

THE THEORY OF IMPREVISION IN THE CONTEXT OF THE ECONOMIC CRISIS AND THE NEW ROMANIAN CIVIL CODE (NCC)

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Abstract

This paper addresses one of the most pressing issues of private law, namely, the theory of unpredictability. The theory of imprevision is a question of law under the effects of the current economic crisis has resulted in contract law. Also, updating legal issues raised by the theory of unpredictability occurs in the context of regulation for the first time at its principle in art. 1271 NCC. This paper deals with the concept, scope, conditions applying theory in the context of imprevision in terms of law doctrine and the relevant case law. It also presents elements of comparative law.

Keywords: *theory of imprevision, economic crisis, NCC (New Civil Code), the conditions for invocation, practical issues, comparative law.*

JEL Classification: *K12*

§1. The Notion, Grounds and Scope of Imprevisiion

1. Notion. Brief History. Origin of the Subject

A. Preliminary Remarks

Sometimes, during their execution, contracts are exposed to certain events related to the economic conjuncture. Most often, they are related to currency fluctuations.²

Imprevisiion poses the legal question of the excessively onerous nature of the fulfilment of obligations of a contract, putting one of the parties in a very difficult economic position. Most of the times, the debtor of an obligation is put in a delicate situation in the sense that the costs of the fulfilment of its obligations are increased. However, imprevisiion also applies to the hypothesis where the value of performance owed to the creditor has been drastically reduced. In both situations, a contractual economic imbalance will arise, evidently having as consequence the loss of interest of one of the parties in maintaining the contract as it was initially drafted by them³.

The modification of consequences is relevant only in exceptional cases. The principle according to which agreements lawfully concluded between the parties are legally binding is not absolute, sacrosanct. When occurred events have the capacity to fundamentally alter the balance of the contract, there results the exceptional situation which the theory of imprevisiion refers to. This phenomenon has been regulated by several law systems, developed into concepts such as: “hardship”, “frustration of purpose”, “geschäftsgrundlage”, “imprévision”, “excessiva onersità sopravvenuta” etc.

In the context of the global economic crisis triggered by the collapse of the banking system, the theory of imprevisiion becomes a particularly important institution.

The economic crisis started in August 2007 when BNP Paris ceased its activity in the USA with regard to hedge funds specializing in mortgage debt. The second stage, deemed in the

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² See Gh. Bistriceanu, Gh. I. Ana, *Finanțe (Finance)*, Didactic and Pedagogical Publishing House, Bucharest, 1993, pp. 68-76.

³ For this purpose, it was decided in case law that “The theory of imprevisiion applies to the extent to which the contractual obligation is no longer mandatory to be fulfilled since the circumstances in which it should have been fulfilled render it radically different from the one undertaken in the contract” – C.S.J. (*Supreme Court of Justice*), secți.com. (*Commercial Section*), dec. no. 1122 of 21 February 2003, www.scj.ro.

international economic press⁴ a confirmation of the economic decline, materialized in the nationalization of the Northern Rock bank by the British government in September 2008. However, the peak is reached in September 2008 when the Lehman Brothers bank in the USA enters into bankruptcy. Under the condition of rise in oil price, the banks maintained a high interest rate in order to fight against inflation. This measure led to a liquidity deficit that drastically affected trading activities. Another important factor was the social-political one. The dissatisfactions of citizens were expressed through riots and strikes that paralyzed for a long time certain economic sectors. On the background of this instability, right-wing political parties⁵ came into the spotlight, promoting economic policies based on austerity and increased taxation⁶.

These circumstances affected the execution of trading contracts. Major discrepancies appeared between the value of performance on the conclusion of the contract and the value of performance on the date of fulfilment of obligations. It became either excessively onerous (in the case of the debtor) or insignificant (in the case of the creditor) and the objective intended by the conclusion of the contract could no longer be reached.

Thus, from our point of view, such a subject is required by virtue of the situation, as well as the care of the Romanian legislator in the context where NCC entered into force on 1 Oct. 2011 and highlighted the “theory of imprevision” by regulating it in art. 1.271 of NCC.

As we have shown, the theory of imprevision arouses interest in the periods of political-economic transition⁷. Since these periods are imminent in the evolution of a state, the theory of imprevision disseminated in time and was adopted by increasingly numerous national law systems, and in the states where the regulation of imprevision was refused, the national doctrine contested this “overlook” by the legislator⁸.

Under these conditions, to which adds the economic crisis that we are experiencing, we may state that the theory of imprevision has become a global notion more important than ever.

B. Brief History

Imprevision originates in the Roman law and is derived from the clause *rebus sic stantibus* conceptualized by Cicero and Seneca⁹. The value of the contract depended on maintaining the circumstances existing at the moment of its formation¹⁰. Even if it did not appear in the contract, this clause was considered implicit in the case of fixed contracts and successive performance contracts (call-off contracts).

The theory of imprevision entered the 14th century secular law from the canon law, where it had been theorized by Saint Thomas Aquinas, without, however, exercising a powerful influence on the legal environment.

⁴ *Global financial crisis: Five Key Stages 2007-2011*, [The Guardian](#), 7 August 2011.

⁵ The European People's Party easily won the voting of 2009.

⁶ In Romania, on 1 July 2010, the VAT rose from 19% to 24%.

⁷ See section §1.2 – Grounds for Imprevision.

⁸ For example: the Civil Code of the Province of Québec, that represents the main source of inspiration for the Romanian Civil Code, does not regulate the theory of imprevision. See Stefan Martin, *Pour une réception de la théorie de l'imprevision en droit positif québécois*, Les Cahiers de Droit, vol. 34, no. 2, 1993, pp. 599-633.

⁹ “*Contractus qui habent tractum succesivum et dependientiam de futurum, rebus sic standibus intelliguntur (Fixed or call-off contracts are maintained as long as the situation remains unchanged).*” See J. Oviedo Albán, *El incumplimiento del contrato internacional*, in *Revista de Derecho Mercantil*, no. 14/2007, p. 252; I. Schwenzer, *Force Majeure and hardship in International Sales Contracts* in *Victoria U. Wellington Law Review*, no. 709 (2008-2009).

¹⁰ L. Flah, and M. Smayevsky, *Teoría de la Imprevisión: Aplicación y alcances. Doctrina y Jurisprudencia*. 2nd ed., Buenos Aires: Lexis Nexis. Ediciones De Palma, 2003, p. 12;

In the European space, the theory of imprevision manifested after the First World War and was seen as a solution to the economic crisis that the former belligerent states were experiencing.

After the Second World War, the solution of the imprevision was embraced by more and more states west of the Berlin Wall, while east of it (in the socialist states), it was rejected¹¹. In Romania, a socialist state as well, imprevision was treated in the same manner¹².

After 1989, Romanian doctrine had different views as regarded the theory of imprevision, sometimes having peremptory positions, other times positions characterized by slight acceptance or non-acceptance, respectively, of the theory of imprevision. Thus, a reputed author stated in 1993 the prevalence of the principle *pacta sunt servanda* over the principle *rebus sic stantibus*¹³. The tacit clause *rebus sic stantibus* is labelled as “inconsistent with reality” since “we cannot claim that such a clause pertains to the intention of the creditor”. The same author considers the modification of circumstances as operable under the condition of the existence of a mandatory law regulation or of an imprevision clause inserted in the contract¹⁴.

Another reputed civil law specialist¹⁵ is of the opinion that the binding force of the contract - *pacta sunt servanda* – is subordinated to the principle *rebus sic stantibus* as per art. 970 para. 2 of the Civ. Code of 1864. This perspective was sustained by virtue of concepts such as: equity, force majeure, balance of performances during contract execution and good faith.

The inclusion of equity in the contract was established in the old Civil Code by art. 970 para. (2): “*They (the agreements) bind not only for what they themselves express, but also for all the consequences that equity, custom or law endow the obligation with, according to its nature.*” Equity has the role of construing and completing legal regulations, including the parties’ expressed will.

It has been considered that equity may be construed both actively (the creditor may request that which is equitable, although it has not been provided in the contract) and passively (the debtor may not be attributed a more onerous performance than “*what equity, custom or law endues the obligation with, according to its nature.*”¹⁶

The matter of this approach is represented by the impossibility encountered by the judge in ordering the adaptation of contracts. It was considered that art. 970 para. (2) does not empower the judge to intervene in view of modifying contractual terms¹⁷.

The request to fulfil the obligation as a result of the modification of circumstances was connected by some authors to the idea of abusive exercise of rights. The doctrine that followed after 1990¹⁸ criticized the grounding of the theory of imprevision by another theory that the legislator had failed to establish.

We consider that the request to fulfil contractual obligations is normal and in harmony with the principle of the binding force of the contract.

¹¹ Al. Weill, Fr. Terré, *Droit Civil. Les obligations*, Dalloz, Paris, 1990, pp. 420-433.

¹² T.S., civ. dec. no. 236/1956, in *Decision Corpus 1956*, vol. I, p.128.

¹³ L. Pop, *Civil Law. The General Theory of Obligations*, vol.I, Chemarea Foundation Publishing House, Iași, 1993, p.73.

¹⁴ See *Ibidem* p.73.

¹⁵ Gh. Belei, The Theory of Imprevision – “*rebus sic stantibus*”- in Civil Law, *The Law No. 10-11/1993*, p.32.

¹⁶ C. Zamșa, *The Theory of Imprevision*, Hamangiu Publishing House, Bucharest, 2006, p. 140

¹⁷ Gh. Belei, *loc.cit.*, p.35 and C. Zamșa, *op.cit.*, pp. 139-141.

¹⁸ C. Zamșa, *op.cit.*, p.143.

