THE UNPREDICTABILITY CLAUSE IN TRANSPORT CONTRACTS, ACCORDING TO THE NEW CIVIL CODE

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Abstract

Until the enforcement of the highly controversial transport law, transport companies must already observe the provisions of the new Civil Code[1] in their transport business. One of the novelties in the new Civil Code, that came into force on October 1, 2011, refers to the unpredictability clause: recurring to this clause, in certain situations to be precisely analysed by courts, parties may even be exempted from certain contractual obligations, when the court decides to rescind the contract based on objective criteria, not imputable to the party that no longer can properly fulfil the obligations that had been undertaken when the contract had been made. However, this solution only is provided after all means of negotiation and mediation between parties are exhausted. The clause meets current market requirements, under which many companies have to deal with bad paying partners.

Keywords: *unpredictability clause, bad payers, contractual obligations, transport law.*

Preliminary

Unpredictability is newly introduced into legislation, as the New Civil Code (article 1271) came into force, establishing a rule on this issue, but also an exception on contract enforcement when the circumstances considered by parties when entering the contract have changed and the contract has become an excessive burden for one of the parties. In this case, a court may interfere with the contract.

The text is placed immediately after the principle of the compulsory force of contracts and represents (along with the institution regulated under art. 1272 NCC[2] as "contract content") a limit thereof, determining an extension of contract effects that differs from the one stipulated in the contract, to the extent of the established degree of unpredictability.

Although the parties to a contract must meet their obligations, irrespective of whether their execution has become a burden, the New Civil Code (NCC) also regulates exceptional situations that may result in the adjustment of the contract, according to the debtor's possibilities.

1. The principle of unpredictability

Thus, the principle of unpredictability is stipulated under art. 1271 NCC, as follows: "contract performance has become excessively onerous because of an exceptional change in circumstances, resulting in an obvious unfairness of the debtor being compelled to meet his/her/its obligations".

Hence, in case a dispute appears where the principle of unpredictability is invoked, the court may decide ***either to adjust the contract***, for a fair sharing of losses and benefits

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[1] Noul Cod civil, Legea 287/2009.

[2] Noul Cod civil, Legea 287/2009.

resulting from the changes in the actual situation (circumstances) between parties, ***either to terminate the contract***, at the moment and under the conditions established by itself.

Analysing the principle of unpredictability, we shall understand that it shows that **all the contracts affected by unpredicted situations and circumstances will produce other effects** than those originally agreed by parties[3]. However, any situation resulting in a change in contracts, according to art. 1271 NCC, must be exceptional and the debtor being compelled to honor his/her/its obligations should be obviously unfair. The circumstances referred to under art. 1271 NCC must be the ones considered by parties when agreeing upon the contract, and their change must have occurred after the contract has been made. Thus, circumstances such as fluctuations in prices, costs or foreign exchange do not represent an unpredictable situation, as they should have been considered when the contract was made.

Moreover, the new regulations shall only apply to contracts made after October 1, 2011, when the Civil Code came into force, and only when the factors resulting in changes in the contract performance are unpredictable.

NCC states: "The change in circumstances and its extent were not and could not have been considered by the debtor in a reasonable manner, when the contract was made".

At the same time, NCC stipulates that the court may decide to adjust or terminate contracts only when the debtor needn't have undertaken the risk of changes in circumstances and he/she/it could not have been reasonably considered to have undertaken that risk.

Moreover, the debtor must have tried, within a reasonable period and in good faith, to negotiate a reasonable and fair adjustment of the contract to the new circumstances.

2. NCC regulations

Analysing NCC regulations, an analysis of unpredictability in terms of error, damage or force majeure is absolutely necessary. Thus, errors and damages may result in the **cancellation of the document** or adjustment thereof, under certain conditions, whereas unpredictability results in the adjustment of the contract or its **termination**.

Moreover, unlike unpredictability, the consequence of force majeure/acts of God is the **exemption of liability**, not the adjustment or termination of contractually agreed relations.

