

# THE UNPREDICTABILITY THEORY AND THE CONTRACTUAL LIABILITY

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## Abstract:

*The purpose of the present study is to establish a relationship between the unpredictability theory and the contractual liability, from both theoretical and practical point of view. Usually, the unpredictability is invoked by way of defense by the debtor, refusing to perform the excessively onerous obligation. However the unpredictability theory shall apply also to the hypothesis of a performed obligation, by way of main action, depending on more factors: the nature of the agreement, investigating the attitude of the party affected by the unpredictability. Observing the conditions and the effects of these two ways of invoking the unpredictability will form the objectives of the present study.*

*The debtor of the excessively onerous, in order to avoid the contractual liability, shall nevertheless perform such obligation, by carrying along some additional costs. If subsequently, the creditor shall refuse to revise the agreement and implicitly, to reimburse the exorbitant costs, the debtor will have to raise the unpredictability by way of action, in order to recover the exorbitant costs in performing the obligation. In such case, the unpredictability is accompanied by another legal issue: the contractual liability of the co-contractor of the party affected by unpredictability.*

**Key words:** *liability, obligation, onerosity, performance, unpredictability*

## Introduction

Analyzing the relationship between the unpredictability theory and the contractual liability represents a new approach in the field of the civil and commercial obligations. The unpredictability theory raises the question of an excessive onerosity of the obligation which, even if not impossible to be performed, can expose the co-contractor to a very difficult economic position, even to bankruptcy, in the context of the occurrence of a very enhanced unbalance of the value of the reciprocal performances of the parties to the agreement.

*De lege lata*, the Romanian law does not stipulate an express provision, which should define and regulate the applicability conditions of the unpredictability theory. The current Civil Code - in force since 1864 - does not contain any reference to unpredictability. The Romanian legislation provides solely special dispositions of the unpredictability theory, such as: art. 43 par (3) of the Law no. 8/1996 on copyright,<sup>1</sup> art. 54 of Emergency Ordinance no. 54/2006 regarding the regime of the concession agreements of public property assets,<sup>2</sup> art.14 of the Law no.195/2001 on voluntary activity.<sup>3</sup>

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<sup>1</sup> Art. 43 par (3) of Law no. 8/1996 on copyright, as subsequently amended and completed: *"In case of an obvious disproportion between the remuneration of the author and the benefits of the entity that obtained the assignment of the monetary rights, the author may request the competent jurisdictional bodies the revision of the agreement or the convenient increase of such remuneration."*

<sup>2</sup> Art. 54 par (1) of the Emergency Ordinance no. 54/2006 regarding the regime of the concession agreements of public property assets, as subsequently amended and completed: *"The contractual relationships between the grantor and grantee are based on the financial balance principle of the concession among the rights granted to the grantee and the obligations imposed thereto."*

<sup>3</sup> Art. 14 of Law no. 195/2001 on the voluntary activity, republished: *"Upon occurrence of a situation that renders difficult the fulfillment of volunteer's obligations beyond the parties' control, during the performance term of*

In the future Romanian Civil Code, the unpredictability theory shall be expressly regulated by art.1271, called „*The unpredictability*”.<sup>4</sup> Regulating the unpredictability by the future Civil Code represents a confirmation of the opinions expressed by the representative, classical and current doctrine and by the Romanian jurisprudence in favor of the acknowledgment and application of the unpredictability theory in the Romanian law.

The present study shall demonstrate that the unpredictability theory may be applied also to the hypothesis of a performed obligation, while the issue of contractual liability of the parties may arise. In this respect, it is important to settle the legal basis of the unpredictability, to analyze its conditions, by taking into considerations the rules and the exceptions in this matter. The opinions expressed in the present study are mostly based on the Romanian jurisprudence and they are totally or partially confirmed by the Romanian, French and Belgian doctrine on this topic.

### **The unpredictability theory in the case law of the Romanian courts of law and arbitration courts**

The current Romanian jurisprudence admits the unpredictability in two fields: the rent increases in relation to the lease agreements and updating of the price of certain goods delivered and not paid. However, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has admitted in principle this theory without any limitation or discrimination in respect to the application fields.

