UNPREDICTABILITY IN THE LOAN CONTRACT

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Abstract

Referring to the conditions of the unpredictability to the substantive elements of the loan agreement, it can be observed that this institution could intervene when the exceptional circumstance of its essence would affect the object of the contract. More specifically, in the case of CHF (Swiss national currency) loans, unpredictability may arise as a result of an exceptional circumstance that would exponentially increase the value of this currency relative to the Romanian leu.

Keywords: *unpredictability, loan contract, instance, binding force, swiss currency*

1. Introduction

Under Romanian law, unpredictability has existed for quite a long period of time, as a mere theory, without finding legal consecration. Since 2011, with the entry into force of the new Civil Code, unpredictability has become an institution of civil law governed by the provisions of article 1271. Thus, the Romanian legislator tries to align the Romanian legislation with the European tendency that is to regulate the institution of unpredictability or, in other words, the possibility of revising the contract. Moreover, lately, we can observe that all the European states are trying to harmonize their legislation in the field of contracts with the legislations of the other states, uniformity which has as cause the freedom of movement of persons and goods.

The way in which the institution of unpredictability was regulated in the Romanian Civil Code was basically influenced by the Draft Common Frame of Reference (DCFR) Rules, which in paragraph III 1: 110, second paragraph, provides for the possibility of the court intervening in the event of an exceptional situation in the performance of a unilateral contract or legal act that makes the debtor's obligation excessively onerous. Also, the Unidroit Principles which, although regulates the international commercial contracts, in Article 6.2.2 speaks of the hardship clause and defines it as when the occurrence of events has fundamentally altered the balance of the contract either because the value of the obligations of a party have increased, or because the amount of benefit that a party receives has reduced.

Unpredictability appears as an exception to the effect of the principle of binding contract force.

Or, in other words, it is a limitation of the principle of binding force, not a violation of it.

The express regulation of the establishment of the unpredictability was necessary for its application to be carried out only if all the conditions provided by the law were observed. The purpose of the binding force of contracts is mainly to ensure the stability and security of legal relations. As an exception to this principle, unpredictability must be applied with caution and always in compliance with all the conditions laid down by the legislator.

Lately, unpredictability is often invoked in cases concerning the execution of the loan agreement or contracts that represent the variants of the former, contracts where the loan was granted in the Swiss national currency.

In order to better understand the notion of unpredictability, it is necessary to present the main features of the principle of binding force of the contract.

2. Unpredictability - exception to the principle of binding force of the contract

Along with the principle of relativity and irrevocability, the principle of the mandatory force of civil legal acts (pacta sunt servanda) indicates how the effects of the civil legal act occur. This principle is explicitly provided by the provisions of article 1270 C.civ. according to which: (1) The valid contract concluded has the force of law between the contracting parties. The contract shall be amended or terminate only with the consent of the parties or for causes authorized by law.

The following conclusions can be drawn from Article 1270: under a contract, the parties are required to perform their own obligations, even if their execution has become more onerous either because of the increase in the cost of fulfilling their obligation or because of the decrease in the amount of the consideration as indicated paragraph 1 of Article 1270. At the same time, the amendment or termination of a contract has as its main source the will of the parties.

Further, the legislator wanted to strengthen the principle of binding force of the contract, mentioning in Article 1271 paragraph 1 C.civ. the fact that the parties are held to perform their obligations, even if their execution has become more onerous either because of the increase in the cost of fulfilling their

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obligation or because of the decrease in the value of the consideration.

Therefore, the fact that the execution of one of the parties or, on the contrary, of both parties has become more onerous does not justify removing the principle of binding force of the contract without the consent of the party to whose benefit the execution is.