Attempts were made to justify the theory of imprevision on the grounds of the principle of unjust enrichment. This ground, however, was justly refuted and abandoned since the enrichment of a party to the detriment of the other is caused by the contract concluded between the parties¹⁹.

Good faith in contract execution was the most viable argument to justify the necessity of accepting the theory of imprevision. In the case of imprevision, the bad faith of the debtor in triggering the modification of circumstances cannot be considered. The lack of fault of the debtor is a fundamental condition, also considered in the regulation of the theory of imprevision in the NCC.

On the other hand, excessive onerousness is also taken into consideration with regard to the creditor. If the value of performance owed to it decreases and the fault of the creditor is not considered, it cannot be responsible for the occurred contractual imbalance.

The rule of equity (art. 970 para. 2 of the Civil Code of 1864) was considered to be adjacent to good faith and have a decisive role in grounding the theory of imprevision²⁰.

The prevalence of good faith and equity was presented in the French doctrine as a “return to the source of the contract” – the initial balance²¹.

In French administrative law, imprevision is grounded on the idea of public interest. Maurice Hauriou supported the institutionalization of imprevision in private law as well, also considering reasons involving public interest²².

C. Notion and Origin of the Subject

a) Imprevision in the Regulation of the NCC

Art.1.271 NCC, in para. 1 provides that “*The parties are bound to fulfil their obligations even if their fulfilment has become more onerous, either due to the increase in the costs of fulfilling their own obligations or due to the decrease of the value of counterperformance*”. The legislator has thus reiterated the regulation of the principle of binding force, expressly mentioning that the parties will be bound by mandatory principle even though the economic circumstances of the contract subsequent to their conclusion will be changed.

The principle of binding force [art. 1.270 para. (1) NCC]²³, also expressed by the maxim “*pacta sunt servanda*”, represents that law rule according to which the contract is binding for the parties similar to the manner in which the law is²⁴. Once the contract is concluded, if it observes the mandatory provisions of the law (mandatory regulations), its execution becomes binding not only for the parties, but also for the court of law, which is bound to consider the parties’ will and not distort it by legal construal in the cases where the parties’ will is clear and where contractual clauses are not likely to be construed differently.

In specialty literature²⁵ there have been several theories that could explain the grounds for the binding force of the contract. As regards us, we agree with the opinion of those authors who

¹⁹ L. Pop, *op.cit.*, p.73.

²⁰ C. Zamşa, *op. cit.*, p.158.

²¹ G. Flecheux, *Renaissance de la notion de bonne foi et de loyauté dans le droit de contrats*, in *Le contrat au debut du XXI siècle*, Paris, 2001, p.590.

²² M. Hauriou, « L'imprevision et les contrats dominés par des institutions sociales », in *Aux sources du droit. Le pouvoir, l'ordre et la liberté*, Caen, Publication du Centre de philosophie politique et juridique, 1986 (1926), pp. 131-137.

²³ Art. 1.270 para. (1) NCC provides that “*The validly concluded contract has force of law between the contracting parties*”.

²⁴ See Gh Beleiu, *Romanian Civil Law. Introduction to Civil Law. The Subjects of Civil Law*, Universul Juridic Publishing House, 11th edition revised and enlarged by Marian Nicolae and Petrică Truşcă, Bucharest, 2007, p. 196.

²⁵ L. Pop, *Treaty of Civil Law. Obligations*, vol. II, *The Contract*, Universul Juridic Publishing House, Bucharest, 2009, p.499 and Fr. Terré, Ph. Simler, Yv. Lequette, *Droit civil. Les obligations*, Dalloz, Paris, 2005, p.32.

consider that the contracting parties' will represents the initial grounds of the binding force of the contract, as the latter cannot be conceived without the free will of the contracting parties. At the same time, the essence of the contract consists of two elements: the contractual interest of each party and the will of the expressed parties, as a medium for these interests²⁶. The contractual interest is based on the economic need of one of the contracting parties to enter into a contractual relationship, and the contracting parties' will, once it is expressed, creates a legal connection between these parties, to be governed by the regulations resulting from the contractual reality.

Thus, the grounds for the binding character of the contract is individual freedom, expressed by the parties' will as well as by the regulatory character of the contract which emanates private regulations that will regulate the parties' behaviour from which they alone (each of them) will not derogate (they may derogate only with the consent of all parties to the contract).

In conclusion, if the parties conclude a contract by observing legal provisions, then between these parties a "solidarity connection" is created, regulated by private regulations expressed by the clauses of the contract. The obligations arisen from the respective contract will have to be fulfilled as they were regulated inside the contract and always in good faith. A consequence of the binding force of the contract is also its irrevocability or the fact that a contract, once concluded and effective, can no longer be amended or terminated unless both parties (all involved parties) agree²⁷.

However, the legislator NCC, in art.1.271 para.2 and 3, for the first time in the Romanian civil legislation, established the theory of imprevision as principle.

Art.1.271 para.2 provides "*However, if the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfil the obligation evidently unjust, the court of law may order:*

a) the adaptation of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances;
b) the termination of the contract at the moment and under the conditions established by it".

Art.1.271 para.3 provides that "*The provisions of para. 2 are applicable only if: a) the change in circumstances intervened after the conclusion of the contract; b) the change in circumstances as well as their extent were not and could not have been reasonably considered by the debtor at the moment of contract conclusion; c) the debtor did not undertake the risk of the change in circumstances and it could not have been reasonably considered that he had undertaken that risk; d) the debtor tried within reasonable term and in good faith to negotiate the reasonable and equitable adaptation of the contract.*"²⁸

The regulation of imprevision in art. 1.271 of the NCC represents a legislative premiere in Romania under the aspect of the existence of a general origin of the subject of imprevision. As we have seen, the legislator NCC proceeds in para. 1 to the reiteration of the principle of binding force for the hypothesis in which the obligation of the debtor becomes more onerous. Although the provisions of para. 1 are apparently redundant since they reiterate the principle defined in art. 1.270, in reality, the practical importance is enhanced in the sense that the text is intended to

²⁶ See L. Pop, *The Contract, op. cit.*, p. 505.

²⁷ This rule is called the rule of symmetry in contracts.

²⁸ The Civil Code of 1864 did not expressly regulate imprevision, but doctrine and case-law accepted it as per art. 970 para.2 Civ. Code of 1864 (the current 1.272, para. 1 N.C.C.). Art. 970 para.2 Civ. Code of 1864 provided that: "*They (the agreements) bind not only for what is expressly contained in them, but for all consequences, what equity, custom or law endue the obligation with, according to its nature.*"

discourage a possible avalanche of defences which the debtors that are defendants in the trial would build on the grounds for imprevision.

From the regulation of para. 1 results the fact that the principle of binding force requires the parties to fulfil appropriately and accordingly the undertaken obligations, even if the parties no longer obtain from the contract execution the benefit they hoped for and even if, regarding the effects of the contract, they could suffer certain losses. In other words, there is a general economic risk which any contracting party must undertake at the moment of concluding the contract. On the other hand, para. 1, whose purpose, we said, is only to strengthen by reiterating the principle of binding force, also has a psychological role for the construer of law and for the parties to which the theory of imprevision will be applied in a possible case of imbalance between performances. Thus, if the theory of imprevision is admitted as a legal exception of the principle of the binding force of the contract, it should be admitted on an exceptional basis and only by fulfilling with maximum strictness and diligence the provisions of para. 2 and para. 3 of art. 1.271, which regulates the possibilities of the judge or of the arbitration judge, when a case of imprevision is established (para. 2 of art. 1.271) as well as the conditions that a case of imprevision must fulfil in order to be able to produce the effects regulated in para. 2 of art. 1.271 (the adaptation of the contract or, as the case may be, its termination).

b) The theory of imprevision in the special laws after 1990 until the entry into force of the NCC

Although it was not generally established, the theory of imprevision was regulated by certain special laws even before the entry into force of the NCC, in fields such as: lease contracts, copyright assignment, volunteer work contracts, or contracts whose object is of real estate nature, and concession contracts.

The main regulations that regulated the theory of imprevision (*rebus sic stantibus*) are the following:

- art. 13 para.1 of Law no. 112/1995 for the regulation of the legal situation of some buildings intended for housing, currently the property of the state²⁹;
- art.43 para.3 of Law no.8/1996. This was the only legislative act that authorized the judge, before the adoption of the NCC, to proceed to the revision of the contracts³⁰;
- art. 31 and art.32 of Law 219/1998 on the system of concessions³¹;
- art.27 para.2 and art.35 para.1 and 2 of the Government Emergency Ordinance no. 40/1999 on the protection of tenants³²;

²⁹ Law no. 112/1995, published in the Official Journal of Romanian, part I, no.279 of 29 November 1995, art. 13 para. 1: “[...] *To the values thus calculated update coefficients will apply, no lower than the growth coefficient of average wage incomes.*”

³⁰ Law no. 8/1996, published in the Official Journal of Romania, Part I, no. 60 of 26 March 1996, art.43 para. 3: “*In the case of an obvious disproportion between the remuneration of the author of the work and the benefits of the one that obtained the assignment of patrimonial rights, the author may request to the competent jurisdiction bodies to revise the contract or to conveniently increase the remuneration.*”

³¹ Law 219/1998, published in the *Official Journal of Romania*, no. 459 of 30 November 1998 and abolished by G.O. (Government Decision) 34/2006, art. 31 para. 1: “*The concession provider may unilaterally amend the regulatory part of the concession contract, with prior notification of the concessionaire, for exceptional reasons related to national or local interest, as the case may be.*”, art. 32: “*The contractual relationship between the concession provider and the concessionaire is based on the principle of the financial balance of the concession, respectively on the establishment of a possible equality between the advantages granted to the concessionaire and the duties incumbent upon it.[...]*”