The Supreme Court of Justice, the Decision of the commercial division no. 21/1994, statuated: “*In this case, the plaintiff leased to the defendant the disputed premises for a 5-year period, there being determined through the lease agreement a monthly rent of ROL 1441.20, on September 13, 1990. In consideration of the liberalization or prices and increase of the inflation rate registered after September 13, 1990, the plaintiff is entitled to claim a higher rent, even if there is no such clause provided in the agreement. In this respect, there are considered the provisions of art. 970 of the Civil Code according to which the agreements are binding not solely for what is expressly provided thereon, but also for all consequences given to the obligation by equity, custom or law, according to the nature thereof. ....Otherwise, one could face the unnatural and inequitable situation that the performance of an obligation assumed through the agreement by the plaintiff ...becomes very onerous, which is inadmissible (art. 1042. item 2 of the Civil Code). In consideration of the foregoing, it is necessary that the court of remand determines, based on an expert report, the amount of the rent for the disputed premises and if the defendant does not agree with such payment, the court is entitled to order the cancelation of the agreement between the parties.*”<sup>5</sup>

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*the agreement, the agreement shall be renegotiated and in case such situation renders impossible further performance of the agreement, it shall be lawfully terminated.”*

<sup>4</sup> Art. 1271 of the future Civil Code, as approved by Law no. 287/2009:

“(1) *The Parties shall be bound to fulfill their obligations, even if such fulfillment became more onerous.*

(2) *In spite of the foregoing, the parties shall be bound to conduct negotiations for adaptation or termination purpose of the agreement, in case the performance thereof becomes excessively onerous for any of the parties due to the change of circumstances:*

*a) that occurred after the conclusion of the agreement;*

*b) that could not be reasonably provided upon the conclusion of the agreement;*

*c) and for which the prejudiced party must not run the risk of the change occurrence.*

(3) *Upon the parties' failure to come to an agreement within a reasonable time, the court may order:*

*(a) the adaptation of the agreement for an equitable distribution between the parties of the losses and benefits arising out of the change of the circumstances;*

*(b) the termination of the agreement at the time and under the conditions provided thereby. .”*

<sup>5</sup> Constantin Crisu, *Repertoire of Romanian doctrine and jurisprudence*, tome I, Bucharest Argessis, 1995,

The Supreme Court of Justice (the decision of the commercial division no. 4456/1999) as regards the contractual liability for non-payment of updated price, combined the unpredictability rules with those of the contractual liability:

- *“According to art. 970 and 981 of the Civil Code, the ordinary clauses are implied in an agreement, although such clauses are not expressly provided therein, and the agreements are binding not solely upon those expressly provided thereon, but also upon all consequences given to the obligation by equity, custom or law, according to the nature thereof. According to art. 1084 of the Civil Code, the damages generally include the loss incurred by the creditor and the benefit it has been deprived of. Therefore, the lack of a contractual clause regarding the price updating according to the inflation rate is irrelevant, such clause is implied, as it is not required to expressly provide the creditor’s right to obtain full remedy for the damage caused by non-payment of the price on the maturity date”*<sup>6</sup>

- The Supreme Court of Justice, the decision of the commercial division no. 347/2000: *“The contractual balance of the agreement has no longer been kept, due to price non-payment by the debtor on the maturity date thereof, the creditor being harmed by the devaluation of the national currency, according to the inflation rate. In reality, there is no question about the application of a sanction for non-performance of a contractual obligation ... but about updating of the price agreed upon the conclusion of the agreement, by the determination of the value of plaintiff’s obligations on the effective payment date by the defendant, in order to reestablish the contractual balance.”*<sup>7</sup>

Further, the jurisprudence of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has issued relatively recently its opinion concerning the admission in principle of the unpredictability theory in the Romanian law system, in its Decision no. 208/2005: *“The defense of the defendant raises two questions, one of principle, regarding the admissibility of the unpredictability theory in the Romanian commercial law, particularly if the parties did not agree anything in this respect and the second one, in case of affirmative response to the first question, if the conditions related to the applicability to the case of the unpredictability are fulfilled.*

