

# ON IMPREVISION AND ITS EFFECT ON THE LITERARY, ARTISTIC OR SCIENTIFIC WORK COPYRIGHT ASSIGNMENT AGREEMENT

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## **Abstract**

*The relatively recently legal notion of imprevision brought under Romanian regulation by the new Civil code that came into force October 1st, 2011, is expected to be subject of numerous specialized analyses in order to clarify the various aspects that make up its identity, characteristics and effectiveness. Following the purpose described here-above, our study aims especially at conjugating the theory of imprevision with the copyright transfer agreement. The article hereafter contains standpoints and de lege ferenda suggestions in relation to the party entitled to institute the legal proceeding relative based upon the imprevision theory, the criteria to be observed in order to adopt a solid legal settlement in this respect, the contracting parties and the court's role in interpreting and applying the imprevision theory.*

**Keywords:** *imprevision, special imprevision, copyright transfer agreement, rebus sic stantibus principle, bona fide, failure to execute liabilities.*

**JEL Classification:** K12

## **1. Regulations, characteristics and imprevision fundamentation.**

Within our law system, imprevision has found ground for regulation within the provisions of article no. 1.271 of the Civil code<sup>2</sup>, which repeats almost precisely article no. 6:111 („Change of circumstances”) of the European Contract Law Principles<sup>3</sup>.

According to article no. 1.271 of the Civil code, *imprevision*:

„(1) *The parties are bound to execute their duties, even when the execution has become more onerous, either due to the one's own duty execution price augmentation, or due to value diminution of the counterpart's duty.*

(2) *Nevertheless, provided the agreement execution has become excessively onerous, due to an exceptional change of circumstances that would make downright unjust to coerce the party liable to execute his duty, the court may decide upon:*

a) *adaptation of the agreement, so as to distribute evenly among the parties the losses and the gains resulting from the change of circumstances;*

b) *termination of the agreement, at the date and with respect to the terms it shall set.*

(3) *The provisions of paragraph (2) are to be carried into effect only when:*

a) *the change of circumstances has appeared subsequently to closing the deal;*

b) *the change of circumstances, altogether with its persistence in time, have not been, nor could they have been foreseen by the debtor, in a reasonable manner, at the time of the deal closure.*

c) *the debtor did not take responsibility for the change of circumstances, nor could his will be interpreted in a reasonable manner so as to result in having taken this responsibility;*

d) *the debtor has tried to initiate, within a reasonable period of time and being of good faith, the negotiation of the agreement adaptation in a reasonable and righteous manner.”*

Therefore, from a terminological point of view, we are in the presence of a theory denominated traditionally as imprevision, but which has also been differently denominated within

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<sup>2</sup> As modified by Law no. 71/2011 for the entering into force of Law no. 287/2009 concerning the Civil code, published in the Official Gazette no. 409/June 10th, 2011

<sup>3</sup> *European Contract Law Principles*, Prepared by the Commission of European Contract Law, Kluwer Law International, Ed. de Lando, Hague, 2000, p. 322.

European law systems, or as referred to in the works of specialty, such as: „change of the contractual circumstances”<sup>4</sup>, „bouleversement of the contractual economy”<sup>5</sup>, or „lawful failure to execute an agreement”<sup>6</sup>.

Although comprised in the marginal denomination, the Civil code makes use of the „Imprevison” concept, but does not define the content of this legal institution. Moreover, the term „imprevison” particular to the legal area is not even explained in the Romanian Language Explicative Dictionary<sup>7</sup>, and neither in the Great Dictionary of Neologisms<sup>8</sup>.

There is no shade of doubt that the meanings of the terms „unforeseeability” and „unforeseeable” (in Romanian – „imprevizibilitate” and „imprevizibil”), as defined by the two dictionaries referred to up-above cannot stand when used within a legal context, purely because in the common language, these terms point at an absolute impossibility to foresee future events, which is not the case when dealing with the legal realities that are described by the notion of imprevison.

