

DISCUSSION REGARDING GOOD FAITH AND CHANGE OF CIRCUMSTANCES

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Abstract

The current economic climate underlines the importance and necessity of proper legal mechanisms which can enforce parties' protection and expectations in regard to unexpected changes of circumstances which may occur during contract performance.

The aim of this paper is to highlight how the institution of „change of circumstances” has been regulated in the newly enacted Romanian Civil Code, while also undertaking a comparative analysis in regard to the Principles of European Contract Law and the Common Frame of Reference.

Before the enactment of the present Civil Code, change of circumstances was viewed as more of a jurisprudential and doctrinal solution to given legal problems which affected contractual balance; however, the current legislation has recognized both change of circumstances and good faith through express provisions. In the context of the principle of good faith we have a better understanding of its role in the change of circumstances and of how the former is applicable in the field of contract performance.

Keywords: change of circumstances, good faith, Romanian Civil Code, European contract law, comparative law

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Section 1. Introduction

The recent enactment of the new Civil Code has aided the discussion regarding the recognition and practicality of the change of circumstances institution. In the system set out by the previous legislation the grounds of this institution were -difficult to determine and led to several debates among legal scholars. The proposed solutions ranged from abuse of rights, good faith, and lack of cause to unjust enrichment.

From a comparative standpoint, the regulation of change of circumstances in European countries differs; however, a common occurrence is its high effect in practice. Change of circumstances proves to be an instrument which ensures honoring of the contractual provisions and that any future contractual imbalances will not endanger the contract², in case the imbalance occurs because of circumstances which could not have been envisioned by the parties when the contract was concluded.

The role of change of circumstances in the field of contractual security and justice is of great use because it raises questions regarding complex economical problems, such as contract adaptation, which without intervention from the courts would render the contract ineffective. The current Romanian Civil Code has strong ties with that of Member States of the European Union and also with proposed legislation in the field of private law. The association between good faith and change of circumstances proves that the Romanian legislation has aligned to the European way of thought.

Section 2. The legal regime for change of circumstances in the Romanian Civil Code

In light of the provisions of Art. 1271 of the Romanian Civil Code, the grounds of the change of circumstances are not a current subject to legal debate anymore. However, some authors have suggested that justice represents the theoretical backbone of this institution.³ The argument behind this idea is that „the effect of the change of circumstances is that the debtor is obliged to execute an obligation which would seem inequitable”. In the latter part of the paper we will find that the reasoning behind the chosen enactment of the Civil Codes belongs not to the Principles of European Contract Law, but to its successor, namely the Draft for a Common Frame of Reference⁴. The grounding principles of the later project are freedom, security, justice and efficiency. The opinions expressed⁵ have associated change of circumstances with contractual security, and not directly with justice. The occurrence of justice in the field of change of circumstances comes from its interaction with good faith. Each party has obligations which arise from contractual loyalty. Thus, the parties are obliged to comply with the requirements of good faith and to cooperate in order to carry on their obligations and save the contract. According to article 1271(3) (d), good faith marks a condition for existence and not a theoretical ground for the change of circumstances. Another critique raised by this enactment was that art. 1271 „does not specify expressly the grounds for the relation between contractual obligativity and change of circumstances”⁶. The answer was based on the fact that the latter is a ground for contractual security which includes the principle of the obligatory force of contract, but subject to the possibility of challenge where an unforeseeable change of circumstances gravely prejudices the utility of the contract for one of the parties⁷. Thus we can conclude that on a fundamental level, change of circumstances represents an exception from the *rebus sic stantibus* principle.

2.1. Defining the concept

² R. Duminica, C. Aleca, „Consideration concerning the regulation of the theory of unforeseeability in comparative law”, *Issues of Business and Law*, volume 4, 2012, p.66.

³ B. Oglinda, „The theory of imprevision in the context of the economic crisis and the new Romanian Civil Code”, *Perspectives of Business Law Journal*, Volume 1, Issue 1, nov. 2012, p.237 and Baias F.A, „NCC comentariu pe articole”, Ed. C.H. Beck, București, 2012, p. 1331.

⁴ D. Dobrev, „Impreviziunea, o cutie a Pandorei în Noul Cod Civil?”, in *Noul Cod Civil. Comentarii*, 2nd ed., edited by M. Uliescu, ed. Universul Juridic, București, 2011, pp. 212.

⁵ C. von Bar, E. Clive, H. Schulte-Nolke, *Principles, Definitions and Model Rules of European Private Law* (outline edition), Sellier, European Publishers, Munich, 2009, p. 71.

⁶ C. Zamșa, „Buna credință în executarea obligațiilor”, *Pandectele Române*, no.1, 2013, p. 10.