*As regards the first issue, it should be held that the unpredictability theory entitles the parties to a long-term agreement to request the re-adaptation thereof, in case the initial circumstances, based on which the agreement has been concluded under a certain configuration, have so seriously affected the balance that one of the parties, although she could perform the assumed obligations, the performance would be excessively onerous. The Romanian law, unlike other law systems, did not provide legislatively such possibility. On the contrary, the judicial doctrine and practice (including arbitration), particularly in the last 15 years are prone to the application of such re-balancing solution of the agreement, including when the contracting parties did not agree to such effect as in this case (...). Consequently, it is held that the unpredictability theory can find its application, in principle, if the applicability conditions are fulfilled, in a specific case.*

*As regards the second issue - if the conditions for the application of the unpredictability theory are fulfilled - the following should be held:*

*Apart from the fact that the agreement - or other related evidence - does not reveal that the parties contemplated, upon the conclusion of the agreement, a certain development of the national ferrous metallurgy industry and a certain situation concerning the raw material for this industry, it should be considered that the parties to the case have concluded a share sale-purchase agreement ...*

<sup>6</sup> C. Bădoiu, C. Haraga, *Commercial obligations. Judicial practice*, Bucharest, Hamangiu Publishing House, 2006, 200.

<sup>7</sup> C. Bădoiu, C. Haraga, *Commercial obligations. Judicial practice*, Bucharest, Hamangiu Publishing House, 2006, 202.

*In consideration of the foregoing, there is no question about the impairment of the contractual balance that might raise for discussion the unpredictability theory, so that this defense of the defendant is to be set aside."*

It is important to notice that Decision no. 208/2005 acknowledges the applicability of the unpredictability theory, based on the principle of the contractual balance, for an unpredictability cause other than the financial or monetary fluctuations - the development of the national ferrous metallurgy industry - even if in this case, the requirements of the unpredictability have not been actually deemed as fulfilled.

### **The basis of the unpredictability theory**

The primary basis of unpredictability retained by the Romanian jurisprudence and doctrine is art. 970 of the Civil Code, which regulates the principle of good faith fulfillment of the obligations (art. 970 par 1 of the Civil Code: "*The agreements must be performed in good faith*"), and the equity principle (art. 970 par 2 Civil Code: "*They oblige not solely to what is expressly included thereon, but also to all consequences granted by equity, custom or law to the obligation, according to the nature thereof.*") Thus, the Supreme Court of Justice of Romania applied art. 970 of the Civil Code (sometimes together with art. 981 or art. 1084 of the Civil Code) in the unpredictability admission decisions related to the lease agreements and to contractual liability for non-payment of updated price.

It results that the Romanian doctrine - inspired from the French doctrine and practice - deduced two obligations derived from the principle of good faith performance of the agreements (art. 970 par 1 Civil Code): of fidelity and cooperation in the performance of the agreement. Non-observance of these obligations could entail the contractual liability of the party in default based on art. 970 par 1 of the Civil Code. These obligations are also falling under the unpredictability legal provisions, with the consequences set forth in the aforementioned quote.

Other basis of the contractual unpredictability, the contractual balance principle, has been upheld by the Romanian jurisprudence in the following decisions:

- The Supreme Court of Justice, the decision of the commercial division no. 347/2000 claimed the principle of contractual balance for justifying the agreement's price updating by the inflation rate, inflation which represents a situation with unpredictable effects on the agreement and determines, in the opinion of the court, the impairment of the contractual balance;
- The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in its decision no. 208/2005, admitted, as principle, the application of unpredictability based on the contractual balance principle, even if, as a practical matter, in this case, the unpredictability conditions had not been verified.