Therewith, the doctrine<sup>9</sup> has pertinently stressed upon the fact that the imprevison notion is to be separated from the issue of updating the civil duties, meaning that the latter cannot be tied to the imprevison theory, but to that of indexation in relation to the inflation index. The duties that emanate from licit legal facts are to be updated by applying the enrichment without legal cause, or the unowed payment regulations, and furthermore the financial obligations derived from the civil delictual responsibility shall be updated based on the prejudice full reparation principle (*damnum emergens* and *lucrum cessans*).

Hence, defining the imprevison concept needs to be made according to the legal area, as it is a notion particular to this domain, while pointing out its specific traits in order to avoid its misuse in relation to other legal institutions than those that it actually addresses.

Not risking any definition of the recently regulated, but undefined concept of imprevison, until the doctrine and jurisprudence will not have clarified the main aspects in relation to imprevison, although we will try to identify its most important traits as follows:

- a) the imprevison represents an exception to the rule of compulsory enforcement of an agreement regarding its execution;
- b) the imprevison represents the circumstances that arise during the execution of an agreement which make it obviously unjust to coerce the debtor to fulfill his duty;
- c) the imprevison can be applied only to onerous, commutative, and with successive stages of execution agreements, or to agreements that contain a fulfillment suspending condition;
- d) the imprevison constitutes the basis on which the court may intervene in order to decide the agreement adaptation, or the agreement termination, with respect to certain conditions.

In an attempt to substantiating imprevison, both doctrine and jurisprudence have referred to concept as: a) the *rebus sic stantibus* rule<sup>10</sup>, b) the equity law<sup>11</sup>, c) the good-faith in the

<sup>4</sup> See art. 6:111, *Principles of European Contract Law*, cited work., p. 322.

<sup>5</sup> See D.M. Philippe, *Changement des circonstances et bouleversement de l'économie contractuelle*, Bruxelles, 1986.

<sup>6</sup> See C. Chabas, *L'inexécution licite du contrat*, LGDJ, Bibliothèque de Droit Privé, Tome 380, Paris, 2002.

<sup>7</sup> In the *Romanian Language Explicative Dictionary* (DEX), 2-nd Edition, Ed. Universul Enciclopedic, Bucharest, 1998, p. 479, there are explanations for the terms of „unforeseeability” („imprevizibilitate”) – characteristic of that which cannot be foreseen and the term „unforeseeable” („imprevizibil”) – which cannot be foreseen.

<sup>8</sup> In the *Great Dictionary of Neologisms*, by Florin Marcu, Ed. Saeculum I.-O., Bucharest, 2000, p. 452, one may find the terms „unforeseeability” and „unforeseeable” with exactly the same explanation as can be found in the *Romanian Language Explicative Dictionary* (DEX).

<sup>9</sup> See C. Zamșa, *Revizuirea contractelor în caz de imprevizune. Desființare.*, Bucharest University Archive, Law Series, 2005 – II, p. 65.

<sup>10</sup> See Gh. Piperea, *Introducere în Dreptul contractelor profesionale*, Ed. C.H. Beck, Bucharest, 2011, p. 270.

<sup>11</sup> See P. Voiculescu, *Teoria imprevizunii*, PhD thesis, Bucharest, 1934.

agreements execution<sup>12</sup>, d) the act of God notion<sup>13</sup>, e) the right abuse<sup>14</sup>, f) the just and useful equilibrium<sup>15</sup>. We will not stress upon these aspects, as they are thoroughly analyzed in the studies referred to in the footnotes.

## 2. *The imprevision applicability premises*

Before starting to analyze the terms and conditions with respect to which the agreements imprevision is applicable, we find it necessary to point out its preliminary premises, meaning those circumstances that, without actually representing the required conditions, still play a preparatory role for the area within the limits of which imprevision is applicable. These premises are: a) the absence of the debtor's guilt, b) the absence of an adaptation clause in the agreement, c) unfulfilling the duty needs to be lawful.

a) *The absence of the debtor's guilt* should be interpreted in relation to having or not having received a notice of default. The notice of default averts applying the imprevision, as this institution represents an advantage bestowed to the debtor who is not guilty with regard to fulfilling an excessively onerous duty.