However, the legislator considered a remedy, a possibility to rescue the contract, in the event of a break in the contractual balance due to the change of circumstances in an exceptional way, circumstances that were not considered by the parties at the beginning of the contract

3. The notion of unpredictability and its conditions in the light of the Civil Code

3.1 The notion of unpredictability

According to art. 1271 alin.2 C.civ. if the execution of the contract has become excessively onerous due to an exceptional change of circumstances which would make it manifestly unfair to oblige the debtor to perform the obligation, the court may order: a) the adaptation of the contract, in order to distribute fairly between the parties the losses and the profits resulting from the change circumstances; b) the termination of the contract, at the time and under the conditions it establishes.

Therefore, unpredictability implies an exceptional change in the circumstances taken into consideration by the parties at the beginning of the contract, circumstances that would make it manifestly unfair to oblige the debtor to execute the obligation in the manner agreed upon by the parties initially. A first condition for unpredictability is the existence of a contract. Although the DCFR Rules governing unpredictability apply to unilateral acts, the Romanian legislator chose to apply this institution only to sinalagmatic (bilateral) contracts.

This paragraph also indicates the mandatory condition for the existence of a situation of unpredictability, namely, that the execution of the contract has become excessively onerous. At the same time, it is clear from this paragraph that another condition must be fulfilled in order to ascertain the interference of the unpredictability, namely to be a successive contract, because in the case of contracts with a sudden execution, uno ictu, the moment of the beginning of the contract, corresponds to the moment of the execution of the obligation, or the execution does not take place at a very long time from the date of beginning of the contract so that an exceptional situation would not be possible. The only situation in which an exceptional situation might arise during the performance of a contract with a sudden execution would be the one in which the obligation of one party would be affected by a suspensive term. Also, the contract must be an honourable one, because if we were in the case of a free-of-charge contract, there is no benefit from both sides, so even the contractual balance would not be affected. Last but not least, the contract must not have finished at the time when the court is required to find the unpredictability

With regard to the classification of contracts in commutative contracts and random contracts, in the event of unpredictability, it can only be a commutative contract where the parties at the time of beginning of the contract knew the rights and obligations arising from that contract and their extent determined or at least determinable (Article 1173 (1) C.I.). The explanation for which the institution of the unpredictability would not find application in the case of random contracts is simple. In the case of these latter contracts, even the parties, by their will, offer at least one of them a chance of winning and at the same time expose them to the risk of loss, which depends on a future and uncertain event (art.1173 paragraph 2 C.civ .). Thus, the premise of unpredictability is even a feature of this type of contract.

The Consumption Loan Contract (mutuum) fulfils the above-mentioned conditions regarding the category of contracts to which the institution of unpredictability might apply, being a sinalagmatic contract, with successive, commutative and pecuniary execution.

The consumption loan contract is defined by article 2158 paragraph 1 C.civ.. According to this article the consumption loan contract is the contract by which the lender gives to the borrower a sum of money or other such fungible and consumable goods by nature and the borrower undertakes to return after a certain period the same amount of money or quantity of goods of the same nature and quality. The legislator therefore established the principle of nominalism in relation to the consumption loan contract for money. Moreover, with regard to the money-lending contract, the legislator sought to reinforce this principle by stipulating in article 2164 paragraph 2 that if the loan is borne by a sum of money, the borrower is not required to return only the nominal amount received, whatever its variation, unless otherwise agreed by the parties.

Also, paragraph 2 of article 2159 C.civ. appreciates that Unless otherwise proven, the loan involving a sum of money is presumed to be forfeit. Thus, a variant of the Consumption Loan Contract is the interest-bearing loan agreement. This implies that under the contract a term of payment of a sum of money or other goods of the same kind shall also arise insofar as there are no particular rules on the validity and execution of that obligation. In other words, when there is no other contract called. The interest included in the contract price may be determined in cash or other benefits under any title or denomination the borrower undertakes as the equivalent of the use of capital. Also, according to article 2169 C.civ. The amount of money borrowed is interest-bearing from the day it was handed over to the borrower.

