense that the enumeration of clauses provided under Article 1203 of the Civil Code is non – limitative; its role is to develop the determination criteria of the uncommon clauses and to serve as guidance for the law practitioners. Other authors argue for the limitative nature of the enumeration provided under Article 1203 of the Civil Code (Moise, 2012).

In our view, the two standpoints are not irreconcilable because the enumeration is exhaustive, in the sense that any clause of certain gravity for the weaker party may fall under one of the types presented by the legislator. Hence, we do not consider viable an interpretation that makes this institution rigid and we endorse the idea presented in the Italian doctrine according to which an extensive interpretation is allowed, but within each type of enumerated clauses (Popa, 2013).

### **2.1.3. Conditions for the application of the provisions of Article 1203**

The first requirement is that clauses must be standard clauses. Standard clauses are defined by Article 1.202 of NCC, according to which there are to be considered as standard clauses those provisions previously established by one of the parties to be used on general and repeated basis and which were included into the contract without any negotiation with the other party (Oglindă, 2012).

The source of inspiration for the Romanian legislator as regards the definition of the standard clauses is represented by the provisions of Article 2.1.19 par. (2) of UNIDROIT Principles which provide: „*Standard clauses are provisions that are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party*”.

Therefore, the legislator sets out two conditions in order for a clause to be qualified as a standard clause:

- the existence of certain clauses contained in a written document, in principle, prior to the execution of the contract, which are in the possession of one of the parties;
- the clauses have not been negotiated with the other party.

There is the situation when a professional decided to use a certain draft of contract with certain type of clauses for the first time. In such case, although the draft has

not been used previously, nothing impedes the beneficiary of the provisions of Article 1203 to benefit from the protection granted subject to the proof of the standard nature of the clause. Although it is more difficult to prove, since the trader may use a draft for the first time, it is not impossible, having regarded that from the drafting date of the contract up to the commencement of the process it elapses an important period of time when the “strong” party may have concluded other contracts. DCFR defines standard clauses as those clauses which are previously drafted to be used in several transactions, having various parties and which were not negotiated individually by the parties. This definition includes also those clauses drafted by a third person, but they should be projected for several uses – an element which is difficult to be demonstrated (Reich & Micklitz, 2008).

A clause proposed by one of the parties has not been individually negotiated, if the other party was not able to influence its content. A contracting party may influence the content of a clause if negotiations between the parties are conducted in such a manner that real opportunities to amend such clause exist. An assessment of the negotiation conducted between the parties is necessary. In general, such negotiations do not imply merely simple discussions with respect to that clause, but it must provide real chances to influence such clause (Study Group on a European Civil Code and Research Group on EC Private Law Principles, 2009).

Therefore, the amendment of the clause throughout the negotiations process represents a sign that real and significant negotiations are conducted. One negotiation between the parties suffices in order to cover multiple uses of the same clause, in case the legal circumstances are similar. A clause shall not be considered as having been individually negotiated only because it was chosen from a list of clauses proposed by the contractual partner. In such case, as a rule, the party that proposes the clauses does not give to the other party the possibility to amend those clauses, while the freedom to influence the content of a contract is limited to the selection several clauses proposed by the other party. Each time when we are in the presence of a standard clause, such produces its effects without having been expressly accepted in writing, as long as the respective clause does not fall under the categories mentioned under Article 1.203 of the Civil Code (Moise, 2012).

The second requirement is that the clauses must provide to the benefit of the proponent party or to the detriment of the other party. Standard clauses that limit the liability of a party, grant the right to terminate unilaterally the contract or to suspend the performance of the obligations are uncommon clauses only when these benefits are granted to the party which proposes the clause. In case this right is granted in favour of other party than the proponent party, it is not necessary the express acceptance, in writing, in order to produce its effects and such remains an operating standard clause (Moise, 2012).

