UNFORESEEABILITY ACCORDING TO THE REGULATIONS OF THE ROMANIAN CIVIL CODE. LEGAL NATURE

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Abstract
Unforseeability is regulated for the first time within the Romanian legal system, by the Civil Code, at article 1271, which integrates it to the effects of the contract between parties. On the basis of the legal norms included by the Civil Code, specialized doctrine and legal literature, the present study aims to carry out a monographic approach, aiming to determine the specific legal nature of unforseeability – considered exception from the "compulsory force" of a contract, cause authorized by law for adapting or terminating a contract, reason for revising the effects of contracts concluded, subject to the restrictive regime instituted by article 1271 of the Civil Code, having to respect the requirements of special law, when they exist; although unforseeability is a cause for adapting a contract, it is nonetheless subsidiary to the legal will of the parties. It must be stressed the usefulness of the present study with a monographic character, under the circumstances in which legal doctrine approaches unforseeability mainly from the perspective of its legal effects, which overcome here the theme of the study.

Key words: *pacta sunt servanta, adaptation of a contract, cause authorized by law, excessively onerous, legal regime.*

1.Introduction

Unacknowledged from A legal point of view, unforeseeability has been invoked throughout time on the basis of the general provisions of article 970 of the former Civil Code[1]. In the absence of clear common regulations, the legal literature in the field has been contradictory, prevailing the solutions which admitted unforeseeability as reason for revising the effects of the contracts concluded.

Unforeseeability is currently regulated by the Civil Code[2] in Book V ("Duties"), Title II ("Sources of duties"), Chapter I ("The contract"), Section 6 ("Effects of the contract"); article 1271 constitutes the general legal ground for unforeseeability, subject to analysis in the present work. Unforeseeability is integrated to the issue regarding the effects of a contract between the parties, its acceptance having the role to insure a balance of losses and benefits within a contractual legal relation.

Being placed in the area dedicated to the effects of a contract, but separately from the provisions regulating the "enforceability of a contract" (there are two articles in the Civil Code with clear distinct names: articles 1271 is named "Unforeseeability", whereas article 1270 is named "Enforceability"), unforeseeability has a legal nature subject to discussion: is it a cause integrated to

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[1] According to article 970 of the 1864 Civil Code, "Conventions must be accomplished in good faith. They are not compulsory only when it comes to their clear constituent elements, but also to all the consequences generated upon their duties by equity, customs or law". See for that matter also the commercial sentence of the Supreme Court of Justice, No. 21 of January 25th 1994, in Constantin Crişu, Nicorina Crişu Magraon, Ştefan Crişu, *Repertoriu de doctrină şi jurisprudenţă română*, volume I (Bucharest: Argessis Publ. House, 1995), 211. In this case, the court ruled that the plaintiff – the lessor – was entitled to demand a higher lease in relation to the change of circumstances – liberalization of prices and growth of inflation following the conclusion of the contract – being taken into account the provisions of article 970 of the Civil Code. This case involves basically a revision of the price, within a contract with successive execution, which was for 5 years.

[2] Law no. 287/2009 on the Civil Code, republished, Romanian Official Gazette, Part I, No. 505 from July 15th 2011, subsequently called the Civil Code.

the enforceability of a contract, is it an exception from the enforceability of a contract and thus a cause for adapting or terminating a contract?

Taking as point of reference the provisions of the Civil Code, articles 1270-1271, the legal literature and practice within the field, we aim to present unforeseeability as an exception from the "enforceability" of a contract and, consequently, as a cause authorized by law to lead to the adaptation or termination of a contract, having a legal character and being subsidiary to the legal will of the parties.

2. Definition and ground

2.1. Definition of unforeseeability

Unforeseeability signifies the significant change of the conditions which have been essential for a contract and established when it was concluded, when during the execution of the contract occurs an event independent from the deeds and will of the contracting parties, unpredictable and insurmountable by them, making the further execution of the contract extremely onerous for one of them[3].

There must be made a difference between unforeseeability and the legal institutions close to it (damage, force majeure, "alea" element, resolutive condition, unpredictable prejudice, indexing, guilty lack of execution of a contract, error), which are similar to it, either from the perspective of causes or from that of affects.