Referring to the conditions of the unpredictability to the substantive elements of the loan agreement, it can be observed that this institution could intervene when

the exceptional circumstance of its essence would affect the object of the contract. More specifically, in the case of CHF (Swiss national currency) loans, unpredictability may arise as a result of an exceptional circumstance that would exponentially increase the value of this currency relative to the Romanian leu.

At present, at national level, there are a lot of loan contracts or varieties of this contract. In many cases, the parties have established the object of the contract in a currency other than the national one, particularly in the Swiss national currency (CHF). In close connection with the determination of the object of the contract in another currency, there is the interest provided by the parties, which was in principle set at a lower amount than if the object of the contract had been set in the national currency. Characteristic of these contracts is the exchange rate fluctuation because the borrower has to repay the amount of money borrowed in the same currency in which it was agreed, according to the principle of nominalism. However, the conversion of the national currency into the borrowed currency can mean for the borrower a greater or lesser financial effort depending on the currency exchange. Could the contract's object, in case this object is established in another currency than the national one, change the character of the contract from a commutative to a random one? It is a question to which we would in principle be tempted to give a negative answer because the evolution of the financial and banking market that determines the value of a currency in relation to the other, should not be an uncertain but rather predictable event. However, analyzing the evolution of a certain currency, namely the Swiss franc, in relation to all other national currencies, the answer may not be so simple.

Returning to the consumption loan contracts for pecuniary interest signed on the territory of Romania in the last 10 years, it can easily be noticed that the loan, in a fairly large proportion, was established in Swiss francs. By making only a small comparison, between the value of a Swiss franc by reference to the Romanian leu on January 1, year 2008 (2.29 lei) and January 1, year 2019 (3.99 lei), it can easily be noticed that the national currency has experienced a depreciation more than considerable during this period.

In connection with this surprising evolution of the Swiss national currency, it was also the observance of the obligations of the borrowers, which became obviously more onerous. Therefore, there are many cases in which the parties have requested, through the courts, the adaptation of these contracts as a result of unpredictability.

Before considering the possible solutions available to courts in these cases, it is necessary to briefly outline the conditions imposed by the legislator for establishing the existence of a case of unpredictability.

3.2. Conditions of unpredictability

Article 1271 paragraph 3 C.civ. provides for the conditions under which the court may intervene in the contract concluded by the parties. These are:

a) the change of circumstances occurred after the beginning of the contract;
b) the change of circumstances and the extent thereof have not and could not reasonably have been taken into account by the debtor at the time of the conclusion of the contract;
c) the debtor did not take the risk of changing the circumstances and could not reasonably be considered to have assumed that risk;
d) the debtor has attempted, within a reasonable time and in good faith, to negotiate the reasonable and equitable adjustment of the contract.

In the case of consumption loan contracts was established in the Swiss currency, previously this currency has an important evolution, it can easily be said that the condition that the change of circumstances occurs after the conclusion of the contract, is satisfied. Also, having regard to the previous ratio between the two coins, it follows that, in principle, the second condition, namely that the change of circumstances and the extent of the circumstances were not and could not be envisaged by the debtor, reasonably at the time of the conclusion of the contract, is fulfilled. However, it is important to note that both the exceptional circumstance that has occurred and the effects of the imbalance that has taken place must occur after the beginning of the contract. According to the doctrine [1], in order to verify the condition of an exceptional situation, it is of interest that the unpredictability as well as the economic-financial aspect - which must characterize the effect on the contract - should relate not only to the nature or the cause of the event, but also to its effects on the performance of contractual obligations.

As regards the third condition, which presupposes that the debtor did not take the risk of changing the circumstances and could not reasonably be considered to have assumed that risk, the opinions are different. It could be said that a person who sign a loan contract in a currency other than the national one and, in fact, the one in which it is remunerated, has automatically assumed the risk of a currency change, regardless of the level or magnitude of that change? As mentioned above, the conclude of these contracts, in the circumstances described, was also based on other benefits for the borrower, in principle, less interest than in the case of contracts where the refund was agreed in the national currency. Another benefit was, in some cases, fixed interest, not variable. That is why analyzing the fulfillment of this condition is complex and involves considering all these elements.