### **The conditions of unpredictability theory and the impact upon the contractual liability**

#### **a) The unpredictability: occurrence of an unpredictable event or with unpredictable effects**

In my work drafted in 2006, I wrote about this condition the following: "*it is a question that bears on the fact that the unpredictability and the economic-financial issue – which should characterize the effect on the agreement - should be referred not solely to the nature or cause of the event - as we would be tempted to think starting from the name of the theory itself - but particularly to the effects thereof on the fulfillment of the contractual obligations.(...) In case the unpredictability refers not to the situation itself, but to the effects thereof, there shall remain valid the requirement related to the ascertainment of the disturbance of the contractual economy for the purpose of applying the unpredictability mechanism. It remains to be considered whether a predictable feature of the event would constitute an impediment against the application of the unpredictability theory.*

*The response is negative, provided that the predictability of the event is “absorbed” by the unpredictability of the effects thereof on the agreement.”*<sup>8</sup>

Further, most of the French doctrine refers to a large and unlimited sphere of the situations constituting unpredictability, which should include, besides the economic-financial circumstances, those situations (for example: natural facts, human facts etc.) which have a disturbing effect over the agreement.<sup>9</sup>

It is important to underline that the future Romanian Civil Code makes no distinction between the sphere or nature of the situations that trigger the unpredictability, or, more correctly, that trigger the excessive onerousness. It means that, according to the syntagm *ubi lex non distinguit nec nos distinguere debemus*, legally, there are no circumstances or situations apriori producers of excessive onerousness or unpredictability. The future Civil Code regulates the so-called *large vision* over the sphere of the events constituting unpredictability.

Unpredictable effect over the agreement or unpredictable situation? Most of the classical and modern French doctrine particularly concludes the unpredictability as attribute of the effect caused to the agreement, not as attribute of the causing event itself. In 1994, Ph.Stoffel-Munck considered that: *“The focus is generally on the event causing the imbalance. It is this event that must have an unpredictable character or be unpredictable. But we can see such issue in more simple terms and at the same time we can directly consider the imbalance.”*<sup>10</sup>

More radically, the famous French jurist Jean Ghestin considered that the unpredictability requirement would no longer be necessary, there being emphasized the effect triggered over the agreement - the imbalance of the obligations: *“In fact, for the positive law, the unpredictability is not itself a condition for revise or for the termination [of the agreement] due to a cause other than the one representing the force majeure. ... This is the objective imbalance of obligations, occurred after the event, which brings into question the fully preserving or revising of the agreement and not the occurrence of a new an unpredictable event.”*<sup>11</sup> In this opinion, it would be sufficient to ascertain together with the imbalance of the obligations that the affected party cannot be held responsible for the occurrence of the event or for the effect thereof on the agreement.

b) The time of the occurrence of the change of circumstances or of the ascertainment of the effect thereon

In my work drafted in 2006 I wrote about this condition the following: *“As regards the contractual unpredictability, two moments are interesting, due to the effects they trigger: a) the first moment refers to occurrence of the unpredictable event or to the effect thereof on the agreement; b) the second moment refers to the ascertainment of the disturbance of the contractual economy and to the application of the unpredictability mechanism, through the revision or adaptation of the agreement (...). Another relevant stage consists in the performance of the agreement, so that from the conjugation of two stages, it results that:*

*- the moment of the occurrence of the situation or unpredictable effect should be placed in time after the execution of the agreement and prior to the fulfillment of the obligation; because in the hypothesis according to which the negative effect of an exceptional situation would have existed from*

<sup>8</sup> Cristina Zamsa, *Unpredictability theory. Doctrine and jurisprudence study*, Bucharest, Hamangiu Publishing House, 2006, 104-105.

<sup>9</sup> D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 625; Y.Picod, *The duty of loyalty in the performance of the agreement*, these, Paris, LGDJ, 1989, 224; C.Chabas, *Lawful non-performance of the agreement*, Paris, LGDJ, 2002, 422.

<sup>10</sup> Ph. Stoffel-Munck, *Considerations on the theory of unpredictability*, Marseille, Presses Universitaires D’Aix-Marseille, 1994, 117.

<sup>11</sup> J.Ghestin, C.Jamin, M.Billiau, *Treaty of Civil Law. Effects of agreement*, vol.I, Paris, LGDJ, 2001, 395.