2.2. Ground of unforeseeability

By *lege lata* are synthetically used the criteria of cause and effect for the application of unforeseeability, without further explanations. In other words, it is mainly taken into account the "exceptional change of circumstances" considered at the conclusion of the contract, having as consequence an "excessively onerous" obligation and, eventually, an unbalance of the amounts of the money owed, which clearly and unfairly obliges the debtor to make such payment; the acceptance of unforeseeability has the aim of precisely "distributing the losses and benefits resulting from the change of circumstances in a fair way between the parties" or the termination of the contract, as the case may be [art. 1271 paragraph (2) letters a) and b)].

It is considered that the new regulations justify unforeseeability based on the idea of equity[4], dealing with the conflict either on favor of the debtor, when costs rise, or on the favor of the creditor, when the value of the amounts of the money which he has to receive back has excessively decreased.

We consider that unforeseeability concerns "contractual justice", imposing that, in the absence of specific contractual provisions, expenses and costs determined by an unpredictable situation[5] are not transferred only to one party's responsibility, this being eventually the idea of equity.

Irrespective of the ground on which is based, the acceptance of unforeseeability as reason for adapting or terminating a contract is conditioned by the compliance with the requests instituted by law, among which the expressed will of a party in regard to it or the so-called "negotiation in advance".

3. Legal nature of unforeseeability

3.1. Enforceability of a contract

The legal classification of unforseability needs first of all taking into account the principle of the enforceability of a contract – *pacta sunt servanda* – with its corollary *mutuus consensus, mutuus dissensus*.

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[3] See for that matter Brânduşa Ştefănescu, *Dreptul comerţului internaţional*, *Note de curs* (Târgovişte: "Valahia" University,, Faculty of Law and Social-Political Sciences, 2004), 50.

[4] Paul Vasilescu, *Drept civil. Obligaţii. În reglementarea noului Cod civil*, (Bucharest: Hamangiu Publ. House, 2012), 457.

[5] According to the regulations of the Civil Code, article 1271 paragraph 2 letter b), "the unpredictable situation could not be reasonably considered at the moment when the contract was concluded".

a) Pacta sunt servanda. According to article 1270 of the Civil Code, (1) "The contract validly concluded has legal power between the contracting parties", legal provisions acknowledging that the principle of the enforceability[6] of a contract has a mandatory value (*pacta sunt servanda*). The Civil Code, just like former regulations - article 969 - assimilates the force of the contract to the force of law, in a metaphoric way, of course.

b) Mutuus consensus, mutuus dissensus. According to article 1270 paragraph (2) of the Civil Code, "A contract can be modified and terminated only with the agreement of the parties or for causes authorized by law". Thus, legal provisions reconfirm, just like the former law, the rule of the symmetry, or the principle *mutuus consensus, mutuus dissensus,* pointing out at the same time another basic effect of a contract, namely its irrevocability, which is integrated to its enforceability. Therefore, besides the will of the parties, only the causes authorized by law can exceptionally lead to the modification or termination of a contract.

Modification of a contract. Modification regards the expansion or restriction of the enforceability of a contract. Expansion signifies the prorogation of the effects of some legal acts, through the effect of law, beyond the term agreed by parties, for instance the prorogation at every 5 years or other periods of time of some lease contracts; an example is the hypothesis instituted by the provisions of article 1[7] of Law No. 17/1994 for the extension or renewal of the lease contracts concerning certain dwelling areas[8] or by the provisions of article 7 paragraph (1)[9] of Law No. 112/1995 for the regulation of the legal situation of certain buildings serving as dwellings and transferred to state property[10].

Unilateral denunciation of a contract. The provisions of article 1276 of the Civil Code – "Denunciation of a contract" – take into account the "right to denunciate the contract acknowledged to one of the parties", which constitutes the general legal ground of the "causes authorized by law" and refers at the same time to the special situations regulated by the Civil Code but also by other special normative acts, such as: termination of the lease contract due to the total or considerable loss of the profit [article 1818 paragraph (1) of the Civil Code]; termination of a lease contract within 30 days from the death of the tenant [article 1834 paragraph (1) of the Civil Code]; termination of the contract of mandate due to the death, incapacity or insolvency of the agent or principal [article 2030 letter c) of the Civil Code]; unilateral denunciation of a credit facility, for solid reasons regarding its beneficiary [article 2195 paragraph (1)].