On the other side, in the presence of the notice of default the debtors guilt is activated for his inactivity until the fulfillment of the falling due term, which leads to holding accountable the debtor for not fulfilling his duty.

b) *The absence of an adaptation clause in the agreement.* The doctrine<sup>16</sup> has underlined the idea that the imprevision cannot be applied when the agreement comprises an adaptation to the new circumstances clause.

In other words, the freedom of agreements principle is of higher priority than the imprevision mechanism, the two institutions not being able to be effective simultaneously, in theory. If the parties comprised in their agreement an adaptation clause, then it is imperative that it should be respected, because it represents the free will of the parties. Only when such a clause is missing from the agreement, the debtor may benefit from the imprevision in order to rule out the unforeseen risk at the closure of the deal.

c) *Unfulfilling the duty by the debtor needs to be lawful* as this is an absolute premise to the imprevision application. Otherwise, we exit the realm of imprevisions, and enter that of simple contractual responsibility.

## 3. *Conditions of the contractual imprevision.*

Subsequently to having outlined the imprevision premises, that one may not find comprised within the law itself, we shall move onwards to presenting the conditions to be respected when dealing with the imprevision legal mechanism.

Thus, specialized literature<sup>17</sup> has so far come up with four conditions, presented here-after:

- a) the excessive onerous character of the agreement;
- b) the change of circumstances should have taken place subsequent to the deal closure;
- c) the change of circumstances should have not been foreseeable at the deal closure time
- d) the risk type determined by the change of circumstances;

<sup>12</sup> See C. Zamșa, *Teoria impreviziiunii. Studiu de doctrină și jurisprudență*, Ed. Hamangiu, Bucharest, 2006, pp. 152-170.

<sup>13</sup> See Al. Oteteșeanu, *Studiu asupra cazului fortuit sau forței majore și a impreviziiunii*, PhD thesis, Bucharest, 1928; L. Pop, *Tratat de drept civil. Obligațiile, Vol. II*, Ed. Universul Juridic, Bucharest, 2009, p. 540.

<sup>14</sup> See Gh. Piperea, cited work, p. 270.

<sup>15</sup> See I. Ghestin, Ch. Jamin, M. Bilian, *Traite de droit civil. Les effets du contract, 3-eme edition*, LGDJ, Paris, 2001, pp. 408-409.

<sup>16</sup> See M. Nicolae, *Drept civil român. Curs selectiv pentru licență*. Ed. Press „Mihaela”, Bucharest, 1998, p. 65.

<sup>17</sup> See C. Zamșa, *Teoria impreviziiunii*, in the Bucharest University Archive, Law Series, 2003-I, pp. 82-84.

As far as we are concerned, our opinion is that to the above conditions we need to add yet another one, namely:

e) the obligation to have discharged the negotiation procedure.

Therefore, hereinafter we shall map out a few general outlines related to these conditions.

a) *The excessive onerous character of the agreement.* The excessive onerous character is not to be understood as the unequivocal application of the imprevision, but as an interpretation from the points of view of both the agreement parties, reason enough for us to subscribe to the idea<sup>18</sup> that this conditions aims at the agreement equilibrium, in other words, the equilibrium of the parties' interests.

Unfortunately, the Civil code has failed to regulate the measurement criterion of the excessive onerous character condition, thus the mission of filling the legislative void is left to the doctrinaires.