*the very moment of the contracting, the legal issue of mistake in which the contractor was is raised, not the issue of unpredictability;*

*- the application of the unpredictability mechanism for an obligation already performed cannot be requested, since the fact of the performance thereof by the debtor demonstrates that it could fulfill its obligation from economic point of view.(...)"<sup>12</sup>*

This condition has been specified above, in principle; however, it should be shaded depending on certain particular situations. The unpredictability theory shall apply, inclusively, in the hypothesis under which, although existent the situation – objectively - at the agreement execution, the exteriorization of the situation or of the effect thereof is placed in time after the execution of the agreement, on the occasion of its performance. The temporal condition should be consistent with the unpredictability condition of the situation or effect thereof on the agreement: what it really matters with respect to the economy of the unpredictability conditions is the verification of the unpredictability upon contracting, upon the party affected by such unpredictability.

Further, the temporal condition should also be consistent with the condition of non-assuming the risk occurred: upon contracting, the party assumed those risks she could reasonably foresee. The Belgian doctrine specified, to the same effect, that *"the contractor must bear the burden resulting from a change of circumstances it could assess at execution of agreement ."*<sup>13</sup>

Finally, the temporal condition should be regarded by virtue of the unpredictability, as shown above; the unpredictability is, first of all, an attribute of the effect caused to the agreement, not an attribute of the causing event itself. That is why I showed in the work drafted in 2006 that the time of the occurrence of the unpredictable situation or effect should be placed in time after the execution of the agreement.

Therefore, it is not necessarily required that the unpredictable situation occurs prior to the execution of the agreement, but it can pre-exist or it can be concomitant with the execution of the agreement, but the effects of such situation could be always produced after the execution of the agreement.

Usually, the unpredictability is invoked by way of defense by the debtor, refusing to perform the excessively onerous obligation. However the unpredictability theory shall apply also to the hypothesis of a performed obligation, by way of main action, depending on more factors: the nature of the agreement, investigating the attitude of the party affected by the unpredictability. Therefore, the debtor of the excessively onerous, in order to avoid the contractual liability, shall nevertheless perform such obligation, by carrying along some additional costs, notifying the creditor about the occurrence of such a situation or of the unpredictable effect. Notifying the creditor is a requisite that must be fulfilled to evidence a correct and non-imputable attitude of the debtor.

If subsequently, the creditor shall refuse to revise the agreement and implicitly, to reimburse the exorbitant costs, the debtor will have to raise the unpredictability by way of action, in order to recover the exorbitant costs in performing the obligation. In such case, the unpredictability is accompanied by another legal issue: the contractual liability of the co-contractor of the party affected by unpredictability.

The aforementioned solutions inferable by way of logics may be supported by the French case law, as it was summarized by D.M.Philippe: *"As of the occurrence of new circumstances, the debtor must inform the creditor about its intentions regarding the follow-up of the contract's execution. (...) ...the debtor must justify its unilateral initiative establishing the refusal of the creditor to accept the reasonable proposals that were brought to his knowledge."*<sup>14</sup>

<sup>12</sup> Cristina Zamșa, *Unpredictability theory. Doctrine and jurisprudence study*, Bucharest, Hamangiu Publishing House, 2006, 119-120.

<sup>13</sup> D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 632.

<sup>14</sup> D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 648-649.

In the current French legal writings, Jean Ghestin, while analyzing this condition, also states in principle that: *“the unpredictability must in principle be quantified upon performance of the agreement”*. Furthermore, as a particular case, the famous French jurist admits that depending on circumstances, the unpredictability can also be quantified upon signing the agreement: *“The moment of quantifying the unpredictability sometimes depends on the circumstances that accompany the agreement’s formation.”*<sup>15</sup>

c) The effect produced on the agreement

The effect produced by an unpredictable situation on the agreement is the practical, economic argument that has in fact imposed the creation of the entire theory of unpredictability. The law cases as summarized by the doctrine propose more objective criteria for measuring the effect produced on the agreement:

- a) *the percentage of 50%* for increasing the value of the debtor’s obligation, respectively of reducing the value of the counter-obligation received by the creditor<sup>16</sup>;
- b) *doubling* the value of the performance the debtor is obligated to<sup>17</sup>;
- c) *the percentage of 30%* for increasing the debtor’s obligation has been recently proposed by an author, by analogy to a solution regulated by a special French law (art.L.131-5 of the Intellectual Property Code)<sup>18</sup>.