Placed after the "enforceability" of a contract and doing nothing else but reconfirming it and acknowledging the will of the parties also in this field, "The provisions of the present article are applied in the absence of any other contrary convention" [article 1274 paragraph (4) of the Civil Code].

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[6] Regarding the ground of the enforceability of a contract, see Cristina Zamşa, „Art. 1271 – Impreviziunea", in collective, *Noul Cod civil. Comentariu pe articole*, (Bucharest: C.H. Beck Publ. House, 2012), 1328.

[7] According to which, "Lease contracts, irrespective of the owner, regarding dwelling spaces serving as houses, subject to legal norms and lease according to Law No. 5/1973, but also dwelling spaces serving as socio-cultural-educational headquarters or which are used by political parties, labour unions and NGO-s, which are being enforced from the entrance in force of the current law, are extended for a period of 5 years, in the same conditions."

[8] Romanian Official Gazette, part I, No. 100 from April 18th 1994.

[9] According to which "Lease contracts concluded on the basis of Law No. 5/1973 on the management of dwelling areas and regulation of relations between owners and dwellers, for the apartments in the buildings provided for by article 1, are extended by law for a period of 5 years from the moment when the decision of the Commission provided for by article 15 last paragraph rests definitive".

[10] Romanian Official Gazette, part I, No. 279 from November 29th 1995.

3.2. Unforeseeability – exception from the "enforceability" of a contract

Specialized literature presents as another exception from pacta sunt servanda[11] the revision of the effects of some legal acts, due to the fact that the contractual balance has been affected, as a result of a considerable change of the circumstances considered when the contract was concluded – the so-called theory of unforeseeability.

In order to establish the exception from the principle *pacta sunt servanda* and, implicitly from *mutuus consensus, mutuus dissensus,* we will take into account the provisions dedicated to unforeseeability by the Civil Code, at article 1271. Being integrated to the effects of a contract between the parties, unforeseeability is distinctively regulated from the "enforceability" of a contract, instituted by article 1270 of the Civil Code. Did the lawmaker want to take unforeseeability out of the area of *pacta sunt servanda,* by providing an obvious exceptional character to it? Or, taking into account the specific character of unforeseeability, did the lawmaker want to provide a well defined legal regime to it, and a clear legal one at the same time – the provisions of article 1271?

According to article 1271 paragraph (1) of the Civil Code, "the parties are bound to fulfill their duties, even if such fulfillment has become more onerous, either due to the raise of the costs for one fulfilling his duty or due to the diminishment of the value of the counter-performance". In other words, law brings again in discussion the compulsory character of the clauses to which the parties of a contract commit themselves, even when the onerous character – one of the basic elements of a contract – changes. Yet, law takes into account here the raise of the costs for one fulfilling his own duty or, as the case may be, the diminishment of the value of the counter-performance, which are naturally integrated to the contractual risk[12], – which is dealt with by the debtor or creditor of the duty to be fulfilled, according to the case and in the absence of any contrary provision; any contract also involves risks, law accepting them within the limits of normality or "reasonability". In other words, "the affected party must deal with the risk of such changes of circumstances taking place".

The text above, which is quite particular, was necessary. Being placed in the area of unforeseeability, it has the role of separating the elements concerning contractual risk ("the fulfillment of duties has become more onerous"), which the lawmaker obviously leaves in the area of the enforceability of a contract, from the elements concerning unforeseeability, characterized by a fulfillment of duties which has become "excessively onerous".

According to article 1271 paragraph (2) of the Civil Code, "If the fulfillment of a contract has become excessively onerous, due to an exceptional change of circumstances which would obviously and unfairly force the debtor to pay back the due amount of money, the court can rule: a) the adaptation of the contract, so as to distribute the losses and benefits resulting from the changes of circumstances fairly between the parties, b) the termination of the contract, at the moment and in the conditions that it establishes".