Without stopping upon analyzing these criteria<sup>19</sup>, we would only like to outline the fact that the competent court to decide upon the adaptation of the agreement affected by imprevision should equally take into account the *in abstracto* appreciation criteria, as well as the *in concreto* ones.

b) *The circumstances change moment.* For the imprevision mechanism to become effective, the circumstances change moment needs to be subsequent to the moment when the agreement had been closed, and previous to that when the duty needs to be fulfilled.

c) *The unforeseeable character of the change of circumstances.* Due to the fact that the Civil code does not comprise any information on the elements nature that may constitute unforeseeable changes, while doctrine oscillated between a large array of opinions, and a restricted vision regarding this issue, we subscribe to the idea<sup>20</sup> that the main criterion for determining de unforeseeable circumstances is represented by the their effect upon the agreement.

d) *The risk type determined by the change of circumstances.* The risk resulted from an unforeseeable event has a different legal nature compared to the risk that the parties have assumed by means of contractual clause. Provided the parties have assumed a type of risk determined by a change of circumstances, this contractual behaviour rules out the possibility of applying the imprevision mechanism, unless, judging by its effects amplitude, the intervened risk surpasses the parties forecasts.

e) *The obligation to have discharged the negotiation procedure.* The imprevision institution cannot be applied unless the parties have fulfilled the legal duty of the negotiation process aiming at restoring the agreement equilibrium that has become unjust for one of the parties. Having the negotiation process ended in failure, the imprevision mechanism can become effective and result in the adaptation of the agreement by the court.

During the negotiation process, the agreement effects may be suspended to avoid other prejudice to be produced on the account of the party affected by the newly and unforeseeably arisen conjuncture.

The negotiation legal duty needs to be fulfilled with respect to two limits. On one hand, there is the condition regarding the attempt of the party that tries to benefit from the imprevision

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<sup>18</sup> See I. Turcu, *Noul Cod civil. Legea nr. 287/2009. Cartea a V-a. Despre obligații (art. 1.164-1.649). Comentarii și explicații*, Ed. C.H. Beck, Bucharest, 2011, p. 3.

<sup>19</sup> Doctrine studies have examined both the subjective criteria for the measurement of the excessive onerous character such as, for example, the downfall of the debtor, as well as objective criteria, such as a certain percent number of the debtors duty value augmentation, or the unmade profit by the debtor. (See P. Stoffel-Munck, *Regard sur la theorie de l'imprevision*, Presses universitaires D'Aix-Marseilles, 1999, p. 114, Al. Oteteleşanu, cited work., pp. 194-196, P. Voirin, *De l'imprevidion dans les rapports de droit prive*, these, Nancy, 1922, p. 100.

<sup>20</sup> A se vedea C. Zămșa, *Revizuirea contractelor în caz de impreviune. Desființare*, cited work., p. 67.

(the debtor) to reach an agreement in a reasonable period of time, and on the other hand, there is the obligation to be of good-faith when negotiating. If these limits are not complied with, the court cannot decide upon the adaptation or the termination of the agreement.

There is no doubt that interpreting whether these two limits have been complied with or not is a particularly difficult task, taking into consideration that the reasonable period of time and the good-faith represent notions that bear a meaning that cannot be measured by precise, mathematical criteria.

On the contrary, the above mentioned notions are naturally flexible, and their use in practice is characterized by complex situations, therefore complying with the reasonable period of time and the good-faith limits is to be appreciated, depending on each case, by the court of justice.

#### 4. *Intervention by the court of justice.*

The revision of the agreement that has become excessively onerous may be disposed by the court by any of the following two means:

- a) by adaptation of the agreement, in order to equitably distribute among the parties the losses and the benefits resulting from the change of circumstances and
- b) by termination of the agreement at the time and with respect to the conditions set by the court.

a) Concerning the *revision by means of judicial adaptation of the agreement*, we subscribe to the opinion<sup>21</sup> that it follows the subsequent legal traits:

1. it is auxiliary to the negotiation duty, due to the fact that only when the parties do not reach an agreement of conventional adaptation, within a reasonable amount of time, the interested party may address the court;
2. it is a direct method, because the injunction modifies the quantity content of the agreement.

