ROMÂNIA
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Consiliul Superior al Magistraturii

The New Civil Code for Everyone

IMPREVISION

- An institution newly introduced by the Civil Code (article 1271): the text in the New Civil Code consecrates a rule and an exception in the field of enforcement of the contract when the circumstances which the parties considered when concluding the contract have changed and the contract has acquired the characteristic of an excessive duty for one of the parties.
- This is a situation when the court of law intervenes in the contract

THE RULE: "*The parties are obliged to perform their obligations, even if their execution has become more onerous, either due to the increase of costs of execution of the own duty, or due to the increase in value of the counter-service*".

According to this first paragraph, each party in the contract must perform their obligation according to the clauses of the contract, even if the own obligation becomes **more onerous** than it appeared at the date of conclusion of the contract, affecting the initial, presumed balance, between the mutual performances.

THE EXCEPTION: *if the execution becomes **excessively onerous** due to an exceptional change of circumstances which would render manifestly unjust to oblige the debtor to perform the obligation, there is a possibility of intervention of the court of law in the contract.*

Solutions which can be pronounced by the court:

a) Adapting the contract so as to distribute fairly between the parties any losses or benefits resulting from the change of circumstances;
b) Cessation of the contract at the moment and under the established terms.

Conditions in which the intervention of the court may take place

The intervention of the court in the contract may be determined not just by any change of circumstances, but several *cumulative* conditions are required:

a) the element causing an excessive character of the task of the debtor must not have existed at the date of conclusion of the contract, but it must have appeared after this moment;

b) the change in circumstances, as well as its extent must not have been envisaged and it shouldn't even have been possible to have been reasonably considered by the debtor at the moment of conclusion of the contract;

c) the party getting into difficulty must not have accepted (expressly or by the nature of the contract) to bear the risk of occurrence of the perturbing event nor reasonably could have considered to have assumed that risk;

d) the debtor must have attempted, within a reasonable lapse of time and in good faith, to negotiate the reasonable and fair adaptation of the contract.

As it results from the last text, the notification of the court is only the second step of the effort of the debtor of the obligation having become excessively onerous, as he is obliged, as a preliminary condition to the notification of the court, to have attempted to negotiate with the other party, in order to obtain an adaptation of the contract.

Importance of the Arising Imbalance

It is necessary for the new circumstances to have caused an imbalance of such magnitude, which can be assessed either *in concreto* by the judge, or *in abstracto* by the lawmaker, who can establish a limit beyond which the imbalance of the performances should be considered as imprevision.

We note that the difference between the **enforcement of the rule** (**on the exact execution of the assumed obligations** by contract) and the enforcement of the **exception (which supposes the adaptation of the contract** by the intervention of the court) is difficult enough, considering the task of the court to discriminate between the situations when the obligation of one of the parties has become **"more onerous"** or **"excessively onerous".**

The new circumstances must place the debtor in a very difficult economic position. An example would be even getting into a situation of bankruptcy, but possible bankruptcy is not the only case which might engender the enforcement of the theory of imprevision.

Differences from other types of institutions

A distinction has to be made between **imprevision and injury,** the most relevant being the moment when the imbalance between performances intervenes. In the case of injury the blatant disproportion between the two performances is assessed at the moment of establishment of the agreement, whereas the imprevision is assessed at the moment of execution. In the case of imprevision, at the moment of conclusion of the agreement there is no imbalance between the performances of the parties, but this imbalance arises later.

Also, there has to be another distinction between **imprevision and force majeure (Act of God).** Concerning the force majeure, we are in the presence of an event which could not have been foreseen nor prevented by the debtor, who thus sees him/herself in the impossibility to further perform the obligation, whereas in the case of imprevision it is certain that the obligation is not impossible to perform, just that it is more onerous, and if the debtor would perform it, then this would attract its bankruptcy. The force majeure cannot lead, as in the case of imprevision, to the adaptation of the contract, it only leads to its suspension or cessation of its effects.