Standard clauses that provide for a waiver of rights or a waiver concerning a term, as well as the limitation of the right to raise exceptions against the other party, the limitation of the freedom to contract with third parties, the silent renewal of the agreement, the applicable law, arbitration clauses and derogations from the norms regarding the competence of the courts of law cannot be construed as uncommon clauses, if stipulated to the detriment of the proponent party. In order for the provisions of Article 1203 to apply, it is necessary that these clauses to be stipulated to the detriment of the party that did not propose them, which party must accept them upon the proposal of the other contracting party (Moise, 2012).

#### **2.1.4. The Condition for the Uncommon Clauses to Produce Effects - “Express Acceptance in Writing”**

It is not sufficient that these clauses are brought to the knowledge of the contractual partner. Such clauses should be expressly accepted, in writing (which is not the same as the signing of the contract, although the signature of the acceptant is required). Also, no individual acceptance of each separate clause is required. They may be accepted in block, but separately from the rest of the contract. This special acceptance aims to draw attention to the other party upon the existence and the content of these clauses. The doctrine admits that this protection is a formal one (Università di Bologna, 2003).

The acceptance statement may contain either the generic mention with respect to the approval of all clauses provided in the contract or the integral transcript of the content of the uncommon clauses stipulated in the contract at the end of the contract or in a separate document, or only the heading number of the uncommon clauses (Popa, 2013).

It is required that each of the clauses to be approved must be clearly identified and referred to so that it draws the debtor's attention with respect to each referred clause. Such requirement is not observed in case of a generic statement according to which it took knowledge of the contractual clauses and that all of them were accepted (Cassazione civile sez. III, 17 marzo 1998, n. 2849). The Italian jurisprudence stated that the express written acceptance of a clause that derogates from the norms on the competence of the courts of law is not required, as long as it was inserted into the contract following the negotiations between the parties, while the same text of the contract referred to the “conditions negotiated between the parties” (Cassazione civile sez. II, 1 dicembre 2000, n. 15385).

#### **2.1.5. Sanction**

With respect to its effects, the contractual provisions identified as falling under the scope of uncommon clauses, which were not expressly accepted by the interested party, do not produce any effect; such clauses are considered unwritten clauses (Oglindă, 2012). As a consequence of the removal of these clauses from the contract, the default statutory rules shall apply (Popa, 2013).

The sanction may be extended to the clauses which, although communicated to the other party, were drafted in an obscure and incomprehensible manner and with respect to which it may be opined that they were not accepted because they were not understood. This would mean that such unclear clause shall have a similar regime with the one applied to the clauses that are not communicated (Carballo Fidalgo, 2010).

## **2.2. Lesion in business relationships**

Nowadays, the equality between the two contractual partners is sometimes a fiction. In this context, an issue arises that a contracting party, making use of its economic power, superior competence and capability, may impose to the other contracting party obligations which might be in a gross disparity in comparison with the advantages that the respective contracting party might obtain from that contract. In this case, the good-faith and the necessity to reconcile the interests of the contracting parties require that the contractual balance be restored.

### **2.2.1. General considerations with respect to lesion under the Romanian Civil Code**

Article 1.221 of the Civil Code provides that “(1) *Lesion exists when a party, taking advantage of the situation of need, inexperience or the lack of knowledge of the other party, stipulates, in its favour or in favour of other person, an obligation having a value considerably higher than its own obligation, at the conclusion of the contract.* (2) *The existence of the lesion is assessed by considering the nature and the purpose of the contract.* (3) *Lesion may also exist when a person under age undertakes an excessive obligation compared with its patrimonial status, the advantages to be obtained from the contract or all other circumstances of the case at hand*”.

Lesion represents a defect affecting the consent, which consists in the fact that one of the contractual partners, taking advantage of the situation of need, inexperience or the lack of knowledge of the other party, stipulates in its favour an obligation having a value considerably higher than the one incumbent to it. Lesion is a form of commutative justice and is based on the principles of good-faith and the equivalence between parties' obligations (Garfias, 1988). The legislator regulates two forms of lesion: lesion in case of persons under age and lesion in case of persons of age (Oglindă, 2012; Boroi & Anghelescu, 2011). This study aims to analyse the lesion, as a defect affecting the consent, in case of persons of age.