It should be remembered that the contractual imbalance must make the execution of the contract

[1] Conditions of Contractual Contradiction between Traditions and Current Affairs-STUDIA-C.Zamşa, Romanian Business Law Review no.6 / 2009

excessively onerous for the one who invokes unpredictability. Therefore, many claimants in the filed cases before the courts, together with the exchange rate of these coins and the change in their personal financial conditions, invoke the courts also from this point of view to make appeals. Obviously, while the proof of Swiss currency development in relation to the Romanian leu is at the hands of the court, in terms of changing the borrowers' financial situation, it must be proved by the party according to art. 259 Civil Procedure Code.

We also note that the court should also take into account the fact that a certain degree of risk was assumed by the parties at the conclusion of the contract. As the Constitutional Court has pointed out in Decision No.623 / 2016, *the contract itself entails an inherent risk voluntarily assumed by the two parties to the contract, based on their autonomy of will, a principle that characterizes the matter of the conclusion of the contract, and one above - added which could not be the subject in particular of a prediction by any of them, a risk which goes beyond the contractual power of the contracting parties and which involves the interventions of elements which could not be taken into account at the time of a quo. Imprudence aims to call over-added risk and, in the context of its intervention, it is meant to reap the benefits the parties have been obliged to under the new economic / legal realities. It is not intended to revert to the benefits at the time of the conclusion of the credit agreement or to the risk accepted by the parties at the same time, being therefore alien to them, but provides a legal basis for the adjustment or termination of the contract (...) Adaptation takes place when the social utility of the contract can be maintained, while the cessation when the new conditions intervene, you are forgiving the social utility. It follows from the above that the adaptation of the contract during its execution to the new reality is equivalent to the maintenance of its social utility, in other words it allows further execution of the contract by rebalancing the benefits*[2].

As the legislator does not offer clear criteria regarding the notion of "changing circumstances", a notion underpinning the institution of unpredictability, I believe that the courts should take into account both previous jurisprudence and possible doctrinal criteria, but taking into account, the current socio-economic reality. Moreover, even regulating the institution of unpredictability in th Civil Code, although it has the role of establishing very clearly the conditions of the unpredictability, one might say that it encourages the parties to invoke the unpredictability, not just a doctrinal theory.

As regards the latter condition, namely that the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adjustment of the contract, it is necessary to consider whether that condition falls within the scope of the notion of a prior procedure governed by art. 193 C.pr.civ. In other words, if the lack of negotiation would constitute a fine of non-receipt in the case of a petition for the purpose that regards unpredictability. According to art. 193 paragraph 1 of the Civil Procedure Code, the court may be referred only after a preliminary procedure, if the law expressly so provides. Proof of the completion of the prior procedure shall be attached to the request for a summons. At the same time, according to paragraph 2, the failure to carry out the preliminary procedure can only be invoked by the defendant by means of a grievance, under penalty of decay.

By virtue of this last condition, it can be said that the legislator provided for two steps to establish the interference of the unpredictability[3]: a stage of the negotiation initiated by the debtor in order to adapt the contract and a court stage of the court's intervention at the request of any party dissatisfied with the election of the phase negotiations-be for the cancellation or for the adjustment of the contract.

Regarding the terms of good faith, fair and reasonable, we note that while the good faith was presumed by the legislator through art. 14 C.civ., regarding the reasonable term and the equitable term, the legislator left the judgment of the court (if a lawsuit is pending), the definition of these terms. Thus, the judge has a great margin of discretion in this regard. However, I consider that the judge should refer to a diligent and prudent person for the consideration of the reasonableness of the condition. Obviously, even in the case of good faith, the court might find that the party had an attitude from which the intention was that the negotiations would fail so that the presumption would be overturned. Such a situation would occur if the contract is to be canceled directly, but there is no agreement between the side.