³² GEO (Government Emergency Ordinance) no.40/1999, published in the Official Journal of Romania, Part I no. 148 of 8 April 1999, art. 27 para. 2: “*The basic monthly rent fee (RON/m²) is updated depending on the annual inflation rate, by Government decision, until 31 January of every year.*”, art. 35 para. 1: “*In the case of lease contracts concluded for a period longer than a year the owner may request the rent increase, except for the case where, by contract, the parties agreed not to increase the rent.*”, art. 35 para. 2: “*The request for rent increase must be addressed to the tenant in writing and substantiated by the performance of*

- art. 10 para.6; art.11 para.2 and 5; art.12 para.2; art.19 para.1 of Law no. 10/2001 on the legal regime of real estate abusively taken over between 6 March 1945 and 22 December 1989³³;
- art.14 of Law no.195/2001 on volunteer work³⁴;
- art.1 para.1 of the 2nd title of the Government Emergency Ordinance no. 184/2002 to amend and complete Law no. 10/2001 approved with amendments and additions by Law no. 501/2002³⁵ on the restitution of real estates that were the property of Romanian religious practices;

c) The theory of imprevision in international regulations and projects

Recent projects to codify contract law generally regulate the theory of imprevision.

i) The UNIDROIT principles, in art. 6.2.1; 6.2.2 and 6.2.3, regulate the theory under the name of hardship, established by the hardship clause used in international commercial contracts. The UNIDROIT principles accept imprevision including when the events that affect the fundamental balance of the contract occurred before its formation, provided that they are known to the parties after the formation of the contract.

The purpose of the UNIDROIT principles is to establish an equitable set of rules applicable to all law systems, regardless of the usages, economic and political conditions of the states in which it is applied. The Preamble of the UNIDROIT Principles establishes their scope³⁶. The reference point of the UNIDROIT Principles is the United Nations Convention on contracts

repair or consolidation works of the home or building or by the increase of the monthly net income per tenant's family member over the level of the monthly net average wage."

³³ Law no.10/2001, published in the Official Journal of Romanian, Part I, no.75 of 14 February 2001, art.10 para.6: "*The corresponding value of constructions abusively taken over and demolished is established according to legislative acts in force on the date of demolition, updated with the inflation index on the date of the effective payment.*", art. 11 para. 2: "*In the case where the expropriated constructions were partially or fully demolished, but the works for which expropriation had been ordered were not executed, the unencumbered land is returned in kind with the remaining constructions, while for the demolished constructions the remedial measures are established by equivalent. If the entitled person received compensation, the restitution is conditioned by the reimbursement of the difference between the value of the received compensation and the value of demolished constructions, updated with the inflation index.*", art. 11 para. 5: "*The value of constructions expropriated in view of demolition is established according to legislative acts in force on the date of expropriation and is updated with the inflation index on the date of the effective payment.*", art. 12 para. 2: "*The entitled person may opt, in the situations provided in para. (1), if the compensation received did not correspond to the value of the real estate, for the completion of the compensation by equivalent, from the value of the compensation received updated with the inflation index to the corresponding value of the real estate.*", art. 19 para. 1: "*The persons that received compensation under Law no. 112/1995 may only request restitution in kind, undertaking the obligation to return the amount that represents the compensation received, updated with the inflation index, if the real estate is not sold until the date of entry into force of this law.*"

³⁴ Law 195/2001 republished as per art. II of Law no. 339/2006, published in the Official Journal of Romania, Part I, no. 651 of 27 July 2006: Art. 14: "*If during the execution of the volunteer work contract, independently of the parties' will, there arises a situation that may encumber the fulfilment of obligations incumbent upon the volunteer, the contract will be renegotiated, and if the situation renders impossible the further execution of the contract, it will be rightfully terminated.*"

³⁵ GEO no. 184/2002, published in the Official Journal of Romania, Part I, no. 308 of 4 July 2000, art. 1 para. 1: "*For the update of compensation granted in the period between 6 March 1945 and 22 December 1989 an up-to-date coefficient will be used corresponding to each year in relation to the RON/USD exchange rate [...].*"

³⁶ "*These Principles establish the general rules applicable to international commercial contracts.*

The principles apply when the parties agreed upon the governing by these principles of the contract between them.

The principles may be applied when the parties agreed that the contract between them be governed by "general law principles", by "lex mercatoria" or by other such principles.

They may apply when the parties did not choose any law to govern the contract between them.

The principles may be used to construe or complete international uniform legal instruments.

They may be used to construe or complete the internal law.

The principles may serve as model for national and international legislators."

for the international sale of goods (CVIM, Wien, 1980) whose provisions are assumed and developed, adding new institutions³⁷.

ii) The Principles of European Contract Law PECL³⁸ provide the conditions and effects of imprevision. Para. (1) of art. 6.111 establishes that the binding force represents the rule, while imprevision is the exception. Art. 1.271 of the Romanian Civil Code is a “translation” of art. 6.111 (PECL). Unlike the UNIDROIT Principles, art. 6.111 para. 2 (a) [PECL] accepts imprevision only if the events that affect the contractual balance occur after the formation of the contract.

iii) The European Contract Code designed by the Academy of European Private Lawyers in Pavia³⁹ establishes the theory of imprevision in art. 97 and art. 157. Likewise, the provisions are similar in substance to those provided in the previously presented projects, however, art. 157 of the European Contract Code is more restrictive in that it diligently regulates the parties’ conduct as of the moment of invoking imprevision and until the moment of adaptation or termination of the contract.

2. Grounds for Imprevision

Both in comparative law as well as in internal law attempts were made in the course of time to find grounds for imprevision.

We reiterate the following as being the most relevant: good faith and equity⁴⁰, unjust enrichment⁴¹, the balance of performances throughout contract execution⁴² and the abusive exercise of rights⁴³.

Out of all attempts to ground the acceptance of the theory of imprevision, we believe that the most appropriate grounds for imprevision is based on the idea of “contractual justice”⁴⁴.

By contractual justice we understand that it is justly considered that, in the absence of a contractual provision, the expenses and costs incurred due to an unpredictable situation do not fall under the obligation of only one party⁴⁵.

In the opinion of D. Maskow⁴⁶, the adaptation of the contract as a result of the change in circumstances occurred in the course of time due to regional economic crises (the effect of the

³⁷ For example, in 2009, the Belgium Court of Cassation invoked the UNIDROIT Principles in order to supplement the provisions of CVIM in view of admitting the theory of imprevision. See Decision Scafom International BV v. Lorraine Tubes S.A.S of 19 June 2009.

³⁸ This project is the result of the commission known as the “Lando Commission”, after the name of its president, Ole Lando, professor at the University of Copenhagen. In 1998, Parts I and II were published, and the project was revised in 2002 when Part III was added. The project was conducted to establish general rules with regard to contract law applicable in the space of the European Union. Its provisions and scope are similar to the UNIDROIT Principles.

³⁹ The Academy of European Private Lawyers in Pavia was founded in 1992 by six law professors from several esteemed universities in Europe (Cambridge, Pavia, Paris “Sorbonne-Pantheon”) who were joined by the President of the Italian Court of Cassation. Its aim is to contribute, by scientific research, to the unification of private law systems in Europe in the spirit of community conventions.

The project “European Contract Code” was initiated in 1995. In 2001, Part I, “Of Contracts in General”, was published and revised in 2004. Currently, the Academy is preparing Part II of the project, entitled “Special Contracts”, of which it completed and published the section dedicated to the sale-purchase contract.

⁴⁰ C. Zamşa, *op.cit.*, p.152.

⁴¹ L. Pop, *op. cit.*, p.73.

⁴² G. Flecheux, *op.cit.*, p.590.

⁴³ C. Zamşa, *op.cit.*, p.143.

⁴⁴ Furthermore, the comments of PECL propose for discussion such grounds for imprevision, in Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée, *European Contract Law*, 2008, p.460.

⁴⁵ See C. Zamşa, *The NCC, Article by Article*, C.H. Beck Publishing House, Bucharest, 2012, p. 1331.

⁴⁶ D. Maskow, *Hardship and Force Majeure*, 40 American Journal of Comparative Law (1992), pp.2-3, 7-10.

fall of the communist bloc in Eastern Europe for Russia and the other socialist states), or global (after the First and the Second World War). We consider that the concept became malleable in the context of the present economic crisis. The disadvantage of this doctrinal reform may be the weakening of the authority attributed to agreements. However, Mascow presents the contract as the programme, the express strategy by which the parties wish to achieve a goal. The fundamental modification of circumstances determines the “derailment” from the initially envisaged purpose. The adaptation of the contract is, in fact, an adaptation of the means to achieve the envisaged goal (established by the expression of the parties’ will). Thus, the “grounds of the contract” – parties’ expectations – remains the same, while the adaptation of the contract generates a new strategy, a new programme, so that the execution of the contract may become possible once more. Therefore, the principle of binding force concerns the object of the contract and the theory of imprevision does not necessarily operate in contradiction to the principle of the binding force of the contract.

3. Scope of the Theory of Imprevision

By the scope of imprevision we understand the category of contracts to which this notion applies, i.e. the theory of imprevision. In other words, we will refer to the category of contracts in which, during their execution, an event that may produce a severe imbalance in value between the parties’ performances is likely to occur.