⁷ C. von Bar, E. Clive, H. Schulte-Nolke, *op.cit.*, p.72

Among legal scholars a consensus regarding the definition of change of circumstances has not been reached, mainly due to the former debate regarding its theoretical grounds.

Article 1271 of the Romanian Civil Code provides that „an obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished”. In the absence of an express legal definition, we can identify the main characteristics⁸ of change of circumstances:

- a) change of circumstances/imprevisiun is an exception from the obligatory force of the contract in regard to its execution.
- b) from a procedural standpoint, this institution enables the judge to intervene in order to rule for the maintaining of the contract or its termination
- c) the moment at which the circumstances occur has to be after the contract was concluded and its consequences make the debtors obligation to be excessive in comparison to the ones envisioned initially
- d) from a theoretical perspective, change of circumstances is difficult to categorize given the open ended nature of its provisions. Thus, article 1271(1) Romanian Civil Code refers to onerosity; however, this institution can be applied in relation to conventions which can be free of charge such as volunteer work. It can also be applied to contracts with successive execution and *uno actu* contracts, or where the price is paid in several installments.

2.2. Preliminary thoughts

Imprevisiun is meant to protect the efficiency and security of the contract when both parties couldn't have envisioned actions, elements or circumstances which would be able to affect the contract. In a different scenario, we can assume that the parties, being aware of what was to follow, have either inserted express clauses to revise the contract, or without doing such, they took up the risk of drastic fluctuations which may affect the value of their obligations.

Aside from the internal conditions for the change of circumstances, we deem the absence of a contractual provision which enables contract revision to be a preexistent condition for filing a claiming court on the grounds of Art. 1271 of the Romanian Civil Code. An example in this regard is the hardship clause which obliges the parties to revise the contractual obligations in case contractual balance is affected by objective circumstances of economic or monetary nature⁹. An index clause represents another instrument which can avoid the risk of change of circumstances. This has been defined by legal scholars as a method to „automatically reevaluate performances depending on the variation of a reference index through the indexation clause or convention so as to cover the depreciation of the currency in which payment is made”¹⁰. This type of solution provides the advantages the main unit of measure for contractual balance refers „not only to money but also to other economic values such as the price on a given day for a raw material and so on”¹¹.

2.3. Requirements

The main provisions regarding the requirements for change of circumstances to be applied are stated in Art. 1.271 (3) of the Romanian Civil Code, namely:

- a) the change of circumstances occurred after the contract was concluded;
- b) the circumstances and their extent hadn't and couldn't be envisioned by the debtor, in a reasonable manner, at the moment the contract was signed;
- c) the debtor hasn't assumed the risk of change of circumstances and it cannot reasonably be expected of him to do so.
- d) the debtor has tried in a reasonable timeframe and with good faith to renegotiate an equitable adaptation of the contract.

⁸ F. Bujorel, „On imprevisiun and its effect on the literary, artistic or scientific work copyright assignment agreement”, *Perspectives of Business Law Journal*, Volume 1, Issue 1, nov. 2012, p.221.

⁹ R. S. Pătru, „Teoria impreviziei din perspectiva dimensiunii economice și juridice a analizei contractului”, *Tribuna Juridică*, Vol. 1, no. 1, June 2011, p. 121.

¹⁰ L. Pop, *Tratat de drept civil. Obligațiile*, vol. II, *Contractul*, Ed. Universul Juridic, București, 2009, p. 534.

¹¹ B. Oglinda, *op.cit.*, p. 242.

According to the requirements under Art. 1271 letter a), the event that causes the change of circumstances has to occur after the contract was concluded. In other legal systems, this requirement is also met even if the event occurs before the contract is concluded, but “the changes are accelerated dramatically” during contract performance¹².

The second requirement refers to the diligence of the debtor, and not of the creditor. Article 1271 Romanian Civil Code protects both parties from the fluctuations in value of the affected obligation. In this regard we understand that both parties are obliged to prevent unforeseen circumstances from rendering the contract ineffective.

In regard to the third requirement, if the creditor has the conviction that drastic changes may occur, even though he hasn't inserted any renegotiation clauses, he will be protected. By informing the debtor during the negotiations regarding ulterior risks, the debtor cannot claim that he is of good faith in regard to this information, which will lead to him carrying on the risk of change of circumstances. Otherwise, if the debtor could have envisioned the possibility of such circumstances, then the requirements under 1271 aren't met and he will have to bear the consequences of the obligations which is more onerous than initially.