d) The risk determined by an unpredictable situation not falling under the category of contractual risks

The existence in the agreement of an adjustment clause or a clause of assuming the risk (occurred) does not exclude the application of unpredictability, as one should have in view both the condition of unpredictability and the condition of excessive onerousness. There is interference among the unpredictability’s conditions, laying stress on the situations’ unpredictability and on the effect of such situation as well as on the ascertainment of the excessive onerousness. Moreover, the French jurist Jean Ghestin considers that what matters is only the lack of balance of the obligations by minimizing the role of the unpredictable situation: *“It is the objective imbalance of obligations, occurred after the event, which raises the question of full maintain or of agreement’s revision and not the emergence of a new and unpredictable circumstance.”*<sup>19</sup> In other words, *“even the adjustment clause may be adjusted”* in case the imbalance created by the occurrence of an unpredictable situation is so great that the parties turn aside from what they could agree at the execution of the agreement, considering the reasonably predictable circumstances of that point.

Thus, the work of 2006 distinguishes between two situations:

*“a) the presence of an express contractual clause whereby the parties undertake any risk determined by the changing of the contractual circumstances;*

*b) the occurred major risk arises of the agreement’s nature.*

*...In terms of legal nature, the respective clause of assigning the risks shall not be confused with an aggravation of the debtor’s liability in case of non-performance, as the risk is undertaken by him regardless of the liability issue, being determined by an objective circumstance. Remaining in the area of contractual freedom exercise, we can notice that we can go back to the issue regarding the application of the unpredictability for the hypothesis of the inefficiency of the agreement’s clause*

<sup>15</sup> J.Ghestin, C.Jamin, M.Billiau, *Treaty of civil law. The effects of agreement*, vol. I, Paris, LGDJ, 2001, 400.

<sup>16</sup> *Principles of European Contract Law*, Hague, Kluwer Law International, 2000, 321

<sup>17</sup> Alexandru Oteteleşeanu, *Study on the contingent case or force majeure or theory of unpredictability*, phd thesis, Bucharest, 1928, 194-196.

<sup>18</sup> Cecile Chabas, *Lawful non-performance of the agreement*, Paris, LGDJ, Bibliothèque de Droit Privé Tome 380, 2002, 423.

<sup>19</sup> J.Ghestin, C.Jamin, M.Billiau, *Treaty of civil law. The effects of agreement*, tome I, Paris, LGDJ, 2001, 395.

of adjustment.... It can be triggered that one may resort to the agreement's adjustment under the following situations, where the unpredictability's requirement is verified:

- the risk occurred following an unpredictable event is different in nature of the risk undertaken by the parties by the contractual clause;
- the risk occurred, although it makes the object of the clause for assigning liability to one of the parties, exceeds, by the spread of its effects, the parties' provision, causing the agreement's upheaval ..... <sup>20</sup>

In the French and Belgian legal writings, this condition is similarly analyzed, in relation to undertaking only the provided for/predictable risk upon the agreement's execution. Therefore, in 1986 D.M.Philippe stated: "*The contractor must bear the costs resulting from a modification of circumstance the impact of which it could evaluate upon the agreement's execution.( ...)... the contractor must bear 10% of the new charges. It is difficult, even in case of a determined type of contract, to establish in advance a percentage of the costs representative for the undertaken contractual risk. (...) Often, the application of the standard clause or the legal provisions is dependent on the occurrence of unpredictable circumstances*". <sup>21</sup>

As regards such arguments, I consider that the existence of such a clause of adjustment of the agreement or of bearing the risks resulting from a possible unpredictable situation does not lead to the „*de plano*” impossibility to apply the theory of unpredictability. The competent jurisdictional body is fully entitled to analyze the effects of the respective clauses by referring to the actually occurred unpredictable situation.