First of all, the theory of imprevision applies to long (open) term contracts and sometimes to fixed term contracts. Even if the possibility that imprevision may be invoked regarding other types of contracts is not excluded, it preponderantly applies to long-term contracts. The category of long-term contracts includes successive performance contracts and some contracts that are under suspensive conditions (legal, conventional, judicial). The execution term of a contract is different from the term of its formation or its existence. The execution term is between the moment of the valid formation of the contract and the moment when the fulfilment of the main obligations is completed. The necessary time for their fulfilment implies a longer period of time, which is a necessary premise for the modification of circumstances in which the contract was concluded. As regards successive performance contracts, they may have a fixed or indefinite term. The theory of imprevision operates both ways and may be invoked by the debtor as well as by the creditor⁴⁷.

Second of all, we note that, in principle, the theory of imprevision applies to non-gratuitous contracts. However, there are situations expressly provided by the law where it also applies to gratuitous contracts.⁴⁸ What we may notice, nevertheless, is that, in principle, the theory of imprevision applies to non-gratuitous contracts, considering the fact that, in general, gratuitous contracts have a more moral than economic character.⁴⁹ However, we believe that, by the nuances shown above and by the exemplification of the situation of the volunteer work contract, the theory of imprevision can also apply to gratuitous contracts and, as it was shown in

⁴⁷ See C. Zamşa, *The Theory of Imprevision*, Hamangiu Publishing House, Bucharest, 2006, pp. 67-68.

⁴⁸ For example, art. 12 of Law 195/2001 on volunteer work (see the exact title) provides that “If during the performance of volunteer work, independently of the volunteer’s will, a situation occurs that may encumber the fulfilment of the obligations incumbent upon the volunteer, the contract will be renegotiated, and if the situation renders impossible the further execution of the contract, it will be rightfully terminated.”

⁴⁹ See C. Stoy Anocithch, *De l’intervention du juge dans les contrats en cas de survenance de circonstances imprevises these*, Marseille, 1941, p. 24; cited after C. Zamşa, *The Theory of Imprevision*, *op. cit.*, p. 67.

doctrine, it will be unilaterally applicable only when the situation of the offering party would be affected, and not the situation of the beneficiary of the gratuitous document.⁵⁰

Thirdly, imprevision applies to commutative, but also to random contracts, to the extent to which the situation of imprevision does not fall within the normal undertaken risk, specific to the random contract.⁵¹

⁵⁰ See C. Zamşa, *The Theory of Imprevision*, op. cit., p. 70.

⁵¹ For this purpose, see J. Guestin, C. Jamin, M. Billiau, *Traite de droit civil. Les effets du contrat*, L.G.D.J., Paris, vol. I, 2001, p. 357. Contrariwise, Ph. Stoffel-Munck, *Regards sur la theorie de l'imprevision*, Presses Universitaires d'aix Marseille, 194, p. 64.

§2. The Conditions for Imprevisión

1. The general condition of the effect of the change in circumstances in the sense of their excessively onerous nature

The excessively onerous nature may concern both the performance of the creditor as well as that of the debtor. Foreign doctrine highlights two theses regarding the excessively onerous nature of a performance.

The first thesis⁵² defines the onerous nature as the difference between the costs of the performance at the moment of contract conclusion and the costs of the performance at the moment of invoking imprevisión. Onerousness is excessive when the affected party cannot fulfil its contractual obligations without the adaptation of the contract.

The second thesis⁵³ analyses the excessively onerous nature by referring to the difference between the value of the performance and the value of the related counterperformance. Inflation, price increase or other causes may lead to an increase in the costs of a performance while the counterperformance maintains its initial value, thus the contractual balance is altered. On the subject of lease contracts, the indexation of the monthly paid amount (the rent) depending on the inflation rate was approved.⁵⁴ Decision no. 21/1994⁵⁵ specifies that when “the rent is no longer the equivalent value if its performance, the lessor is no longer able to maintain the good in suitable condition to serve the purpose it was rented for.” Moreover, approval was granted to update the rent according to the inflation rate even after the expiration of the lease provided that the lessee, by means of a tacit relocation, continued to own the lease of the premises under litigation⁵⁶.

For example, Italian case-law applies both theses⁵⁷ and establishes the excessively onerous nature under the conditions in which one of the parties suffers from “a sacrifice that alters the economy of the contract and the original balance existing between performances”⁵⁸.

The Official Comments on UNIDROIT Principles (1994) provided, if possible in a real situation, the pecuniary quantification of performances affected by the unpredictable and extraordinary circumstances that occurred. It has been considered that a change by at least 50% of the initial value of the performance is necessary in order to consider the case of hardship. The establishment of a mathematical limit was highly criticized in doctrine, therefore the 2004 version of the Principles rectified this controversy by deciding that the fundamental alteration of the contractual balance should be analysed by means of the circumstances specific to each particular case. Any type of references based on mathematical formulas was omitted.

This new version was in compliance with doctrinal studies according to which excessive onerousness begins where the normal risk undertaken by the parties ends⁵⁹. The normal risk is defined as being: “predictable fluctuations of the value of performances by considering the nature of the contract and the original balance established by the parties.” The initial situation represents the landmark to which the current situation is compared in order to establish the fundamental alteration of the contractual balance.

⁵² R. Sacco, *Trattato di Diritto Civile. Il Contratt*, Utet Publishing House, Torino, 1993, p. 664.

⁵³ C.M.Bianca, *Diritto civile, 5, La responsabilità*, Giuffrè Publishing House, Milano, 1994, p. 395.

⁵⁴ S.C.J., com. s, dec. no. 87/1997, in *B.J.* 1997, p. 436-437.

⁵⁵ S.C.J., com. s, dec. no. 21/1994, in *Law n. 12/1994*.

⁵⁶ S.C.J., com. s, dec. no. 16/1999, in *R.D.C. n. 9/2000*, p.134.

⁵⁷ R. Sacco, *op.cit.*, p. 678.

⁵⁸ Cass. 21.2.1994, n. 1649, *RFI*, 1994, *Contratto in genere*, n. 504.

⁵⁹ A.Pino, *La Excesiva Onerosidad de la Prestación*. Barcelona: J.M. Bosch, 1959 and E.C., Zaccaria, *The Effects of Changed Circumstances in International Commercial Trade*. En: *International Trade & Business Law Review*, no. 135 (2005).

In order to reflect the insufficiency in using a mathematical formula in view of categorizing a case within the scope of hardship, we may take as an example the game or bet contract. The risk undertaken by the parties may fluctuate even by 200% (for example). It results that, in the case of the game or bet contract, based on the 50% rule, imprevision would apply to all cases.

Therefore, the solution is entirely up to the judge who, depending on the specificity of the case⁶⁰, must establish whether the extent of onerousness radically affects the balance of contractual performances⁶¹.

2. The non-existence of a clause to maintain the contract value – the premise for applying imprevision under the conditions of art. 1.271 NCC

A. Preliminary Remarks

The contracting parties, by their agreement, may intervene with the purpose of re-balancing the contract by concluding an agreement to adapt it to the new conditions. Furthermore, they will be diligent in the sense that they will anticipate certain unpredictable events that may occur during the execution of the contract and even in the contract that regulates the legal relationship between them (the initial contract), to regulate certain clauses that are aimed at maintaining the contract value.

In order to apply the theory of imprevision, as it is regulated in art.1.271 para.2 and 3 of the NCC, it is necessary that the contract does not contain a clause whose aim is to maintain the contract value, a preventive imprevision clause. If a clause to maintain the contract value existed (preventive imprevision clause), then what would apply is the legal regime of that clause, by virtue of the principle of contractual freedom, and not the provisions of art.1.271 para. 2 and 3 of the NCC.

It is preferable, of course, and even recommended that the parties, when they conclude a contract, be cautious and provide clauses for its maintenance. This is also recommended in practice, considering the exceptional nature and the limited scope of imprevision, as the fulfilment of all the conditions for imprevision is rarely possible. As a result, the parties may provide in the contract more flexible clauses with regard to the restrictive conditions of imprevision regulated by art.1.271 of the NCC, which will have priority over the enforcement of the legal text to the extent to which they observe the provisions of the law on public order and morals (art.11 NCC)⁶².

To continue, we will discuss the various clauses aimed at preventing imprevision as an economic phenomenon, the so-called clauses of maintenance of the contract value.

A last remark should be mentioned at this point, and namely that, *in the case where the parties regulate the situation of imprevision, by clause of maintenance of the contract value, we are not within the scope of the exception from the principle of the binding force of the contract,*

⁶⁰ M. De La Puente y Lavalle, *El contrato en general*. Alianza Editorial, Madrid, 1975, p.264.

⁶¹ It was decided in a case that “referring to price liberalization and the increase in inflation rate that followed after 13 September 1990, the plaintiff is entitled to claim a higher rent, even if the contract did not provide such a clause. Otherwise, the unnatural, inequitable situation would arise where the fulfilment of the obligation undertaken by contract by the plaintiff, namely to maintain the rented space in a state appropriate for the reason for which it was rented, would become very onerous, which is inconceivable” – S.C.J., sect.com. (*Commercial Section*), dec.no.21/1994, in *The Law* no.12/1994, p.59. Note that the decision given is governed by the Civil Code of 1864.

⁶² The regulation contained in art. 1.271 of the NCC is a supplementary regulation.

but the opposite, *we are within the scope of the direct and actual enforcement of the principle of binding force of the contract* (“*pacta sunt servanda*”), an expression of free will by means of the clauses aimed at preventing imprevision.