There are several condition required for lesion to be applied in case of persons of age. Firstly, the existence of a gross disparity between the values of the obligations (objective condition). The gross disparity must refer to objective elements: status of the market, prices on the market, etc. Such gross disparity must exist at the conclusion of the contract. The sudden increase of the prices due to a decrease in offers cannot generate lesion (Study Group on a European Civil Code and Research

Group on EC Private Law Principles). The value may depend, among others, on circumstances of time and place (Mackaay, 2010).

Secondly, the affected party must be in needs, inexperienced or without knowledge in comparison with the other party. The fulfilment of this condition is assessed in accordance with the particularities of the person that invokes the lesion. Some authors consider that lesion should not include the situation when the affected person is a person who is sufficiently informed, experienced, but, due to a distress caused by economic, moral, affective or other nature reasons, is obliged to accept to its detriment clauses that are excessively onerous (Garfias, 1988).

Thirdly, the disparity between the parties' obligations must exceed half of the value that the obligation promised or executed by the affected party had at the conclusion of the contract, and such disparity should subsist until the an action in law aiming at rescinding the contract for lesion is initiated. [Article 1.222 par. (2) of the Civil Code].

The fourth condition is that lesion applies to onerous and commutative deeds.

#### **2.2.2. Legal Consequences of Lesion**

The person affected by the lesion may opt for one of the following legal actions: to invoke the *partial nullity* of the contract or to request the reduction of one of the obligations. Pursuant to the provisions of Article 1.222 par. (3) of the Civil Code, the court of law may maintain the contract, in all cases, if the other party offers, in an equitable manner, a reduction its own claim or an increase of its own obligation, as the case may be. The doctrine opined, for identity of reasons, that the affected party might request also the increase of the obligation of the other party (Boroi and Anghelescu, 2011).

#### **2.2.3. Application of Lesion in Private Law**

In principle, the lesion appears to have a general vocation to be applied to all contracts, as it results from the applicable legal provisions. However, as evidenced below, the Romanian legislator expressly regulates, in Article 1.224 of the Civil Code, the contracts in whose case the lesion cannot be invoked. Article 1.224 of the Civil Code provides that "*Aleatory contracts, settlement contracts, as well as other contracts expressly provided by the law cannot be challenged for reasons related to lesion*".

Firstly, the lesion cannot be incident in case of gratuitous contracts. In respect of this category of contracts, one of the parties does not receive on purpose a benefit and, therefore, it is obvious that one cannot allege a disparity between the parties' obligations.



Secondly, aleatory contracts represent an exception from the rule on the applicability of the lesion. The rationale of the Romanian legislator, when it excluded this category of contracts from the scope of lesion, was the absence of a disparity between the parties' obligations, considering that the extent of the obligation of at least one of the parties is not known at the moment of the conclusion of the contract (Boroi & Anghelescu, 2011).

With respect to the settlement contract, the legislator excluded this contract from the scope of the lesion, since the object of such contract would not allow its rescission or subsequent adaptation, considering that it is based on personal reasons (Zamșa, 2012; Ungureanu & Munteanu, 2013).

#### **2.2.4. Business Contracts**

First of all, the lesion is incident in case of consumer contracts and, then, in case of regular civil contracts.

At this point, we aim to debate the paramount issue referring to the concrete legal actions as to whether the law practitioners may invoke the lesion, as a defect affecting the consent, in case of business contracts. Further, in order to determine the legal regime of the lesion in case of business contracts, it is useful to approach firstly a classification of the contracts that we proposed in the doctrine, in 2012, namely: balanced and imbalanced contracts (Oglindă, 2012). Since the parties are or not in a relative position of economic equality and, respectively, in a position of economic dependency, contracts may divide into balanced and imbalanced contracts.

*Balanced contracts* are the category of contracts where the parties *are in a relative position of economic equality one towards the other*. In their turn, the balanced contracts may further be divided into two subdivisions: negotiated contracts and non-negotiated contracts (the classification criterion is whether they practically undergo a negotiation stage) (Oglindă, 2012).