Another concept used in doctrine is „reasonable imprevision”¹³, according to which, the parties could not have foreseen the ulterior changes. Although reasonableness and contractual good faith are open-ended concepts and lack tradition in the Romanian civil law, legal scholars have shown that the meaning of the word „reasonable” has to be evaluated in an abstract manner, as a *bonus pater familias*, and not taking into account the personal characteristics of the party¹⁴.

The last requirement consists of the obligation on behalf of the debtor to negotiate a reasonable and equitable adaptation of the contract. This obligation must be executed in a reasonable timeframe and with good faith. The provision at hand must be interpreted with Article 1170 of the Romanian Civil Code which states that „parties have to act with good faith while negotiating, concluding and executing the contract”. From a terminology standpoint, legal doctrine has differentiated two forms of good faith, namely subjective and objective¹⁵. The latter represents the obligation to achieve a norm of conduct¹⁶ which limits rights and creates obligations. Thus, according to Article 1271 of the Romanian Civil Code, the debtor has to try to adapt the contract without trying to render it ineffective and subsequently lead to its termination.

2.4 Effects

The effects of change of circumstances are provided by Article 1271 (2) of the Romanian Civil Code which provides that “if performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) adapt the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court.”

The adaptation of the contract is the first solution set out by the law. The creditor of the obligation which became too onerous may not be pleased with this scenario because it counters the opportunity to benefit from the change of circumstances. However, this cannot be possible once the obligation set out by Article 1271(3) is met, and thus contractual security is maintained. Although an imbalance in information between the parties is to be expected, the principle of good faith does not allow one to benefit from the lack of information or hindsight of the other party. Thus, this would lead to an uncommon situation where the creditor knows the extent of his obligation, while the less informed party does not.

An important facet of the change of circumstances is the possibility of the judge to determine on his own how the losses shall be borne. Not all contracts affected in a substantial manner must lead

¹² *Ibidem*.

¹³ F.A. Baias, *op.cit.*, p .1331.

¹⁴ I. Turcu, *Noul Cod civil. Legea nr. 287/2009. Cartea a V-a. Despre obligații (art.1164-1649) Comentarii si explicații*, Ed. C.H. Beck, București, 2011, p. 338.

¹⁵ C. Zamșa, *op. cit.*, p.10.

¹⁶ M. Uliescu, „Principii directe ale dreptului european al contractelor”, in *Dreptul românesc în contextul exigențelor Uniunii Europene*, Editura Hamangiu, București 2009, p.8.

to termination. In regard to commercial agreements it is to be desired that they continue to be performed rather than terminated because it's a simpler and cleaner alternative. Thus the courts should foremost try to maintain the contract in force in order to promote contractual security and efficiency. This will give way to several problems in assessing the cost allocation of the new situation, and given that there are no criteria or guidelines as to how the legal provisions must be applied, there is a certain risk that the court rulings may become arbitrary in regard to financial efficiency.

As a limit to the adaptation of the contract we support the opinion¹⁷ that "the court may decrease or increase the prices stipulated in the contract and the amounts of goods, may order back charges or modify certain contract clauses. What it may not do is rewrite the full contract as, in this case; it would have violated the principle of the parties' freedom of will and the contract mandatory force principle."

From a structural interpretation of the article we conclude that the law maker sought to favor the salvation of the contract and only after it is not possible, termination should become the solution. Article 1271 (3) (b) recognizes the right of the court to change the parameters in which the contract shall be terminated.

Section 3. Different applications of the change of circumstances

Practical applications of the change of circumstances theory can be found in laws such as the following:

1. Law no.8/1996 regarding copyright and neighboring rights. According to Article 43 (3) „Where there is an obvious disproportion between the remuneration of the author of the work and the profits of the person who has secured the transfer of the economic rights, the author may request the competent jurisdictional bodies to revise the contract or increase the remuneration accordingly". Legal doctrine has pointed out that the efficiency of this provision is debatable given it is difficult for the author to prove the amount of income obtained by the one who further transfers the rights¹⁸. As a result, the requirement of "obvious disproportion" is difficult to achieve, minimizing the effects of the change of circumstances theory. A key difference from the Civil Code provisions, the copyright law applies this theory not to the contractual relationship if the author and the buyer, but to that between the initial buyer and a third party and the benefits which arise from that. Secondly, in this field, the renegotiation of the contract is not a requirement and the court can directly decide on the proper amount of money that the author should receive.

2. Law no. 112/1995 on the settlement of the legal condition of some buildings designed for dwelling purposes, passed into State property. Article 13 provides that the amount of damages to be paid to the former owners shall be made on the basis of further special legislation. In order for the damages not to be affected by the fluctuations of the value of the goods, monetary coefficients shall apply which shall not be lower than the economic growth index of the average salary in the economy.