B. Clauses of Maintaining the Value of the Contract

To continue we will discuss *indexation clauses*, *contract revision clauses* with their most important subspecies, the *imprevision clause*.

a) Indexation Clauses⁶³

Indexation Clauses represent an expression of the principle of contractual freedom.⁶⁴ In doctrine⁶⁵, indexation was defined as the rightful procedure of automatic re-evaluation of performances, in relation to the variation of a reference index established by an express clause or by an agreement on separate indexation, in order to cover the devaluation of the currency in which payment is made. Indexation was an instrument meant to maintain a balance between the nominal and the real value of money. More generally speaking, by indexation we may understand the correlation of an economic value with another economic value, in view of maintaining in time a real and balanced value of contractual obligations.⁶⁶ As a result, according to this broader concept, indexation clauses are not only related to currency or of monetary origin, but they refer to other economic elements as well, such as the daily price for some raw materials. In the case of stipulation of the indexation clauses, they operate by right, and the balance of pecuniary performances is automatically restored.

b) Contract Revision Clauses (Hardship Clause)⁶⁷

The contract revision clauses are generally aimed at re-balancing the contract when an economic phenomenon occurs that may affect the obligations of the parties to the contract, binding the parties to the obligation of renegotiating the contract⁶⁸. It is obvious that these clauses, in order to be effective, should not just reiterate the conditions of art.1.271 of the NCC, because they would then be redundant, and the common law effect of the theory of imprevision would produce. They may provide actual means and actual obligations to negotiate, including the obligation to undergo mediation.⁶⁹ The parties may provide the obligation of mediation for the purpose of adapting the contract. The essential difference between the revision clauses (the hardship clause) and the indexation clauses is the fact that, in the case of revision clauses (the hardship clause), the effect is not rightfully produced, but there arises for the parties a diligence obligation, of means to negotiate the contract. Of course, in order for the obligation to be useful from the point of view of the nature of the clause, the means to negotiate and the actual obligations of the negotiation to adapt the contract will have to be regulated in concrete terms⁷⁰.

⁶³ See C.S.J. dec. no. 904/1992 by which the indexation clause is admitted in a bank credit contract.

⁶⁴ L. Pop, *The Contract*, *op. cit.*, p. 534.

⁶⁵ *Ibid.*

⁶⁶ For this purpose see L. Pop, I. F. Popa, S. I. Vidu, *op. cit.*, p. 155.

⁶⁷ For the hardship clause in international trade, see M. Almeida Prado, *Les hard ship dans les droit du commerce international*, Bruilant-fec, Bruxelles, 2003, p. 129 and the ssq.; A.T. Saliba (2001), “*Rebus sic stantibus: A Comparative Survey*”, *E Law / Murdoch University Electronic Journal of Law*, Vol. 8, No. 3, September, available at: www.murdoch.edu.au; H. KONARSKI, “*Force Majeure and Hardship Clauses in International Contractual Practice*”, *Revue de droit des affaires internationales* 2003, p. 405; A. Pinto Monteiro, J. GOMES, “*Rebus Sic Stantibus – Hardship Clauses in Portuguese Law*”, *ERPL (European Review of Private Law)* 1998, p.319.

⁶⁸ M. Fontaine, *Les clauses de hardship, aménagement conventionnel de l'imprevision dans les contrats internationaux à long terme*, 1976, pp.5-9.

⁶⁹ Mediation is regulated by Law no. 192/2006 on mediation and the organization of the mediator profession, published in the *Off. M.*, Part I, no. 441/2006.

⁷⁰ D. Philippe, *La clausula Rebus Sic Stantibus et la renégociation du contrat dans la jurisprudence arbitrale internationale*,

3. Special Conditions Regulated by Art. 1.271 of the NCC Para. 3 of the NCC

A. Preliminary Remarks

Inspired by the European legislative projects for the codification of contracts, especially by the Principles of the European Contract Law (PECL) – art. 6.111⁷¹, the Romanian legislator provided the following conditions so that an event may trigger the practical applicability of the theory of imprevision and the obligation of the judge to deliver one of the decisions regulated in para.2 of art.1.271.

Art.1.271 para.3 of the NCC provides that “*The provisions of para.2 are applicable only if: a) the change in circumstances occurred after the conclusion of the contract; b) the change in circumstances, as well as its extent, was not and could not have been reasonably taken into account by the debtor at the moment of conclusion of the contract; c) the debtor did not undertake the risk of the change in circumstances and it could also not have been reasonably considered that he would undertake this risk; d) the debtor attempted, within reasonable term and in good faith, to negotiate the reasonable and equitable adaptation of the contract*”. As a result, the judge, in order to deliver on the adaptation of the contract or on its termination on the grounds of imprevision, the following conditions must be fulfilled:

B. Special Substantive Conditions Regulated by Art. 1.271 para. 3 of NCC

a) The change in circumstances to have occurred after the conclusion of the contract⁷²

As a result, it is necessary that the event interrupting the contract balance occurred after its conclusion⁷³. If it existed on the date of contract conclusion, imprevision is no longer the case and other legal institutions may possibly intervene.⁷⁴

In the Official Comments on UNIDROIT Principles, this condition is presented in a certain light. Thus, there are situations in which the change in circumstances occurs gradually but the final result of this change may be a cause for imprevision. If the change in circumstances started occurring before the moment of contract conclusion, hardship intervenes only if the pace of the change dramatically accelerates during contract execution. In order to clarify this situation, the Comments also offer a practical example.⁷⁵

Paris,2006, available at: www.philippelaw.com.

⁷¹ Art. 1.271[Civ. Code] is a “translation” of art. 6.111 [PECL].

⁷² C. A. Alba Iulia, com. dec. no. 52/A/2008, Limits of applying the theory of imprevision “are, however, given by the need to meet the imprevision conditions, among which rises the fundamental condition of having, during the execution of the contract, the occurrence of an economic, political, social, etc. situation able to generate a serious disturbance in the parties’ contract-based relationships, in particular the rent initially established in the contract”.

⁷³ P. J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, Nordic Journal of Commercial Law, 2/2011, pp. 44-47.

⁷⁴ It may be about the initial execution impossibility that is subject to regulation by art. 1.227 N.C.C., according to which “The contract is valid even if, at the moment of its conclusion, one of the parties is unable to fulfil its obligation, except from the case where the law provides otherwise”; or, if the contractual imbalance exists at the moment of contract conclusion, the damage of vice of consent will intervene, under the conditions of art. 1.221 [NCC].

⁷⁵ International Institute for the Unification of Private Law, op.cit., p.185, *EX*: In a sale-purchase contract concluded between A and B, the price is expressed in the national currency of the state X. The value of this currency was already on the decrease, but the pace of devaluation was very slow. A month after contract conclusion, a political crisis occurred in state X, generating the devaluation by 80% of the national currency. These circumstances are premises for hardship since the devaluation accelerated dramatically and this situation could not be predicted.

b) The impossibility by the debtor to reasonably predict the change in circumstances, as well as its extent.

Even if the change in circumstances occurs after contract conclusion, this condition required by let. b of art.1.271 para.3 aims at the fact that the circumstances cannot represent a case of imprevision if they could have been reasonably taken into consideration by the party affected by imprevision at the moment of contract conclusion.

The practice was consistent in rejecting the theory of imprevision with regard to lease contracts when the price used to be determined in other currencies than the national currency (dollars or Euros). It was believed that the depreciation of the national currency, as well as the price fluctuation, had been foreseen by the parties at the time of concluding the contract, a fact deduced from expressing the price in a different currency than the national one, which gave priority to the *pacta sunt servanda*⁷⁶ rule.

c) The non-existence of a clause aggravating the debtor's liability in the case of events of imprevision and, as a result, the failure of the debtor to have undertaken the risk of the change in circumstances, or the undertaking of such a risk not to result from the nature of the contract or from the circumstances of its conclusion.

The provision of art.1.271 para.2 let.c) of the NCC "*The debtor did not undertake the risk of the change in circumstances, nor could it reasonably predict that it would undertake this risk*". The legislator actually regulated two hypotheses:⁷⁷

In the first hypothesis, the debtor, by an express clause, undertakes the risk of the occurrence of an unpredictable event (for example, the contract expressly provides that the occurrence of a certain unpredictable event will bear no effect on its contract and, what is more, the debtor undertakes liability for the force majeure);⁷⁸

In the second hypothesis, undertaking the unpredictable risk is inferred by way of construal, by the use of the criteria of reasonability by the construer of law, sometimes from the very nature of the contract, other times from the real circumstances in which the contract was concluded. A party concluding a speculative transaction may be considered to "reasonably accept the risk", even if it did not predict the risk and its consequences on the date of contract signing⁷⁹. This hypothesis is illustrated by the authors of UNIDROIT Principles with a practical example⁸⁰.

Imprevison is rejected if the modification of circumstances took place out of the debtor's culpability⁸¹.

C. Special procedural condition – non-admissibility of the debtor's defence – consisting in the debtor's obligation of negotiating the reasonable and rightful adaptation of the contract within term that is a reasonable and established in good faith.

This condition is derived from the provisions of art. 1.271 par. 2 let. d) "*The debtor attempted, within a term that was reasonable and chosen in good faith, the negotiation of the*

⁷⁶ S.C.J., com. s, dec. no. 59/1997, in B.J. 1997, p.448-450; as well as H.C.C.J., com. s., dec. no. 1675/2011 <http://www.scj.ro/jurisprudenta.asp>.

⁷⁷ See in this respect L. Pop, I. F. Popa, S. I. Vidu, *op. cit.*, p. 159.

⁷⁸ *Ibidem*.

⁷⁹ Therefore, the reasonableness criterion is still a criterion used by the NCC law in the assessment of various elements.

⁸⁰ International Institute for the Unification of Private Law, *op.cit.*, p.186, "E.g.: A, an insurance company operating in the field of maritime transports, requests an additional premium from the customers who carry out their activity in areas with high war and insurrection risk due to the outbreak of wars in three states in the vicinity of the respective region. A is not entitled to request the adaptation of the contract even if three states are simultaneously affected due to the fact that, by means of an insurrection and war clause introduced in the contract, the said company stood these risks."