Unlike the provisions of article 1271 paragraph (1), the lawmaker institutes above unforeseeability - exception from *pacta sunt servanda* – in the given conditions, by providing a well defined legal regime to it. By maintaining the contract in the area of changes, unlike the previous hypothesis, the lawmaker takes here into account an exceptional change of circumstances, capable to make the fulfillment of a contract excessively onerous, while forcing the debtor to give back the due amount of money would become clearly unfair. In other terms, in order to characterize a change as unforeseeability and not as a mere contractual risk, the lawmaker establishes a threshold, a limit, which are characterized from the perspective of cause and effect: exceptional changes, making the

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[11] See for that matter: Gabriel Boroi, Liviu Stănciulescu, *quoted works*, 151; T.V. Rădulescu, „Art. 1271 – Impreviziunea", in collective, *Noul cod civil. Comentarii, doctrină, jurisprudență*, volume I, (Bucharest: Hamangiu Publ. House, Bucharest, 2012), 586.

[12] The relation between risk and unforeseeability is not precise, the change of circumstances being excluded form the area of risks, amendments being determined by interpreting the convention, according to the nature of the contract. See for that matter the commercial sentence of the Supreme Court of Justice, No. 1122 from February 21st 2003.

fulfillment of a contract excessively onerous and creating unbalance between the due counter-performances, making so that a party is excessively favored or "clearly and unfairly forcing the debtor to give back the due amount of money", according to law.

Although article 1271 paragraphs (2)-(3) of the Civil Code only refers to the debtor of the duty to be fulfilled, due to an omission made by the lawmaker, the unfairness of fulfilling the duty can concern any of the parties of the "excessively onerous" contract, as it also happens in the hypothesis provided for by article 1271 paragraph (1) of the Civil Code; the "excessively onerous" character concerns both the raise of the costs for one party fulfilling his duty, but also the diminishment of the value of the counter-performance. Just as a debtor cannot be forced to accept a counter-performance which has become excessively onerous, the creditor cannot be forced either to accept a counter-performance which has become moderate, due to the exceptional change of the circumstances considered when the contract was concluded.

The two texts presented above are well harmonized, both having the role to distinguish between the maintenance of the effects of a contract if a normal or natural change of the circumstances considered when concluding it occurs and the modification of the effects of a contract, including its termination, when the new circumstances have an exceptional character.

In fact, our statements do nothing but reinforcing the fundamental principle of law - „*pacta sunt servanda*", if „*rebus sic stantibus*", on which the mechanism of unforeseeability is based.

In the form it has been regulated, unforeseeability constitutes, in the given circumstances, an exception from the enforceability of a contract, which is well characterized from a legal point of view and aims to bring back the balance between the counter-performances owed by the contracting parties.

There are however authors considering that the involvement of a judge in a contract, by using unforeseeability, "is not an assault to the principle regarding the enforceability of a contract, but on the contrary, is capable to render full force and efficiency to it"[13].

3.3. Unforeseeability – cause authorized by law for adapting/terminating a contract

Instituted for the aims of contractual justice and the idea of equity, unforeseeability is only described by law as "cause authorized by law", having as effect the adaptation or termination of a contract. Before being a cause authorized by law, unforeseeability can be assigned, as a rule, to "conventional mechanisms", its scope being contractual.

On the ground mentioned above, the parties themselves can negotiate right at the conclusion of the contract an unforeseeability clause, integrated to the contract and basically functional, subject to the principle *pacta sunt servanda.* From this perspective, specialized literature mentions unforeseeability as a cause for adapting the value of a contract[14] or, according to us, as an application of the provisions of article 1270 paragraph (2) of the Civil Code, hypothesis I ("a contract is modified or terminated only with the agreement of the parties…")

In our opinion, the parties must consider the adaptation of a contract only when relevant changes take place, culminating either with "the raise of the costs of one's obligation or the diminishment of the counter-performance"; in other words they must consider a certain result, briefly described as "excessively onerous", otherwise the unforeseeability caluse can be interpeted and confounded with other similar ones, for instance the indexing clause[15].

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[13] See for that matter Liviu Pop, *Tratat de drept civil. Obligațiile*, volume II (Bucharest: Universul Juridic Publ. House, 2009), 503.

[14] Together with: clause of the customer befitting from more advantages; clause of the competitive offer; clause of negotiation of price; clause of the first refuse; clause of the first and last refuse. See for that matter B. Ştefănescu, *quoted works,* 50.