All in all, the direct intervention by the court envisions the duty that has become excessively onerous, or the correlative duty. However, when dealing with the copyright assignment agreement, the court cannot always choose between one of the two alternatives, but has only one alternative in hand: the raise or the diminution of the price paid by the beneficiary in correlation to the losses or the benefits of the author resulted from the change of circumstances<sup>22</sup>.

3. it is governed by the rule of equitable distribution among the parties of the losses and the benefits resulted from the change of circumstances.

Without any legal provisions, the criteria according to which the court may equitably distribute the losses and the benefits have been largely disputed among the doctrinaires<sup>23</sup>. Here are some of the criteria considered to be efficient when dealing with this sort of issue: the availability criterion (included in the adaptation claim by the plaintiff), the equity criterion (as comprised in art. 1.272 from the Civil code), the performance equivalence criterion (dealing with a relative equivalence, and not an absolute one), and the proportionality criterion (in correlation to the results of the expertise).

<sup>21</sup> See C. Zamșa, *Teoria impreviziunii, cited work.*, p. 97.

<sup>22</sup> The same line of thought has been brought forward by other authors when dealing with the services agreement. It was stated that the adaptation of the agreement may become effective exclusively by means of raising the service price, and not by reducing the service parameters. See C. Stoyanovitch, *De l'imprevision dun jude dans le contract en cas de survenance de circonstances imprevises, these*, Marseille, 1941, p. 185.

<sup>23</sup> See C. Zamșa, *Revizuirea contractelor în caz de impreviziune. Desființare, op. cit.*, pp. 77-78., P. Voirin, cited work, p. 196, C. Stoyanovitch, *cited work*, p. 183, L. Fin-Longer, *L'équilibre contractuel*, Dalloz, Paris, 2002, p. 225, B. Ionescu, *Nestemate de jurisprudență*, Ed. Universul Juridic, Bucharest, 2011, p. 130.

As far as we are concerned, our opinion is that the court must scale the performance and the counter performance by the parties, and decide what was the initial equilibrium of the agreement, so that the arbitrary should not prevail, and, nevertheless, so that the exception should not arise to the point of turning into the rule.

b) *Judicial termination of the contract* due to the imprevisio effect is, without any shade of doubt, a radical measure that does not share the legal characteristics of a sanction for neither of the parties.

However, once the decision has been taken to terminate the agreement, the court may also decide upon granting reparation in favor of the party that has been harmed as a result of failing to execute his duty by the debtor. The reparations shall not cover entirely the prejudice suffered by the party harmed by the judicial termination of the agreement because, in this case, the liberation of the debtor from fulfilling the excessive onerous duty would turn into another duty, to repair the prejudice suffered by the other party, hypothesis which would render the imprevisio institution useless.

On the other hand, not granting any reparation for the creditor would transfer the debtor losses over to the creditor, which would again turn the situation into an inequitable one.

##### **5. *Some aspects on the incidence of imprevisio upon the copyright assignment agreement.***

Generally speaking, the copyright assignment agreement is regulated by the provisions of articles no. 39-47 from Law no. 8/1996, and the derived agreements (the editing agreement, the theatrical representation or musical performance agreement, and the lease agreement) are regulated by articles no. 48-69 from the same normative act.

The copyright assignment agreement may be revised, or the price owed to the author may be raised by the competent court, based upon a claim by the author fundamented on the provisions of art. 43 par. (3) from Law no. 8/1996.

Therefore, a partial regulation of the imprevisio comprised in art. no. 1.271 from the Civil code may be found also in the Law on the copyright and the correlated rights.

Compared to the imprevisio regulation comprised in the Civil code, the special regulation by the Law no. 8/1996 requires furthermore debate.

a) In the specialized legal literature<sup>24</sup> one can find good pieces of criticism related to the provision by the Civil code according to which the imprevisio is applicable exclusively when the contractual duty becomes too excessive for the debtor, meaning that it only envisions the passive side of the legal duty relationship.

Some scholars have considered not being sufficient for the imprevisio to be applied only as a result of the onerous character of the debtor's duty, and found it appropriate to also look into the effects that the unforeseeable situation has brought upon the creditor.