⁸¹ C.A. Brasov, dec. no. 129/Ap/2009, <http://www.jurisprudenta.org>.

reasonable and rightful adaptation of the contract". In reality, in view of meeting this requirement, we believe there are implicitly more duties falling under the responsibility of the imprevision victim. With regard to this aspect, we first of all believe that the victim of imprevision shall be bound to notify the debtor on the occurrence of the unforeseeable event,⁸² the latter's obligation to take steps in order to facilitate contract renegotiation conditions and revise the said contract as an effect of the imprevision effect having occurred. In relation to the obligation to negotiate in good faith, the lack of its fulfilment shall allow to be deemed a non-admissibility of the debtor's defence.

Given the fact that the imprevision consists in the fundamental alteration of the contractual balance, par. 2 let. d) of art. 1.271 entitles the disadvantaged party to request that the other party renegotiate the initial contract terms in view of adapting it to suit the modifications of circumstances.

A renegotiation request fails to present any interest if the contract has been added a clause stipulating its automatic adaptation (a clause which would determine the price indexation should any events occur). Despite all the above, renegotiation grounded on imprevision shall, in such cases, not be dismissed if the respective adaptation clause stipulated in the contract fails to cover the occurred events, as well.⁸³ For instance, A concludes with B a contract whose object is to build a plant in country X. The contract comprises a hardship clause specifying contract renegotiating in the case of having increased workforce-related costs. The government in country X adopts a new legislation on the protection of the environment, which leads to an increase of the costs required for the erection of the plant under the necessity of new equipment. Although the contract did include a hardship clause, imprevision applies since the events occurred were not stipulated by inserting the respective clause.

The exact period within which renegotiation must be requested depends on the circumstances of each individual case: it may, for instance, be a more extended one when circumstances are gradually altered⁸⁴.

The disadvantaged party does not lose their right to request the renegotiation for the mere fact of having acted under unjustified delays. The delay of the request may, however, hinder the ascertainment of the hardship and its consequences upon the contract.

The principle of good faith assigns the disadvantaged party the duty of indicating the grounds on which they request renegotiation in order to allow the other party to assess whether the renegotiation request is justified or not. An incomplete request is considered not made in due time only if the grounds of invoking hardship are so obvious that they discard the necessity of stipulating it in the request. The failure to mention the grounds of the renegotiation request may generate the same effects as the unjustified delay in requesting renegotiation.⁸⁵

Among the European projects on the elaboration of contract law codes, we will emphasize art. 157 in the European Contract Code⁸⁶ which imposes a six-month period dedicated to carrying

⁸² See in this respect art. 1.634, par. 5 N.C.C. which provides that „The debtor must notify the creditor on the existence of the event which causes the impossibility of fulfilling the obligations. If the notification fails to reach the creditor within a reasonable term from the time when became or was supposed to become aware of the execution impossibility, the debtor is liable for the damages caused as such to the creditor”; see in the same respect, L. Pop, I. F. Popa, I. S. Vidu, *op. cit.*, p. 160.

⁸³ International Institute for the Unification of Private Law, *op.cit.*, p189.

⁸⁴ See comment 3(b) of art. 6.2.2 in the UNIDROIT Principles, International Institute for the Unification of Private Law, *Official Comment of the UNIDROIT Principles*, Rome, 2004, p.186-187;

⁸⁵ On the subject of international arbitration, see: Ph. Fouchard, E. Gaillard and B. Goldman, *Traité de l'arbitrage commercial international*, Litec 1996, p.26.

⁸⁶ Academy of European Privatist, *European Contract Law*, Pavia, Italy, 2004.

out negotiations, calculated as of the date when the creditor received the renegotiation request. Once this period has expired, any of the parties may take legal actions within 60 days.⁸⁷

§3. Effects of imprevision

In the hypothesis that the renegotiation failed, despite having been carried out in good faith, and a litigation erupted, either the judge or the arbitrator, being referred to by any of the parties, shall be able to deliver the following settlements:

A. Contract adaptation

The adaptation of the contract functions as the first option for a judge or an arbitrator when they are referred to by one of the parties requesting a sentence delivery on the imprevision, also considering the contract safeguarding principle, which we can safely say it dominates the entire contract law, as is the present one regulated by the NCC⁸⁸. The contract adaptation idea shall be applied by rightfully distributing among the parties the losses and the benefits resulting from altering the circumstances. The idea is that the contract adaptation rule shall be formulated starting from the principle of proportionality between the parties' rights and obligations

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 will⁸⁹ and the contract mandatory force principle.

This solution also ranks on top among international contract-related regulations⁹⁰.

B. Contract termination

Whenever there is an absence of premises for and extreme difficulty in performing the adaptation of the contract, the judge or the arbitrator shall be able to order the termination of the contract. Naturally, the termination shall only refer to future effects. The court shall establish the termination time and terms so that the damages incurred by the parties should be as reduced as possible and equitably distributed between them⁹¹.

C. Other possible intermediary solutions the judge might consider in cases of imprevision

⁸⁷ Association Henri Capitant des Amis de la Culture Juridique Française, Société de Législation Comparée, *European contract law*, 2008, p.476.

⁸⁸ B. Oglindă, „*Business Law. General Theory. The contract*”, Universul Juridic publishing house, Bucharest, 2012, p.271-272: „In the event when, upon the conclusion of a contract, the provisions stipulated by the law for its valid conclusion were not observed, the problem of nullifying the contract shall be raised. However, the delivery of a sentence on contract nullity must not be a purpose in itself, either for the parties to declare [art. 1.255 par. (1) NCC], or for the judge to rule.

The contract safeguarding principle translates as the law rule based on the modern and pragmatic conception referring to contract nullity, according to which, the parties and the court of law must resort to implementing the sanction and, consequently, to the occurrence of its effects, only as a final remedy and to the extent to which other legal options are not or are no longer possible. The contract safeguarding principle is manifested at a higher rate in the case of contracts concluded within the business environment due to the more emphasized dynamics of the commercial circuit, in opposition to the general civil circuit.

Law principles saving the null contract are the ones that are familiar and treated in a traditional manner in the Romanian doctrine in the field of effect nullity being, to be more precise, cases in the development of which the *quod nullum est, nullum producit effectum* rule is dismissed, to which we shall add the *nemo auditor propriam turpitudinem allegans* principle.”

⁸⁹ F. Dionysios, *Comparative Remarks on CISG Article & PECL Articles 6:111, 8:108*, year 2002. Available at: www.cisg.law.pace.edu.

⁹⁰ UNIDROIT Principles [art. 6.2.3 alin. (4) (b)], PECL [art. 6:111 par. (3)(b)], European Contract Code [art. 157 par. 5].

On the other hand, contrary to this vision, the project of revising the French obligations and statute of limitation law, coordinated by prof. Pierre Catala, does not allow the adaptation of contracts on grounds of imprevision. For more details, see J. Cartwright, *Defects of consent and security of contract: French and English law compared*, in: *Themes in Comparative Law*, OUP 2002, p.153;

⁹¹ Flambouras, Dionysios, *op. cit.*

a) Suspension of the contract effects

In the absence of an express regulation, the question arises whether the judge will be able to order the suspension of the contract effects when an imprevision event occurs, while still lacking a clause to justify the measure. The hypothesis of the above is that it is difficult to deliver a contract adaptation ruling given that some of the elements required by such an order do not exist, but having the premises of executing the contract under the initially agreed upon terms, in a not so distant future. In this case, apparently not grounded on a legal text, the prevailing solution would be the judge or the arbitrator ordering the impossibility of suspending the contract execution. As far as we are concerned, we believe there is an omission of the legal text in the fact that it does not stipulate the possibility of suspending the contract effects, as well. As we see it, the suspension solution would have sometimes been more suitable for the principle of safeguarding the contract effects, since, on occasions, the practice will find it difficult to adapt the contract at a given time, an equitable solution being that of suspending the contract effects over a limited period of time and, possibly, resuming its execution as per the initial conditions. It is our opinion that, although not expressly stipulated, the suspension solution as a temporary measure would be required even in the absence of a text expressly providing it.⁹² In reality, we are faced with a measure taken provisionally and pre-emptively for the purpose of adapting the contract.

b) Resuming negotiations

In the foreign doctrine and jurisprudence⁹³, the case in which the termination or suspension of the contract is not possible due to the harmful effects it might have upon the parties or other entities (the idea of public interest) received similar settlements, in the way of resuming negotiations.

The nature of the circumstance may often impose the lack of adequacy in either the adaptation or the termination of the contract. Consequently, the only reasonable solution for the court would be to order that the parties either resume negotiations in view of reaching a mutual consent, or confirm the terms of the contract in its already existing version (the original version) or the conditions for its termination.

D. The solution of dismissing an imprevision request as premature provided that the party did not attempt to negotiate with the other party.

Additionally, if the judge has been notified on the existence of an imprevision case which saw the party failing to attempt, in good faith, the contract adaptation renegotiation, they shall dismiss such a request as premature.

E. Other procedural aspects related to the theory of imprevision

In order to deliver a contract adaptation or termination ruling, the judge must, as a rule, acquire jurisdiction by means of a claim or a counterclaim⁹⁴. The judge may never deliver such sentences if the theory of imprevision has been invoked by way of a defence posed in a regular trial. Naturally, this does not entail that, should the theory of imprevision be invoked in the form of a defence posed in a regular trial, the judge should ignore its consequences. Quite the opposite, if it is grounded as an effect of invoking the theory of imprevision by way of a defence posed in a regular trial, the judge could, at the most, dismiss the other party's request that the victim of the

⁹² On the other hand, the suspension may be regarded as a form of adaptation of the contract.

⁹³ J. Rimke, Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, 2000, ch. VII B, available at: www.cisgw3.law.pace.edu.