*Imbalanced contracts* are the category of contracts where the contracting parties are not in a position of real economic equality, but, in most cases, in a state of economic or contextual dependency one towards the other, that may have implications as regards the contractual legal regime (Oglindă, 2012). The most important subdivision (but without being limited to such subdivision) of the imbalanced contracts is represented by the adhesion contracts.

Lately, the excessive onerousness has also appeared in the international trade where, by means of standard contracts that contain standard clauses, extremely onerous obligations are imposed to one of the parties, which have a gross disparity between price and received benefit and which limit the liability for hidden defects in case of merchandises, constructions related defects or impose prescription terms that obstructs the legal actions that may be taken in case of breach of contract (Garfias, 1988).

A contracting party should take advantage of the needy situation, inexperience or the lack of knowledge of the other party. As already shown, this condition required for the application of the lesion has specific dimensions and facets in case of business contracts; therefore the utility of a separate approach is fully justified.

A contractual partner should find itself in a situation of need, inexperienced and without knowledge prior to the conclusion date of the contract. The situation of need may alter the freedom of consent and determine the contractual partner to accept the conclusion of a contract under extremely disadvantaging terms. The situation of need must not be mistaken with the situation of necessity. Whilst the situation of need has an external element as basis, the situation of need presumes an element of internal nature. On the other hand, from our point of view, if the situation of necessity regards a severe loss, the situation of need envisages a circumstance of relative gravity, which does not necessarily require that severe consequences are about to occur.

The situation of necessity may be also characterised by the lack of an alternative, situation when the conclusion of the respective contract represents the only way out (Cserne and Szalai, 2010). For the affected party, the contract shall be useful as long as such party does not pay more than the value of the asset that is intended to be safeguarded; otherwise it is expected to refuse the offer (Cohen, 1985).

The inexperience and the lack of knowledge are alternative cases when lesion becomes incidental, may apply in a variety of cases (Turcu, 2011). In case of professionals (natural or legal entities) it is more difficult to foresee hypotheses when these alternative cases related to the fulfilment of the condition for the incidence of lesion may apply, since they act on a market that is known to them and specific to their business activity.

#### **2.2.5. Nature and purpose of the contract**

Article 1.221, par. 2 of the Civil Code regulates a criterion which is paramount for a judge in order to assess the fulfilment of the conditions referring to the lesion, in the sense that the “existence of lesion is assessed in light of the nature and purpose of the contract”. The rule according to which the existence of the lesion is assessed in light of the nature and purpose of the contract is also mentioned in Article 3.2.7 of the UNIDROIT Principles that regulates the lesion (Unidroit, 2004).

The classification of the business contracts, as analysed above, presents not only a theoretical but also a practical importance, since, depending on the nature and the purpose of the contract, the applicability of the lesion may be likely, less likely or even impossible sometimes. In this respect, we believe that the application of the lesion in case of business contracts is less likely than in case of civil contracts *stricto sensu*. With respect to imbalanced contracts, we considered that lesion is applicable in business relationships in a similar manner as to civil contracts.

As regards balanced contracts, we consider that it would be very difficult (if not impossible) that lesion applies. From this perspective, the one who seeks to interpret the legal provisions should consider two different measures when assessing the conditions of the lesion: one for the civil contracts *stricto sensu* and for imbalanced business contracts and another one, extremely restrictive for balanced business contracts.

### **3. Contractual imbalance arisen throughout the performance of the agreement - theory of imprevision**

#### **3.1. Concept. Applicable law**

Imprevision refers to the legal issue when the performance of the obligations undertaken under a contract became exceedingly onerous, case when one of the parties is put in a delicate situation because the costs for the performance of its obligations increased or the value of the counter-performance owed to the creditor decreased significantly (Bistriceanu, 1993). In both cases, a contractual economical imbalance occurs with the consequence that one of the parties to the contract loses its interest to maintain the contract as it was initially contemplated by them.

In this respect, the jurisprudence decided that *"The theory of imprevision becomes incident to the extent that the contractual obligation is no longer susceptible to be performed whereas the circumstances in which such obligation should be performed makes it totally different from the one undertaken under the contract"* (Supreme Court of Justice, 2003).