#### **The effects of unpredictability's application. The contractual liability of the party who refuses the application of unpredictability.**

Admitting the unpredictability, the Romanian Supreme Court of Justice directly intervened in the agreement, ordering the updating of the price or of the rent (decision no. 21/1994, decision no. 4456/1999, decision no. 347/2000). It must be underlined that in the last two decisions, the Supreme Court of Justice applied art. 970 of the Civil Code (the good faith and equity in executing agreements), art.1084 Civil Code (complete remedy of the damage, as a measure of the contractual liability) and the contractual balance principle, ordering the update of the price for some merchandise with the inflation index. Therefore, both the rules of unpredictability and those of the contractual liability of the debtor of the obligation to pay the price have been applied.

In the work of 2006, I particularly analyzed the unpredictability's effects starting from the hypothesis of its pleading by way of defense, as means of defense of the debtor who informed the creditor that he would not perform the excessively onerous obligation. However, the unpredictability could be also invoked by way of action, in the sense of activating the contractual liability of the co-contractor who refuses the application of unpredictability, thus causing damages.

Therefore, the analyzed Romanian case law demonstrates that the unpredictability may be accompanied by the application of the rules of the contractual liability of the co-contractor who refuses to adjust the agreement to the new circumstances, by not paying the price or the rent much higher at the time of performance than upon the agreement's execution, due to the occurrence of a situation unpredictable or with unpredictable effects. Such cases imply the careful combining of the unpredictability rules with the contractual liability rules.

<sup>20</sup> Cristina Zamșa, *Unpredictability theory. Doctrine and jurisprudence study*, Bucharest, Hamangiu Publishing House, 2006, 137-138.

<sup>21</sup> D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 632-635.

Thus, the party affected by the unpredictability must notify the co-contractor about the occurrence of the event unpredictable or with unpredictable effects. If the co-contractor, debtor of the price, refuses to adjust the agreement, the affected party shall take legal action whereby she will request the recovery of the damage incurred by putting upfront some exorbitant costs for the performance of the obligation, costs that imply the increase of the contractual price.

The cause of advancing of the exorbitant costs is objective, independent of the party's fault and represents an event unpredictable or with unpredictable effects. Such a legal action relies on two grounds: the first ground is represented by the theory of unpredictability (based on art. 970 Civil Code or the balance of obligations, according to the aforementioned decisions of the Supreme Court) and the second one is the contractual liability of the co-contractor who refuses to pay the price increased following the occurrence of an unpredictable situation (or with unpredictable effects), by virtue of art. 1084 of the Civil Code.<sup>22</sup>

In the mentioned decisions of the Supreme Court, the increase of price occurred as a result of inflation – unpredictable situation – however any unpredictable and objective event, independent of the will of the party affected by the unpredictability may trigger the recalculation of the agreement's price.

## Conclusions

The conditions of the unpredictability theory must be globally acknowledged and verified. Therefore, the following issues are important both theoretically and practically:

- The condition of unpredictability shall be verified even if only the unpredictable effect has occurred after the agreement's performance, although such situation is existent before such performance;
- The consequence over the agreement is essential, produced by the unpredictable situation or by the unpredictable effect, namely: the contractual imbalance created by the excessive onerousness of one of the obligations;
- The scope of the situations unpredictable or with unpredictable effect does not limit to the financial or monetary phenomena but can also include natural phenomena, actions made by man, evolution of an industrial domain, etc.;
- The agreement's adjustment clauses or the risk allocation clauses do not impede the application of unpredictability, if the risk which occurred, although makes the object of a risk-allocation clause, exceeds, by the spread of its effects, the parties' provisions, determining the excessive onerousness of an obligation or if the risk which occurred as a result of an unpredictable event is different in nature of the risk undertaken by the contractual clause.

The unpredictability may be invoked not only as defense but also by way of action, for recovering the damage suffered following the performance of the excessively onerous obligation, in order to avoid the debtor's contractual liability (in this case, the condition of the lawful character of non-performance is not longer required). The party refusing to apply the unpredictability upon verifying its conditions may be subject to the contractual liability. There are no legal impediments for the Courts to reject such actions issued upon the performance of the excessively onerous obligation.

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<sup>22</sup> Art. 1084 of the Civil Code establishes the principle of full remedy of the damage in the contractual liability: "The damages owed to the creditor generally include the loss suffered and the benefit it was deprived of, save for the exceptions and modifications mentioned below."

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