⁹⁴ See V.M. Ciobanu, G. Boroï, *Civil criminal procedure. Selective course*, ALL Beck Publishing house, Bucharest, 2003, p. 203.

imprevisión execute certain performances. We can see that this will, practically, lead to an implicit suspension of the contract.

§4. The theory of imprevisión in Comparative Law

1. Preliminary provisions

In the realm of comparative law, certain national legal systems are characterised by the fact that the theory of imprevisión is established at a principle level, boasting a more limited or wider field of application, under more flexible or more restricted conditions, as the case may be, as we shall further illustrate. Other national systems, as was also Romania's case until the NCC came into effect, does not establish at a principle level the theory of imprevisión in the civil code, jurisprudence holding various and subtle positions concerning the applicability of the theory of imprevisión.

We shall further on review the presence of the theory of imprevisión in the legal systems which regulate by law the said theory and then we shall refer to those systems where it does not enjoy such regulatory benefits, indicating in all cases the status and variations introduced by jurisprudence in its implementation.

2. Systems which regulate the theory of imprevisión

A. German Law

a) Applicable law.

In the German law, the theory of imprevisión is regulated by art. 313 of the BGB (the Official Journal) in force.⁹⁵

Contract adaptation was first applied by the Supreme Court of Germany (Reichsgericht – RG) during the Weimar Republic.

The application of this concept was determined by the economic crisis Germany was going through in the aftermath of First World War. At the end of 1921, prices were 35 times higher than they were in 1914, only to multiply 1475 times one year later.

The courts ordered the adaptation of contracts as per art. 275 (1) in the old Civil Code which regulated the impossibility of executing contracts which gave rise to excessive and unforeseeable obligations for one of the parties, which could no longer be demanded to fulfil their contractual obligations.

Subsequently, after 1922, contract adaptation was performed by applying the concept centred on the modification of the fundamental circumstances which represented the grounds for the conclusion of the contract by reference to article 242 in the Civ. Code on the matter of good faith. The courts defined good faith as "obvious perceptions shared by both parties, at the time of

⁹⁵ The German Civil Code enacted on January 2nd 2012 regulates the theory of imprevisión in art. 313:

(1) If the circumstances forming the grounds of the contract underwent substantial modifications after its conclusion and the parties failed to stipulate these modifications at the time of concluding the contract, to the extent to which, considering all the circumstances of the concrete case and, in particular, the contract-based or legal distribution of risks, one of the parties is unable to execute the contract.

(2) The false representation of the parties with regard to the fundamental recitals which constituted the grounds of the contracts is equivalent to an essential modification of the circumstances.

If the adaptation of the contract is not possible or is not exigible, the revocation of the contract shall be invoked by the injured party. In the case of contracts with successive performance, the injured party is entitled to terminate the contract.

concluding the contract, with regard to the present or future existence of circumstances which formed the basis of the will to conclude contracts.”⁹⁶

The application of imprevision in jurisprudence imposed the necessity to establish a legal basis. Following the legislative reform of 2002, imprevision (*Geschäftsgrundlage*) was regulated in art. 313 of the BGB. Both in the doctrine, as well as in jurisprudence⁹⁷, art. 313 is considered to make reference to the modification of the circumstances exterior to the parties’ wilful manifestations. The modification has to be important enough so that, had they been aware of them beforehand, the parties would not have concluded the respective contract. If the adaptation is not possible, par. (3) provides the injured party with the possibility of terminating the contract that became excessively onerous.

Imprevision in the German law is based on the theory elaborated by professor Oertman who draws on the old *Rebus Sic Stantibus* doctrine⁹⁸. The difference consists in the fact that the expectations concerning the effects of the contract must be mutual. These expectations represent “the basis of the contract”⁹⁹. If the circumstances under which the contract was concluded suffered fundamental modifications and the initial goal was deviated from, the contract is void of content and the courts may exonerate the parties from its execution. The solution consists in adapting or revoking the contract on condition that the parties did not stipulate the respective changes.

b) Jurisprudence

Inflation represents a prevailing case of modifying the value of the undertaken performance, in which the judicial practice identified the theory of imprevision.

In 1919, one of the shareholders of an enterprise sold their part of the shares. They cashed in half the price, the remaining half following to be collected in 1921. Between 1919 and 1920 the purchasing power decreased by 80%. The purchaser demanded that the contract be executed as per the conclusion terms from 1919, however, the court applied the doctrine of changed circumstances.¹⁰⁰

The flexibility¹⁰¹ of German law courts is very well illustrated by the following paragraph from a *Reichsgericht* (arbitration court) motivation: “the currency depreciation degree in Germany is so high [...] that the courts must be creative and deliver reasonable sentences. The

⁹⁶ P.S. Coderch, *Alteración de circunstancias en el art. 1213 de la Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos*, Barcelona 2009, InDret 4/2009.

⁹⁷ H. Rosler, *Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law*, European review of private law, VOLUME 15 NO. 4–2007, p. 487-491.

⁹⁸ E. Baranauskas, P. Zapolskis, *The effect of change in circumstances on the performance of contract*, Vilnius, Lithuania, 2009, Jurisprudence 4/2009, p. 204-206;

⁹⁹ J.F. Chamie, *El principio general de reductio ad aequitatem por desequilibrio contractual*, Revista de Derecho Privado, Columbia, n.º 22, enero-junio, 2012, p. 248-252.

¹⁰⁰ Dec: RGZ 103.328 from 1922.

¹⁰¹ The flexibility of the German system is also reflected by the difference between art. 313 and art. 6.111 (PECL). The applicability scope of art. 313 is wider, hence its greater flexibility. The field covered by article 6.111 is more limited due to the condition that the contract balance must be affected. One common feature is represented by the distribution of the risk, similarly taken into account by both norms. Art. 313 provides the possibility of adapting the contract even if the circumstances underwent changes prior to the modification of the contract, which comes rather as an error in the form of a vice of consent. The procedure took this path in order to avoid the termination of the contract and streamline the economic circuit. Both norms provide the possibility of adapting the contract by way of negotiation and, in case of failure to reach an agreement, PECL leaves the adaptation issue to be settled by the court, however, art. 313 is more efficient, the injured party being granted the possibility of terminating the contract. H. Rosler, *op.cit* p. 502-503.

guiding principle must be that of equitably adapting the contract according to the parties' interests."¹⁰²

After the Second World War, the theory of imprevision was used to combat the disastrous economic effects it generated (the segregation of the state, inflation, emigration, etc.). In 1953 a company from West Berlin was supposed to deliver, based on a contract, 600 drill presses to an entrepreneur in the D.R.G. Due to the institution of the Berlin Blockade, the delivery was no longer possible. In spite of these, nearly half the tools had been manufactured. The Federal Justice Court concluded that "if, in the context of an agreement for the sale/purchase of items, the parties' expectations relating to the contract can no longer be fulfilled, the court must either adapt the contract to the current situation or cancel the respective contract." In accordance with this line of thought, the purchaser was compelled to pay ¼ of the due amount in order to cover the production costs of the already manufactured drill presses.¹⁰³

B. Italian Law

a) Applicable law¹⁰⁴.

In the Italian law, the theory of imprevision is regulated by art. 1467, art. 1468 and art. 1469.¹⁰⁵

The concept of excessive onerousness of performance is not defined by the Italian legal norms, however, jurisprudence in the field¹⁰⁶ defines it as the amplification of the initial costs entailed by the respective performance.

Additionally, it was also mentioned in the doctrine¹⁰⁷ as the situation in which the debtor incurs a prejudice which affects the economic effect of the contract and the balance of contractual performances, imagined by the parties at the time of concluding the contract. Art. 1467 regulates in general terms the "presupposizione" doctrine, which is the equivalent of the theory of imprevision (France), the "frustration of contracts" theory (in England), the "Geschäftsgrundlage" theory ("contract foundations" - Germany) and the "hardship" concept (the UNIDROIT principles). "La Presupposizione" operates as a result of meeting two conditions. An objective one consisting in the elements of the change, the frequency with which it occurs and the effects of the change. Secondly, one must take into account the subjective conditions related to the injured party's ability to foresee, at the time of concluding the contract, the upcoming changes.

¹⁰² H. Beale, *Cases, Materials and Text on Contract Law*. Oregon: Hart Publishing, 2002, p. 633.

¹⁰³ Baranauskas, *op.cit.*, p. 205.

¹⁰⁴ S. Ruperto, *La giurisprudenza sul codice civile*, Giuffrè, Milano, 2011, art. 1467, art. 1468 and art. 1469.

¹⁰⁵ Art. 1467. Italian Civ. code: (1) In the case of continuous or periodic execution contracts, if one of the parties' service provision became excessively onerous due to the occurrence of extraordinary and unforeseeable events, the party with an outstanding performance to execute may request the termination of the contract, with the effects established by article 1458.

Art. 1467 (2): The termination may only be requested if the onerousness rejoins the normal course of the contract.

Art 1467 (3): The party against which the termination is requested may avoid it by accepting the reasonable modification of the contract conditions.

Art. 1468: The contract which generates obligations for a single party: Under the provisions of the previous article, if the focus lies on a contract in which only one party enters into obligations, the said party may request a reduction of service provisions or the modification of the execution methods so that the provision might become reasonable.

Art.1469: Random contract: The norms mentioned in the previous articles do not apply in the case of contracts which are random by nature (art. 1879) or by the parties' will (Art.1448, art.1472).

¹⁰⁶ G. Marchisio, *Rebus Sic Stantibus: a comparative analysis for international arbitration*, July 2012, p. 8-9.

¹⁰⁷ *Ibidem*.