Imprevision is regulated by Article 1.271 of the Civil Code. In par. 1it provides that the *"parties are bound to perform their obligations even if the performance thereof became more onerous either due to the increase of the costs associated with the performance of their own obligations or due to the decrease of the value of the counter-performance."*

Under paragraph 1, the legislator reiterates the principle of the binding force of a contract, by providing expressly that the parties shall be bound to perform their contractual obligations, even if the economic circumstances of the contract shall have changed subsequently to its conclusion. The principle of the binding force, also expressed by the sentence *„pacta sunt servanda"*, is the rule of law according to which the contract is binding between the parties in the same way as the law (Beleiu, 2007).

We support the opinion issued by legal scholars, according to which the fundament of the binding force of a contract is the will of the parties; the contract is a vehicle for the parties' interests (Pop, 2009; Terré *et al.*, 2005).

However, the legislator laid down, for the first time in the Romanian legislation, in Article 1.271 par.2 and par. 3 of the Civil Code, the theory of imprevision as a matter of principle. Article 1.271 par. .2 stipulates „*However, if the performance of the contract became excessively onerous due to an exceptional change of the circumstances which would make fully unjustifiable the performance of the obligation of the other party, the court of law may dispose:*

*a) the adaptation of the contract to distribute equitably the losses and the benefits resulting from the change of the circumstances;*

*b) termination of the contract at the moment and under the terms it establishes”.*

Art.1.271 par.3 stipulates that „*the provisions of par. 2 are applicable only if: a) the change of the circumstances arose after the conclusion of the contract; b) the change of the circumstances, as well as the extent thereof were not and could not have been reasonably envisaged by the debtor at the conclusion of the contract; c) the debtor did not assume such risk; d) the debtor intended, in a reasonable period and in good-faith, to negotiate the reasonable and equitable adaptation of the contract.*”

According to the provisions of Article 1.271 par. 1, the parties assume a general economic risk upon the conclusion of the contract, but, in case of excessive onerousness, the theory of imprevision is accepted as legal exception from the principle of the binding force of the contract (Oglindă, *The Theory...*, 2012).

### **3.1.1. Application of the Theory of Imprevision**

The scope of the imprevision refers to the category of contracts for which the theory of imprevision may be invoked.

Firstly, the theory of imprevision is preponderantly incident in case of long – term contracts, such as continuing contracts and some contracts affected by a term. The extended duration of such contracts permits the occurrence of changes of the circumstances existent upon the conclusion of the contract (Zamșa, 2006).

Secondly, it is noticed that the theory of imprevision is incident, mainly, in case of onerous contracts, due to their lucrative nature (Stoyanovith, 1941).

Thirdly, the imprevision is also incident in case of commutative contracts; however, there are cases when imprevision may be incidental in case of aleatory contracts (Guestin *et al.*, 2001; Stoffel-Munck, 1994).

**3.2. Conditions of imprevision. General condition regarding the effects  
of the changed circumstances. Contract becomes excessively onerous**

The excessively onerous nature results from the difference between the costs incurred for the performance of the obligation at the conclusion of the contract and the costs incurred for the performance of the obligation at the moment when imprevision is invoked (Sacco, 1993).

From another perspective, the onerous nature is regarded as the difference between the value of the performance and the value of the related counter-performance (Bianca, 1994). The Italian jurisprudence makes the application of both perspectives and acknowledges the onerous nature in case one of the parties incurs *“a sacrifice that alters the economy of the contract and the initial balance existent between the parties’ obligations”* (Sacco, 1993: 678).

Although it was debated whether mathematic formulae should be used for the purposes of identifying the excessive onerousness, legal studies contended that excessive onerousness begins where the normal risk undertaken by the parties ends (Pino, 1995; Zaccaria, 2005).

In conclusion, the solution is at the discretion of the judge, who must acknowledge whether the magnitude of the onerousness affects radically the balance of the contractual obligations of the parties, considering also the specifics of the case (De La Puente y Lavalle, 1975).