3. Law no. 195/2001, Law on Volunteerism. According to Article 14 „provided that during the performance of the volunteer activities contract unexpected events impede the performance of the volunteer's activities, the contract shall be renegotiated and should the situation render the performance of the contract impossible such contract shall be considered terminated in law". In comparison with other applications of the imprevision theory, this law holds proves fairly similar to the provisions of the current Romanian Civil Code. The Law on Volunteerism highlights the main effects of imprevision, namely the adaptation of the contract, leaving up to the parties the possibility to agree upon how the contract should be adapted. While the volunteer contract is free of charge, another specific quality is the unilateral character¹⁹ of the application of the imprevision theory, namely only to the benefit of the volunteer.

Section 4. Change of circumstances in international legislation

International and European legislation offer solutions similar to the one adopted by the Romanian legislator. Among these the following prove of greater interest:

¹⁷ B. Oglinda, *op.cit.*, p. 246.

¹⁸ F. Bujorel, *op.cit.*, p. 226.

¹⁹ C. Zamșa, *Teoria impreviziiunii*, Ed. Hamangiu, București, 2006, p. 256.

1. Principles of European contract law, article 6.111²⁰. Within the Principles, change of circumstances is centered on the idea of contractual justice, given how risk is allocated after the modification of the initial parameters. Given that the courts are empowered to reestablish contractual balance, the provision highlights the recent trend where judges have more power to intervene in contracts at the cost of contractual freedom²¹.

2. UNIDROIT Principles of international commercial contracts: art. 6.2.1–6.2.3. In this iteration, change of circumstances is most similar with the hardship clause. The UNIDROIT principles contain a series of provisions specific to change of circumstances such as the effects and how renegotiation of the contract should be conducted. In case a party starts the renegotiations it cannot claim for their obligation to be suspended or diminished for the time being²².

The end result of the UNIDROIT Principles is to create a set of rules which can be applicable to all legal systems, regardless of costumes, economic or political context of the states where they may apply²³. Legal scholars have proved to be skeptical in this regard, by referring to the large extent to which the system relies on arbitration. This has been identified as a weakness of the UNIDROIT Principles because arbitration has proved strong ties with minimalist and formalist ways of thought which led to such restrictive interpretations that it led to associating imprevisión with force majeure²⁴.

3. The revised edition of the Common Frame of Reference (“CFR”) section III art. 7:110²⁵. As previously stated in section 2, the CFR represents the original source material for the Romanian law maker. After analyzing the foreign doctrine, we found that an instrument such as change of circumstances cannot properly function without a well-established legal practice set out by the courts.

²⁰ Article 6:111 PECL (ex art. 2:117) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract; (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

²¹ Bénédicte Fauvarque-Cosson, Denis Mazeaud, *European Contract Law. Materials for a Common Frame of Reference*, Sellier. European Law Publishers, Munich, 2008, p.323.

²² A.E. Moise, G.I. Moise, *Teoria imprevizunii: de la creatie doctrinara la normă juridică*, in the book of proceedings of the conference „Știință și codificare în România, Comunicări prezentate la Sesiunea științifică a Institutului de Cercetări Juridice”, 2013, p.140.

²³ B. Oglinda, *op.cit.*, p.236.

²⁴ H. Rosler, „Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law”, *European Review of Private Law*, vol 15, no. 4, 2007, Wolters Kluwer, p.505.

²⁵ III.7 – 1:110: Variation or termination by court on a change of circumstances. (1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. (2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court. (3) Paragraph (2) applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred; (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

An example in this regard is the German model in the case of the Wegfall der Geschäftsgrundlage²⁶, the later proving strong ties with the change of circumstances as regulated by the CFR.

Section 5. Conclusion

Change of circumstances in its current form proves to be a common ground between Romanian and European legislation in regard to risk allocation. In an economic climate shielded from major fluctuations, the occurrence of this institution should not have to be frequent. As a conclusion we find change of circumstances to be a viable last resort type solution which the parties can use during contract performance. Given that the requirements for change of circumstances and also its effects prove to be rather difficult to apply in practice, we find comparative law to be a source which should be used more often in order to better understand how this institution functions.

At a global level, the alignment of the civil law provisions with that of the recent European models leads us to believe that the Romanian Civil Code is a step in the right direction in regard to the objective of the European Union to prevent national legislation from being an obstacle in the way of cross-borders commercial relations within the territory of the Union.

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²⁶ R. Duminița and C. Aleca, „Consideration concerning the regulation of the theory of unforeseeability in comparative law”, *Issues of Business and Law*, vol. 4, 2012, p.63.