The situation of the Italian law presents the particularity of adapting contracts to the uninjured party's request to have the circumstances fundamentally changed, in the hypothesis that the said party wishes to avoid the termination of the respective contract.

b) Jurisprudence

Inflation did not represent a cause of imprevision. During the real estate market fluctuation period it was not accepted among the extraordinary and unpredictable situations.¹⁰⁸

In the context of jurisprudence it was considered that the existence of an indexation or hardship clause removes the subjective conditions (the party's capacity of foreseeing the upcoming modifications)¹⁰⁹.

With regard to the effects, jurisprudence established the prevalence of the contract adaptation measure.¹¹⁰

C. Lithuanian Law

a) Applicable law:

In the Lithuanian law, the theory of imprevision is regulated by art. 6.204 (Lithuanian civil code) on the "fulfilment of contractual obligations following changed circumstances"¹¹¹.

b) Jurisprudence:

One of the most recent published cases¹¹² in which the Supreme Court of Lithuania applied the respective article (art. 6.204) was tried in 2006. In a lease contract, the parties established a price derived from the ratio of convertibility into dollars specific to the national currency. One year later Lithuania, following a monetary reform, applied the equivalence between the value of the national currency and the value of the currency used in the European Union (euro). As such, the balance of the lease contract was strongly affected. The court ordered the adaptation of the price so that contract balance should be reinstated.

D. Colombian Law

The Colombian Commercial Code regulates imprevision on the basis of the principle of good faith (art. 1603 in the Colombian Civ. code), however, this rule applies exclusively to successive performance contracts and contracts affected by a suspensive term, unlike random or immediate performance contracts.¹¹³

E. Other states which regulated imprevision¹¹⁴

- Greece, art. 388, the Greek civil code adopted in 1946;
- Portugal, art. 437, the Portuguese Civ. code, adopted in 1966;
- Switzerland, art. 373, the Federal Code of obligations;
- Holland, art. 6:258, the Dutch civil code, adopted in 1838, latest revision 1992;
- Mexico, Article 17, the Mexican civil code adopted in 1928;
- Austria, art.936, art.1052, art.1170(a), the Austrian civil code;
- Denmark, Finland and Sweden accept the practice of the theory of imprevision¹¹⁵;

¹⁰⁸ Cass, 28 January 1995 n. 1027.

¹⁰⁹ Cass. civ. 25 May 2007, n. 12235,

¹¹⁰ Cass. civ. 29 September 2004, n. 19563, in *Contratti* 2005, p. 473.

¹¹¹ Art. 6.024 in the Lithuanian civil code adopts to the letter the provisions of the UNIDROIT Principles on the matter of hardship.

¹¹² E. Baranauskas, P. Zapolskis, *op. cit.*, p. 210.

¹¹³ Montoya, *L'imprevision dans les contrats*, 2012, available at: www.chairejlb.ca

¹¹⁴ G. Anton, *Theory of imprevision in the Romanian law and the comparative law*, Law 7/2000, p.33-35.

¹¹⁵ Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée, "*Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*", p.466;

-Algeria;

2. Systems which do not regulate imprevision at a principle level

A. French law

The French Civil Code does not comprise any rule for situations in which contractual obligations become burdensome due to changed circumstances. The French law courts preferred to remain faithful to the *pacta sunt servanda* principle¹¹⁶. The only rules which exonerate the execution of contractual obligations are those referring to force majeure, act of God and external causes.

This path drawn by the Court of Cassation has been kept to the present day. No change within the economic environment will entitle the judge to modify the terms initially established by the contracting parties.

On the other hand, the French administrative courts (Conseil d'Etat) accept the theory of imprevision. The jurisprudence decision which set the foundations of applying imprevision in the French administrative law dates back to 1916. In 1904, the city of Bordeaux concluded with a private company a concession agreement for the supply of gas and electricity over a 30-year period. In 1916, after the First World War, the price of coal had risen from 35 to 117. As a result, the company requested the increase of the fixed contract price and financial reliefs. This is a reference case for the French administrative courts and the application of imprevision.

The acceptance of imprevision within the administrative law is explained by means of the public interest concept. Maintaining without any modifications a non-executable contract, the object of which is the supply of electricity, thermal energy and gas (as in the "Gaz de Bordeaux" case) would have tragic repercussions for the entire community, from the mere individual to the level of the macroeconomy paralysed by the lack of production factors.¹¹⁷

The French civil law remained faithful to the individualism specific to the Liberalist "laissez faire" ideology founded on the *pacta sunt servanda* rule, according to which the agreements concluded as per the parties' wilful manifestations operate as laws between the parties (art. 1134 in the French Civil Code). The French civ. code contains only regulations on the absolute impossibility of executing contractual performances (reflecting the concept of force majeure regulated by article 1148) and the loss of the due item (art.1302).

In the doctrine it was suggested to settle excessive onerousness by resorting to contract termination or revision. Both suggestions were declined by the French civil law courts.

In a Report of the Court of Cassation (June 15th 2007) with regard to the project on revising Obligations in the French Civil Code, the Court objects to the Català Commission's lack of regulations on imprevision in accordance with the UNIDROIT Principles, the Principles of European Contract Law (PECL) and the European Contract Code.¹¹⁸

¹¹⁶ A famous case for the matter under discussion is that of the Cramponne Canal. The parties concluded in 1567 a contract for the irrigation of a garden. 300 years later, the initially set price no longer covered the required costs. The AIX Court of Appeal ordered the adaptation of the price to the new economic conditions. The Court of Cassation cancelled, in 1876, the decision taken by the Court of appeal based on article 1134 in the French Civil Code which stipulates the principle of the mandatory force of contracts.

¹¹⁷ E. Baranauskas, P. Zapolskis, *op. cit.*, p.199-201.

¹¹⁸ J.F. Chamie, *El principio general dereductio ad aequitatem tempor desequilibrio contractual*, Revista de Derecho Privado, n.º 22, enero-junio de 2012, p. 252.

In the administrative law, the theory of imprevision was applied in the case of contracts regarding public services, public acquisitions and concession agreements.¹¹⁹

In the Camponne case¹²⁰ the Court of Cassation claimed: “given the fact that art. 1134 is a general and absolute one, the law courts do not possess the competence, however fair this decision might appear, of relying on the subsequent events and circumstances in view of ordering the modification of the contracts concluded between the parties”.

Despite all the above, the subject of arbitration witnesses a greater tolerance with regard to the modification and adaptation of the contract following changes in the economic environment.¹²¹

Second, special laws were adopted, allowing the modification of contracts in the case of commercial lease contracts, bankruptcy and successive performance contracts.

B. Belgian Law

In 2009, the Supreme Court applied imprevision in the case of sale/purchase contract for stainless steel pipes. Ascertaining the increase by 70 % of the stainless steel price compared with the price at the time of concluding the contract, the Court ordered the adaptation of the price invoking as grounds art. 6.2.1, art. 6.2.2 for the purpose of completing the CISG provision.¹²²

C. English Law

Until the middle of the 19th century the mandatory force of contracts had been irremovable. A relevant case dating back to the 17th century (Paradine v. Jane) compels the lessee to pay the rent although they were not able to take possession of the rented space as it was occupied by an invading army.

This rigid position of the law courts concerning the “frustration of contracts” doctrine was kept until 1863 when, in the Taylor vs. Caldwell case¹²³, the parties concluded a contract for the lease of a hall designated to be the venue of a concert. One day before the concert the hall was destroyed by a fire, the Court dismissed the request by means of which the lessee (the organiser of the concert) claimed damages. This case marked the beginning for the usage of the “frustration of contracts” concept in cases where contractual obligations become impossible due unforeseeable circumstances.

The scope of applicability was subsequently extended, also comprising the situations in which the object of the contract disappears (frustration of purpose). In *Crell v. Henry*, a contract was concluded for the lease of an apartment for the purpose of watching the King Edward VII's coronation procession. Due to a medical condition which affected the king at the last moment, the coronation was cancelled. The Court exonerated the lessee from the obligation of paying the rent on the grounds that: “The coronation procession constituted the cause for the conclusion of this contract, and the non-performance of the procession prevents the execution of the contractual obligation entered into.”

Traditionally, the British law courts are not entitled to intervene in the relations created by synallagmatic contracts. The attempts to extend the scope of frustration were repressed by the

¹¹⁹ Aziz T Saliba, *Rebus sic stantibus: A Comparative Survey*, E Law / Murdoch University Electronic Journal of Law, Vol. 8, No. 3, Brazil, 2001, p. 5.

¹²⁰ Cour de cassation, civ. 06-03-1876, *Les grands arrêts de la jurisprudence civile*, 12e édition 2008, p. 183.

¹²¹ D. TALLON, „*La revision du contrat pour imprevision au regard des enseignements recents du droit compare, Droit et vie des affaires*”, Litec, Paris 1997, p. 403.

¹²² A. Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, Rev. dr. unif. 2010.

¹²³ E. Baranauskas, P. Zapolskis, *op. cit.*, p. 201-204.

uncompromising position of the House of Lords, who plead for the fulfilment of contractual obligations¹²⁴. In 1956, Lord Radcliffe said that “the *frustration of contracts* doctrine may only be accepted to the extent to which, following unforeseeable events, the contractual obligations become radically different from the ones entered into at the time of contract conclusion.” This statement was made in the context of non-granting of damages (to the debtor) based on a contract which established the erection of 78 houses within 8 months for a fixed price. Due to adverse weather conditions, the construction of the houses exceeded 8 months. The effect of contract frustration consists in the exoneration of the debtor from the execution of their obligations and the payment of damages, without allowing the adaptation of contracts. This measure, however, was not applied in the above mentioned case.

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¹²⁴ H. Rosler, *op. cit.*, p. 497-500.

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