[15] When parties inserted in their contract *the indexation clause*, integrated to the "clauses for *maintaining* the value of the contract", unforeseeability does not operate, such clauses being subject to distinct rules. Being stipulated quite often, the indexation clause provides that a price can vary according to the fluctuations of an index or agreed

The parties have the possibility above even after the conclusion of the contract, when the exceptional change of circumstances has already occurred, negotiation concerning the hypothesis instituted at article 1271 paragraph (3) letter d) of the Civil Code – "the debtor has attempted in reasonable terms and in good faith to negotiate the reasonable and fair adaptation of the contract". Negotiation refers here to the adaptation of the contract, according to the circumstances created. Moreover, law itself speaks about the unforeseeability of conventional mechanisms, the negotiation attempt being a condition prior to addressing the court.

The expression "cause authorized by law for adapting/terminating a contract" is an application of the provisions of article 1270 paragraph (2) of the Civil Code, hypothesis II ["a contract can be modified or terminated (…) for causes authorized by law"], corroborated with the provisions of article 1271 paragraphs (2) and (3) letter d) of the Civil Code.

Unforeseeability – "cause authorized by law for adapting/terminating a contract" operates if the following conditions provided for by law are met:

a) an exceptional change of the circumstances existing at the conclusion of the contract occurs.

b) there has been an attempt to negotiate the reasonable and fair adaptation of the contract, in a reasonable term and in good faith. This second condition, which is distinct from the exceptional change of circumstances, places the adaptation of the contract under the will of the parties, providing to the legal revision of the contract only a *subsidiary* character.

Generally speaking, unforeseeability is a cause authorized by law for adapting/terminating a contract, with a subsidiary character, operating in the presence of conditions clearly provided for by law.

3.4. The legal character of unforeseeability – cause authorized by law

If when it comes to the unforeseeability clause negotiated by parties, the court appealed can only take act of the will of the parties, by interpreting it, when it comes to unforeseeability regarded as cause authorized by law, the court appealed must establish the exceptional character of the change of circumstances, taking into account the legal criteria, mentioned at article 1271 paragraph (3) of the Civil Code ant to order the adaptation or termination of the contract, in relation to their gravity.

According to law, any change must be out of the will of the parties. Law does not establish reference points for the change in question, these being the product of the specialized literature, which is different from a case to another.

Unforeseeability has a judiciary character only when the attempt to negotiate the reasonable and fair adaptation of the contract did not succeed and the parties could not reach an agreement about it.

4. Conclusions

The Civil Code institutes unforeseeability, for the first time in the Romanian legal system, readjusting the solutions proposed in legal and contractual practice or by legal doctrine.

Simplified and essential, the provisions of article 1271 of the Civil Code constitute the general ground and the substantial legal field for unforeseeability, having the role of shedding light upon its legal nature and facilitating at the same time its separation from other similar legal institutions. By regulating some "applications" of unforeseeability, both the Civil Code and some special provisions do nothing but enforcing and reconfirming its specific character.

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benchmark, for instance the oil price; the enforcement of such clause involves a certain automatism, being easier to do than *legally revising a contract* and leading to the avoidance of conflicts. When it comes to indexation, parties can revise the contract, in certain circumstances and according to the existing clause, therefore abiding by the enforceability of the contract. If appealed, the court applies the provisions of the contract, abiding by its enforceability.

The provisions of article 1271 of the Civil Code concern unforeseeability – seen as ground for judicial revision of a contract – establishing the conditions in which is applied and making an exception from it.

By "obligating" the parties to attempt negotiation, law does nothing else but enforcing the autonomy of the will expressed by parties, in the spirit of principles *pacta sunt servanda* and *mutuus consensus, mutuus dissensus;* the reasonable and equitable adaptation of a contract, as well as its legal termination, as the case may be, constitute only a subsidiary or exceptional measure. Before being a cause authorized by law, unforeseeability is subject, as a general rule, to "conventional mechanisms", its scope being contractual.

Finally, unforeseeability is "a cause authorized by law" for *subsidiarily* adapting a contract, but also for terminating it, at the moment when, as a result of the contractual balance being broken, the parties could not reach an agreement or the court ruled for an exception from the rule *pacta sunt servanda* to be applied.

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