Turning to the solutions that the court could decide if the conditions of the unpredictability were met, the legislator stipulated in article 1271 paragraph 2 C.civ. that if the performance of the contract became excessively onerous due to an exceptional change in the circumstances that would make it manifestly unfair to order the debtor to perform the obligation, the court may order: a) the adaptation of the contract in order to distribute fairly between the parties the losses and benefits changing circumstances; b) the termination of the contract, at the time and under the conditions it establishes. Could the solution decided by the court be influenced by the will of the parties? In principle, the answer should be negative because if both sides would like to terminate the contract, this would happen precisely as a result of the parties' agreement and not as a result of a court ruling. On the other hand, if only one party would request the termination of the contract, I believe that the court is not limited to the solution it can

[2] Constitutional Court Decision no.623 / 2016, paragraphs 96 and 97

[3] Cristina Zamşa, Imprevision in the light of the law on the application of the new Civil Code. Reflection of the new concept on the contract - Romanian Business Law Review, no. 5 of June 30, 2011

dispose of, and it is necessary to consider whether the adjustment of the contract would be feasible. The principle of availability provided by art. 9 C.civ. would not be defeated in this respect because the legislator, by the way he chose to regulate the institution of unpredictability, has made it clear that termination of the contract is to be ordered only if which would not be possible to adapt it. If the court has ordered the termination of the contract, the deadline set may only be one later.

Regardless of which of the solutions would be ordered by the court, it should also have a fair distribution between the parties of the losses and benefits resulting from the change of circumstances or of the moment and conditions in which the termination of the contract occurs. Obviously, the parties may at any time until the process terminate, conclude a transaction by which they themselves establish these elements. In most cases, even by the petition to sue, the claimant also indicates the form in which he wishes to adjust the contract, namely the stabilization of the course of the Swiss franc to the one at the date of the conclusion of the contract. I believe that the courts should also consider the evolution of other currencies relative to the national currency, noting that the Romanian leu depreciated in general but differently from a percentage point of view. Inflation should also be considered. All of these elements and not only should be analyzed precisely so that the contractual imbalance is removed, and not just transmitted from one side to the other. Also, the institution of unpredictability should not be the way for a contractual party, through the court's appeal, to change the contractual conditions in an easy way.

In practice, in the case of interest-earning contracts where the object of the contract was established in the Swiss currency, it seems to be rather difficult for the courts to rule on how the unpredictability is going to take effect. The difficulty of such a solution results from the fact that these contracts are complex and, implicitly, the effects of such contracts are complex. Courts have to be cautious when they have the adaptation or termination of the contract, mostly because, in principle, the solution is contrary to the will of one of the contracting parties.

4. Differences between the regulation of the unpredictability in the French Civil Code to the Romanian Civil Code

Unlike the Romanian civil law, in the French Civil Code the legislator provided in Article 1195 expressly that during the period of prior negotiations between the parties in the event of an exceptional occurrence, the effects of the contract are not suspended. This solution is also expressly provided by the Unidroit Principles under Article 6.2.3 (2).

A further difference from the domestic regulation, the French legislature has made it necessary to bring legal action to a negotiation initiative and not to a proper negotiation. Thus, it is admitted that even the refusal of the other party to negotiate legitimizes the party invoking the imprudence to bring its claim before the courts.

5. Conclusions

Although more than 7 years have passed since the entry into force of the New Civil Code regulating the institution of unpredictability, the courts appear to be very cautious in order to review the loan agreements in which the loan was granted in the Swiss currency. This caution appears to be largely justified by the fact that the judge does not want, through his solution, to move the losses resulting from the change of circumstances from a part to the other and to create a new contractual imbalance. At the same time, this caution is both legitimate and necessary because the review of contracts by the court should not lead to the abolition of the principle of binding force of the contract. However, it is worth noting that several states chose not to give any law to the contract. This, together with the express regulation of the institution of unpredictability, undoubtedly leads to a greater margin of appreciation for the courts.

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