**3.2.1. Absence of a clause to maintain the value of the contract – premise  
for the application of imprevision pursuant to the provisions of Article 1.271  
of the Civil Code**

In order to apply the theory of imprevision, it is required that the contract contains no clauses that provide for the maintenance of the value of the contract, namely a clause preventive of imprevision. In case such clause exists, its provisions shall be applicable in light of the contractual freedom principle instead of the provisions of Article 1.271 par. 2 and par. 3. These clauses are: Indexation clauses and Hardship Clause.

Legal doctrine defined Indexation as the automatic procedure for re-evaluation of the obligations of the parties by comparison with the variation of a reference index stipulated in an express clause or in a separate indexation agreement, for the purposes of covering the depreciation of the currency in which the payment is done. In case an indexation clause is inserted, it produces its effects by the operation of law and the balance of the monetary obligations is automatically restored (Pop, 2009).

The purpose of the Hardship clause is to re-balance the contract when an economic phenomenon occurred, which might be able to affect the obligations of the parties assumed under the contract, in which case an obligation for the parties to re-negotiate the contract arises (Fontaine, 1976). The specific method of negotiations and the obligations which are subject to the adaptation of the contract must be expressly set out (Philippe, 2006). In relation with the hardship clause in international trading, please see Prado (2003) and Saliba (2001).

### **3.3. Special Conditions Regulated by Article 1.271 par. 3 of the Civil Code**

#### **3.3.1. The Change of the Circumstances Occurred after the Conclusion of the Contract**

Accordingly, it is required that the event which disrupts the contractual balance occurs after the conclusion of the contract (Mazzacano, 2011). In case the change of the circumstances started before the conclusion of the contract, the imprevision may be applicable only if the pace of the changes accentuates dramatically during the execution of the contract (Unidroit, 2004).

#### **3.3.2. The impossibility of the debtor to foresee reasonably the change of the circumstances, as well as its extent**

The circumstance that might have been reasonably contemplated by the affected party upon the conclusion of the contract cannot be construed as an imprevision situation. Case law is consistent as regards the rejection of the theory of imprevision in relation to the lease agreements, when the price was determined in other currencies than the national currency (dollars or euro), considering that the fluctuation of the price was foreseen by the parties upon the conclusion of the contract (Supreme Court of Justice, 1997; Supreme Court of Justice, 2011).

#### **3.3.3. The contract must not contain a clause providing for an extension of the liability of the debtor in case of imprevision events**

The debtor must not have assumed the risk of change of circumstances or such assumption of risks related to the change of circumstances must not result from the nature of the contract or from the context upon its entering into. This condition is provided in Article 1.271 par.2 letter .c) of the Civil Code, whereby the legislator regulates two situations: „*The debtor did not undertake the risk for the change of circumstances and could not reasonably provide that such risk would have been undertaken.*”

In a first situation, the debtor undertakes the risk, in an express clause, regarding the occurrence of an unpredictable event or, even more, the debtor assumes the liability in case of a force majeure event (Pop *et al.*, 2012).

In the second situation, it is construed that the unpredictable risk is undertaken. When a party concludes a speculative transaction, it might be considered that it “reasonably accepted the risk”, even if it did not foresee the consequences upon the execution date of the contract (Unidroit, 2004: 186).

**3.3.4. Procedural special condition which refers to the obligation of the debtor to negotiate the reasonable and equitable adaptation of the contract within a reasonable term and in good-faith**

This condition is inferred from the provisions of Article 1.271 par.2 letter d): „*The debtor intended, in a reasonable period and in good-faith, the negotiation of reasonable and equitable adaptation of the contract.*” In fact, this condition generates several obligations incumbent to the party affected by imprevision. First of all, the party affected by the imprevision shall have the obligation to notify the debtor with respect to the occurrence of the unpredictable event. As regards the obligation to negotiate in good-faith, the failure to comply with such obligation may be construed as a reason to reject the defences put forth by the debtor.

The affected party is entitled to request to the other party the re-negotiation of the initial terms of the contract in order to adapt it following the change of the circumstance. The precise timing when the re-negotiation should be requested depends on the specific of each case; for example, the timing can be more extensive when the circumstances change gradually (Unidroit, 2004).