The rule on the performance of contracts by signatory parties is provided under art. 1271 (1) NCC, according to which "Parties are held liable for their obligations, even though their performance has become more onerous, either for an increase in the parties' own costs, or for a decrease in the value of the corresponding consideration." Thus, each party to the contract must meet its obligation according to contractual clauses, even when their own obligation tends to become or has already become more onerous that it had been when the contract was made, affecting the originally presumed balance between mutual performances.

The exception established by art. 1271 NCC is given by art. 2, that states:

"However, when contract performance has become excessively onerous because of an exceptional change in circumstances, resulting in an obvious unfairness of the debtor being compelled to meet his/her/its obligations, the court may decide:

a) t**o adjust the contract**, for a fair sharing of losses and benefits resulting from the changes in the actual situation (circumstances) between parties;

b) to terminate the contract, at the moment and under the conditions established by itself."

When contract performance has become excessively onerous because of an exceptional change in circumstances, resulting in an obvious unfairness of the debtor being compelled to meet his/her/its obligations, the court may interfere with the contract. Hence, the

[3] Jacques Ghestin, *Traite de droit civil. La formation du contract*, L.G.D.J., Paris, 1998, p. 231.

court may re-establish a contractual balance, adjusting the contract to the new situation, so that resulting losses and benefits do not create an imbalance[4].

Moreover, the court may even decide to terminate the contract (art. 1271 (1) (b) NCC), when the contract can no longer be adjusted for re-establishing a balance.

Therefore, unpredictability is a legal device aiming at protecting a contractual partner that is highly and unfairly affected by the unexpected evolution of the market, and practically sharing the risks generated by such an unexpected evolution between both contracting parties.

"The exceptional changes" that may result either in the amendment or termination of the contract (as we shall see below) are not defined by law, as they will be evaluated by the court, on a case by case basis.

When can the court interfere:

The court may not interfere with the contract for any change in circumstances, but several cumulative conditions are required:

a) the element causing an excessive character of the debtor's burden should not have existed when the contract was made, but it should have appeared after this moment;

b) the change in circumstances and its extent should and could not have been considered by the debtor, on a reasonable basis, when the contract was made;

c) the party undergoing difficulties should not have undertaken (explicitly or by nature of the contract) to bear the risk of the occurrence of the perturbing event and it cannot be reasonably considered to have undertaken such risk;

d) the debtor should have tried to negotiate the reasonable and fair adjustment of the contract, within reasonable time and in good faith.

As the final text shows, the appeal to a court is only the second step in the actions of the debtor with an obligation that has become excessively onerous. As a prior condition for appealing to a court, he/she/it should have tried to negotiate with the other party, with a view to achieving the adjustment of the contract.

3. The importance of the imbalance at stake

New circumstances must create an imbalance of a certain importance, that may be evaluated by the judge *in concreto* or by the lawmaker *in abstracto* (the latter may establish a threshold beyond which any imbalance in performances should be considered an unpredictability).

The difference between the enforcement of the rule[5] (on the proper execution of contractual obligations) and the enforcement of the exception (implying the adjustment of the contract by interference of the court) is quite difficult, as the court must discriminate situations when the obligations of a party has become "more onerous" or "excessively onerous".

New circumstances should place the debtor in a very difficult economic position. Bankruptcy may be such a situation, but the possibility of bankruptcy is not the only case that would entail the application of the unpredictability theory. The problem of an unpredictability situation may arise in contracts with successive performance, continuous performance (with a long performance term), as well as contracts subject to a rather distant suspension term. Because of this element (time), a major imbalance might appear between the performances the contracting parties are obliged to, during the performance of the contract.

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[4] Dumitru Dobrev, Impreviziunea, o cutie a Pandorei în Noul Cod Civil, in *Noul Cod Civil al României, Comentarii, ediția a II-a revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2011, p. 47.

[5] Op. Cit., p. 79.

This imbalance usually appears regarding the obligation to pay the amounts of money, when the creditor, according to the contract, the transport contract included, must receive an amount of money which is significantly lower than the real value of the counterpart performance. However, the debtor may also face such a situation, when, according to the contract, he/she/it must pay a significant amount of money, compared to the real value of the acquired good.