We fully subscribe to this point of view also in relation to the copyright assignment agreement. Thus, when dealing with the copyright assignment agreement, article 43 par. (3) from Law no. 8/1996 does not have the meaning envisioned by the Civil code. In this particular case, the imprevisio refers to the hypothesis according to which the price owed to the assignant author is smaller than the benefits of the assignee.

Therefore, article 43 par. (3) of the Law envisions only those cases where the disproportion concerning the material advantages is against the interest of the assignant author, and not the hypothesis according to which the assignee should find himself in the unforeseen impossibility to fulfill his duties.

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<sup>24</sup> See C. Zamșa, *Teoria impreviziunii*, cited work., p. 98

Subsequently, in correlation to the copyright assignment agreement, the parties may call to their advantage the imprevision mechanism, as provided by art. 43 par. (3) from Law no. 8/1996, when the assignant author reaches a disproportioned material state compared to the financial benefits gained by the assignee from exploiting the assigned copyright. Accordingly, the assignee does not find himself in an excessive onerous character of his duty, but it's rather the assignant author that comes to such an inferior financial state, precarious by comparison to the benefits gained by the assignee from exploiting the transferred copyright.

This is the reason why, to set things right, our opinion is that the provision by art. 43 par. (3) from Law no. 8/1996 should, *de lege ferenda*, be supplemented by adding dispositions concerning the imprevision application also when the assignee should find himself in an excessive onerous character of his duty. This would in fact correlate the dispositions comprised in the Law no. 8/1996 to those from the Civil code.

b) Yet another issue concerns the identity of the person that may claim the revision of the assignment agreement, or more precisely, the plaintiff.

The dispositions by the Civil code do not provide us with any information regarding the person that may file the lawsuit based upon which the court can decide to revise the agreement on imprevision terms.

However, scholars have underlined, as presented here-above, that nothing blocks any party, nay it is within the equity spirit, to file a complaint over to the competent court of justice claiming the revision of the agreement on imprevision grounds.

This is equally pertinent with regard to the right of any of the parties involved in an assignment of a literary, artistic, or scientific work copyright to claim its revision.

Therefore, it is only normal that article 43 par. (3) from Law no. 8/1996 referring to the right of the assigned work's author to claim the revision of the agreement, to be modified, *de lege ferenda*, so that it will grant this right to any assignee owner of the copyright, be it legal or physical person, as well as to the assignant.

The equality in front of the law principle, provisioned by article 16 of the Romanian Constitution entails without any shade of doubt such a regulation<sup>25</sup>.

c) The succeeding point of view, related to the criteria used by the court in order to decide upon the agreement adaptation, is valid also in the hypothesis when imprevision is applied to the copyright assignment agreement.

When confronted with the special imprevision institution [the one provisioned by article 43 par. (3) from Law no. 8/1996] the decision to revise the copyright assignment agreement is rarely effective enough, if not actually ineffective, as long as the plaintiff author does not hold the right to determine the benefits extent gained by the assignee<sup>26</sup>.

Also, even if such an estimation would be possible, the „obvious disproportion” notion still revolves around a too generous in its wideness and vague criterion in order for the legal decision to reach the envisioned goal. This is the reason why the court and the parties need to identify those criteria able to quantify as precisely as possible the difference between the parties benefits arisen from the ongoing agreement. As an example, we make reference to the criterion from the French copyright legislation which provides in a highly inspired manner what is the meaning of the benefits disproportion<sup>27</sup>.

<sup>25</sup> Furthermore, see T. Bodoaşcă, *Dreptul proprietății intelectuale*, Ed. Universul Juridic, Bucharest, 2011, p. 109.

<sup>26</sup> Furthermore, see V. Roș, D. Bogdan, O. Spineanu-Matei, *Dreptul de autor și drepturile conexe. Tratat*, All Beck, Bucharest, 2005, p. 365, I. Macovei, *Tratat de drept al proprietății intelectuale*, C.H. Beck, Bucharest, 2010, p. 475.