**3.4. Effects of imprevision**

If the negotiations failed and a dispute has been initiated, the judge or the arbitrator may order, at the request of any of the parties, one of the following solutions:

**3.4.1. Adaptation of the contract**

The adaptation of the contract represents the first option for the judge or the arbitrator, when one of the parties requested for a ruling with respect to imprevision, considering also the principle of safeguarding the contract which governs the entire contractual law, as regulated by the Civil Code. “*The principle of safeguarding the contract is the rule of law based on the modern and pragmatic conception related to the nullity of a contract, according to which the parties and the court of law must recourse to the application of the sanction and, by way of consequence, to produce its effects, only as the last remedy and to the extent that no other legal actions are or shall not be available any longer*”(Oglindă, 2012: 271-272).

The adaptation of the contract shall be done by distributing between the parties, in an equitable manner, the losses and the benefits resulting from the change of circumstances. The court of law may decrease or increase the prices stipulated in

the contract, as well as the quantities, may dispose for compensatory payments or may amend certain contractual provisions. What the court of law cannot do is to re-write the contract in whole because this situation would constitute a breach of the principle of free will of the parties (Dionysios, 2002).

#### **3.4.2. Termination of the contract**

If the adaptation of the contract is extremely difficult to be implemented, the judge or the arbitrator may order the termination of the contract. The termination produces effects only for the future. The court of law shall establish the termination terms so that the prejudice incurred by the parties to be as low as possible and distributed equally between the parties (Dionysios, 2002).

The doctrine and the jurisprudence identify two possible intermediary solutions. A first solution regards the suspension of the effects of the contract, on the other hand, the suspension may be regarded as a form of contract adaptation. The second solution consists in resuming the negotiations in case neither the adaptation nor the termination of the contract is appropriate (Rimke, 2000).

### **4. Conclusions**

In summary, as it could be noticed, the idea of contractual balance in business relationships represented a special concern for the Romanian legislator in 2011, when the Civil Code was adopted and, moreover, we consider this shall be a concern in the following years both for the doctrine and the jurisprudence, which will construct the application and the interpretation of the legal institutions analyzed above (uncommon clauses, lesion, theory of imprevision).

Because the contractual balance was affected either from the creation of the contract for the reason of the position of economic force which a party has over the other contracting party or during the performance of the contract, the central idea of our study envisaged the creation of a comprehensible system for the interpretation of the contract, so that it may be adapted (rebalanced) in such atypical and unwanted situations.

In case of uncommon clauses, the legislator opted to consider as “unwritten” those clauses that affect the contractual balance, with the observance of the provisions of Article 1203. In case of lesion, the legislator offered also the possibility to adapt those business contracts where a professional holding a position of economic superiority over other professional takes advantage of the respective situation in order to determine the other party to conclude a disadvantageous contract. In this case, the legislator is concerned as well, in principal, about the adaptation of the contract, as an innovative solution, and, as a last resort, about the annulment, in full, of the contract concluded under such terms.



The principle of safeguarding the contract represents a dominant principle in contractual matters, applicable both in case of the nullity and in case of the performance of the contract and it may be construed as a general principle in contractual matters, which is inferred from the entire regulatory framework regarding contracts. In this respect, it may be considered as a general principle of law, which may be recognized by doctrine and jurisprudence during the following years, in the sense of Article 1 par. 1 of the new Civil Code.

In case of imprevision, as already shown, the contractual imbalance is not necessarily generated by the superior position of a party over the other party, upon the conclusion of the contract, but it is caused by the occurrence of certain events during the performance of the contract, which affect the contractual balance between the parties. In this scenario, which, however, has other cause, the legislator found it natural to offer a “flexible valve” to the contracting parties for the adaptation of the contract.

What all these three situations have in common is, as already shown, the creation, by the legislator, of these “flexible valve” for the adaptation of the imbalanced contracts where the weakest party (even a professional) or the party whose obligations were affected during the performance of the contract has and must have at hand as contractual remedies in a modern contractual law system.

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