Of course, unpredictability may concretely arise only when the performances or obligations undertaken by the parties have not been executed yet. If the contract has been fully performed, the parties can no longer invoke any increase in performance costs or any decrease in the value of the counterpart, for a very simple reason: if the obligation could be executed, this obligation represented, on the debtor's behalf, the proper and proportional equivalent of the correlated obligation. If the obligation was partially performed, we believe that unpredictability may be invoked for any remaining obligations.

Transport contracts may take a wide range of forms, according to the scope of the carrier's activity (transport of passengers, goods, luggage and packages), the means of transport (railway, road, water, air), the particularities implied by international transport, compared to domestic transport. For these reasons, unpredictability must also be analysed for transport contracts, according to the transport's commercial and technical management, the scope of the transport contract, the route choice, etc. In other words, transport contracts should also be evaluated in terms of concrete elements and actual situations of unpredictability.

4. Conditions required in order to invoke unpredictability

In the first place, a major and obvious *imbalance* must exist between the parties' obligations, i.e. the strength of this imbalance should place the debtor of the obligation at stake in a highly difficult and disadvantageous situation, when he/she/it fulfilled such obligation[6]. As it may be noticed, the law deals with an obligation that has become *excessively* onerous, as this is the only hypothesis when a party may invoke the unpredictability theory. In order to emphasize the importance of this concept, the law specifically states that an obligation that has become onerous (not *excessively* onerous) cannot be considered a reason for a party to invoke unpredictability. This event must cumulatively meet three conditions, so that it may be accepted as a source for an unpredictability situation:

- it must appear or become known to the disadvantaged party after the contract was made and it could not have been reasonably considered when the contract was made; hence, it is important that the source of this event entailing the imbalance of performance should occur after the contract is made (this is a material difference from damage), on the one hand; on the other hand, this event should not be known by the contracting party or, in other words, as per art. 1271 (3) (b) NCC, the change in circumstances and its extent was not and could not have been reasonably considered by the debtor when the contract was made;
- be outside the control of the disadvantaged party; when the party could have foreseen or remove the effects of this event, unpredictability can no longer be invoked;
- the risk of events should not have been undertaken by the disadvantaged party; any risks may be taken, as this situation concretely refers to a contractual clause whereby the contracting party firmly and unequivocally agrees to perform its obligations, irrespective of the changes that might appear during the performance of the contract, even though such changes affected contractual balance.

[6] Cristina Elisabeta Zamsa, *Teoria impreviziunii. Studiu de doctrină şi jurisprudenţă*. Hamangiu Publishing House, Bucharest, 2006, p. 142.

The second element is unpredictability itself, i.e. the imbalance between performances should occur in a completely *unpredicted* manner, with neither of the parties knowing what would happen in a future (by definition, a distant future) with the value of their undertaken obligations[7]. If this unpredictable element does not exist, one cannot talk of the application of the unpredictability theory; the party in a less favourable situation cannot invoke the *rebus sic stantibus* rule; hence, in such a situation, when the party does not perform the contract that has become excessively onerous for a reason it has foreseen, the issue of faulty inobservance of obligations arises, which is something completely different. Moreover, unpredictability does not exist when the performance of the obligation has been rendered impossible by a force majeure event, not by the obligation becoming excessively onerous; of course, such a situation is a case of contractual risk, not unpredictability.

On balance, unpredictability is an imbalance in the performances of parties occurring after the contract has been made, during its execution (a difference between unpredictability and damage, which, in turn, is a significant imbalance in the performances of parties, but an original imbalance, i.e contemporary to the moment when the contract is made). The text allows for the contract to be reviewed not merely because the contract must survive and be continually executed, because its execution is to the benefit of both parties.

Therefore, the New Civil Code regulates the unpredictability theory as a premiere for Romanian legislation. The law is based on the principle of compulsory contract effects, which it reiterates and emphasizes, especially for outlining that unpredictability is a *strict* exception from the contract's compulsory character.

The unpredictability theory is regulated by art.1271 NCC in a single article, which is, however, clear enough. Case law will actually concretise and establish genuine unpredictability situations to be invoked in practice.

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[7] Op. Cit., p. 173.