<sup>27</sup> According to article 131-5 from the French Intellectual Property Code, it is a case of harm or insufficient prevision when the author has suffered a prejudice of more than 7/12 when assigning the exploitation right.

The equipoise of the court, identical to the last system itself, needs to prevail, and be a stranger to absurdity and Caesarism. In this respect, the judges imperatively have to cooperate with the parties and always grant the possibility to cooperate aiming at identifying the criteria for the good-will and equitable execution of the agreement<sup>28</sup>.

d) According to some opinions<sup>29</sup>, imprevision is regarded not without reticence, bringing forward the idea that the party involved in an agreement „must repair the prejudice when the execution impossibility is only in fact”.

As far as concerns the copyright assignment agreement, we stand firm stating that such a position is to be ruled out. We strongly affirm that the imprevision needs to find its applicability unconstrained when dealing with the copyright assignment agreement, and especially when the assignant is the same person with the author of the assigned work.

The reason behind applying the imprevision in the examined field derives from the necessity to protect, above all, the literary, artistic, or scientific works authors, whose primordial interest and goal is represented, theoretically, by the assertion of his creative personality, the prestige increase, and the subscribing to the greatest human values realm of their particular creative field.

Mainly following to reach these goals, the authors often neglect their material interests, the profits that they might gain from entering such copyright assignment agreements, and hence, with respect to some conditions, there is a need to reestablish the contractual harmony, by terms of invocation of the imprevision institution.

We dare to state that even if the imprevision institution would not have found its way into the Civil code content, it would have still needed completion and application, based upon article no. 43 par. (3) from Law no. 8/1996.

And because it deals with creators, writers, artists, or scientists, we strongly believe that they are entitled to an exception. It is only reasonable that such particular law subjects not to suffer from a kind of circumstances that could not have been foreseen at a certain time.

The authors, as all living beings, eventually die and disappear, but their creations live on, therefore the moral and intellectual purity requires special protection by means of granting them with the proper rights, not only for eternity, but mainly during their lifetime.

The jurisprudence has instructed us with respect to the idea that the protection of the creators rights has to be granted first of all during their lifetime<sup>30</sup>.

e) Hoping that the „*rebus sic standibus*” theory, when confronted with the „*pacta sunt servanda*” principle, will not turn out evanescent, but on the contrary, will necessarily add meaning to it, we underline the fact that, when dealing with copyright assignment agreements, the distribution among the parties of the losses and the benefits has become an imperative need.

However, in order to avoid that the court of justice should gain discretionary powers, and aiming at eliminating the mistrust attitude shared by the party that should lose some of the benefits derived from its privileged position, we subscribe to the idea<sup>31</sup> according to which filing

<sup>28</sup> For furthermore development on the cooperation duty of the parties in the agreement execution process, see D. Gherasim, *Buna-credință în raporturile juridice civile*, Ed. Academiei Republicii Socialiste România, Bucharest, 1981, pp. 86-87.

<sup>29</sup> See B. Ionescu, *op. cit.*, p. 130, D. Dobrev, *Impreviziunea, o cutie a Pandorei în Noul Cod Civil? Comentarii*, 2nd Edition, revised and duly completed, Coordinator M. Uliescu, Universul Juridic Publishing House, Bucharest, 2011, pp. 210-219.

<sup>30</sup> A good example is provided by the trial subsequent to which the great symbolist poet Charles Baudelaire (1821-1867) has been sentenced, on August 1st, 1857, because he dared to write and publish the poetry volume „*Les fleurs du mal*”, considered at that time by the “Le Figaro” newspaper as being “that which gives rise to despair, a slaughter-house poetry that creeps you out.” The sentence has been decided for the offence brought to the wide public, prohibiting six poems from being published due to words and expressions considered immoral and obscene, and fining the poet a sum of money. After nearly a century (1949), The French Cassation and Justice Court canceled the sentence thus cleaning any stain that may have had littered the memory of Charles Baudelaire. For more details, see M. Jacta, *Procese celebre*, Ed. Științifică, Bucharest, 1969, pp. 19-65.

<sup>31</sup> See D. Dobrev, cited work, p. 218.



an imprevision based complaint with the court of justice should be preceded by establishing an agreement by the involved parties on the topic of filing a lawsuit.

*De lege ferenda*, we believe it would be useful that the dispositions of article no. 1.271 from the Civil code and those of article 43 par. (3) from the Law no. 8/1996 should be duly supplemented by means of adding, as a condition for the admissibility of the complaint, the duty for the parties to close a previous agreement regarding their free will to give permission to the court to decide upon the revision of the agreement based on imprevision grounds.

f) Our suggestion is that the copyright assignment agreements should contain an imprevision clause that would furthermore stimulate the participation of the parties at strictly negotiating the agreement for purpose of avoiding as much as possible the intervention by the court of justice.

g) The situation regulated by the art. 43 par. (3) from Law no. 8/1996 only partially envisions the common law imprevision institution. Therefore, we take notice of the fact that the effect of a complaint filed by the assignant author based upon the special law is either the revision, either the reasonable raising of the agreement price<sup>32</sup>.

In other words, the imprevision from Law no. 8/1996 (the special imprevision) only envisions the effect of revising the agreement, which is analogous to its adaptation as provisioned by the common law. What is lacking from the special imprevision effects is the possibility to terminate the agreement at the time and with respect to the conditions set by the court. We consider this situation not to result in an obstruction of any party of the copyright assignment agreement to invoke the common imprevision and request a decision by the court, where possible, to terminate the agreement.

## 6. *Conclusions.*

The contractual imprevision issue is of course contradictory to the freedom of will principle. Bringing forward the topic for debate and regulating this exception from the compulsory character of an agreement's provisions will surely and unavoidably trigger an avalanche of controversy related to the benefits and drawbacks resulted from no longer applying the rule of not interfering with the dynamic of an agreement when the agreement has come to a severe imbalance between the parties correlated duties, which is caused by the change of circumstances while the agreement is ongoing.

No matter what the doctrine's and jurisprudence's opinion may turn out to be, our belief is that the judicial revision of an agreement fundamented on the subsequent and unforeseeable change of circumstances finds its justified applicability when dealing with a certain set of agreements, among which the copyright assignment agreement is, undoubtedly, inscribed.

It is obvious that, according to its own nature, the legal provision shares the character of a rule, generally speaking<sup>33</sup>, and this results in concluding that, from this perspective, the imprevision theory refers to all the agreement types described by the law, but most certainly finds a palpable applicability in regard to the assignment agreement, in particular. In other words, the meaning of the rule regarding the imprevision matches equitably this type of contract.

This is the reason for which we have taken the chance to carry forth a few points to assist the thesis we stand by, hoping that those who share our point of view, as well as those who find themselves against the imprevision institution will take part in a useful doctrinaires' debate aiming at identifying the application area, the impact of the imprevision principle upon the parties

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<sup>32</sup> See V. Roş, D. Bogdan, O. Spineanu-Matei, cited work, p. 365, T. Bodoaşcă, *op. cit.*, p. 108. The latter writer's opinion, to which we fully subscribe, is that the reasonable augmentation of the agreements price is one of the possible means of revision.

<sup>33</sup> See G. del Vecchio, *Lecții de filosofie juridică*, Ed. Europa Nova, Bucharest, 1992, pp. 206-207.

trust in the agreements effectiveness, as well as the solutions to follow in order to diminish the discretionary power of the court of justice in this respect.

All in all, the imprevision institution needs to be applied in such a manner as to take into account the essence of the law in relation to which the legal will of a subject should be assessed correlated to the legal will of the other subject concurring for the legal relationship to be established.

To conclude with, the two-sidedness of the legal behavior of the parties in respect to which a single legal determination is affirmed is the keystone of any legal edifice.

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