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THE PREJUDICE AND THE IMPREVISION - SITUATIONS THAT CAUSE A CONTRACTUAL IMBALANCE

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Abstract: *The prejudice and imprevision are two situations that cause a contractual imbalance. Although in the case of both institutions of civil law there is a clear disproportion between the parties' services, the disparities among these are the ones that determine their existence as autonomous institutions regulated distinctly by the Civil Code, the prejudice being considered a vice of consent, while imprevision is appreciated as an exception from the principle of binding force of a contract, which has as its basis the principle of good faith and fairness.*

Key words: *prejudice, imprevision, obligation, contract.*

1. The statutory regulation of the two institutions of civil law: the prejudice and the imprevision

The prejudice is a vice of consent governed by the Civil Code in art.1221-1224.According to art. 1221 of the Civil Code, *"(1) We deal with an prejudice when one party, taking advantage of a state of need, the inexperience or lack of knowledge of the other party, stipulates in its favour or of another person, services of a considerably higher value at the date of concluding the contract than the value of their services.(2) The existence of the prejudice must be assessed according to the nature and purpose of the contract.(3) The prejudice may also exist where the child assumes an excessive obligation related to his/her heritage status, the services one gets from the contract or to all the circumstances. "*

The sanction, in the event of prejudice, is provided by art.1222 of the Civil Code: *"1) The party whose consent was vitiated by prejudice may demand, at their option, the cancellation of the contract or the reduction of his/her obligations to the amount of damages-interests which would be justified.(2) Except for the case provided in article 1221 par. (3), the action for annulment is admissible only if the damage exceeds half the value it had at the time of conclusion, the benefit promised or performed by the damaged party. 3) In all the cases, the court may maintain the contract if the other party fairly provides a reduction of their claims or, where appropriate, an increase of their own obligations.*

The provisions of art. 1213 concerning the adaptation of the contract shall apply accordingly. In accordance with the provisions of art. 1223 of the Civil Code,

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*"(1) The right to action for annulment or reduction of the obligations for the prejudice prescribes within one year from the date of conclusion of the contract. (2) The annullability of a contract cannot be opposed by way of exception when the statute of limitations ends. "*And art. 1224 of the Civil Code regulates the situations where prejudice is unacceptable, without the possibility of being called down upon by the contracting parties, thus *"The aleatory contracts, the transaction and other agreements expressly provided by the law cannot be appealed for prejudice."*

The imprevision, considered an exception from the principle of binding force of the contract [3] is regulated by art. 1271 of the Civil Code, as follows: *"(1) The parties are bound to fulfil their obligations even if their execution has become more onerous, either because of the increases in the execution costs of their duties, or due to the decrease in the value of the counterperformance. (2) However, if the execution of the contract has become excessively onerous because of an exceptional change of circumstances which would obviously make it unjust to order the debtor to comply with the duty, the court may rule:*

a) the adaptation of the contract in order to distribute equitably between the parties the losses and services resulting from a change in circumstances;

b) the termination of the contract at the time and under the conditions it sets.

(3) the provisions of par. (2) shall apply only if:

a) the change of circumstances occurred after the conclusion of the contract;

b) the changing of circumstances and the extent thereof have not been and could not have been envisaged by the debtor reasonably at the time of the conclusion of the contract;

c) the debtor has not assumed the risk of changes in circumstances and it could not be reasonably considered that he would have assumed this risk;

d) the debtor has tried, within a reasonable term and in good faith the negotiation of a fair and reasonable adaptation of the contract. "

2. Considerations regarding the legal nature of the prejudice and of the imprevision

With regard to the legal nature of the prejudice, the legal literature coming into force previously to the new Civil Code [3] ,have expressed more opinions, appreciating that this is either a vice of consent, or a cause of invalidation for incapacity, or a defect in the object of the contract, with the presumption of an fault committed by the beneficiary of the contractual imbalance.

The New Civil Code settles these disputes, regulating prejudice in the chapter dedicated to the vices of consent so that, in the view of the legislature, the prejudice is nothing but a vice of consent which can occur at the conclusion of the contract.

It should also be noted that in the doctrine previous to the entry into force of the new Civil Code, there were two conceptions on the structure of the prejudice, namely the subjective conception and the objective concept.

In the light of the subjective conception, the prejudice implies two main structural components: the obvious disproportion between counterperformances to the detriment of that claiming prejudice, as an element of objective nature, i.e. the attitude of the beneficiary of the counterperformance with a higher value, as an element of subjective nature materialized in a vice of consent, a vice which implied the exploitation of the state of need, the inexperience or lack of knowledge in which the other party is, the

other being aware of and taking it as an advantage. According to the objective concept, the prejudice results from the non-equivalence of the services stipulated by the parties, independent of the circumstances that generated it. The structure of the prejudice, through the objective conception, shows a single objective element, namely the evident disproportion of value between the mutual services.

The New Civil Code exhibited the subjective conception in the case of the person of full age, prejudiced by the disproportion between the contractual services, while for the minor, it ascribed the objective conception. It could be argued that in the case of the minor, when the contract ended in prejudicial conditions for them, there is an absolute presumption regarding their lack of experience and the fact that the favoured part took advantage of this situation by concluding the contract in disadvantageous conditions for the minor.

Note that art. 1221 of the Civil Code provides the following as general criteria to determine the situations of prejudice: the nature and purpose of the contract, following that, in the case of minors, his/her heritage status would be considered, the services they get from the contract and, in general, the entire set of circumstances. Regarding the legal nature of the imprevision, it should be mentioned that in the literature, before the entry into force of the new Civil Code, two views had emerged in order to explain the legal nature of the theory of imprevision [3] .

In the first opinion, which represents the majority opinion, the theory of imprevision is the result of the changing economic realities existing at the time of concluding the contract. Thus, the parties conclude the contract in the light of the current economic situation existent at a certain time. But if, after signing the contract, there are certain unforeseen exceptional circumstances (inflation, war, etc.) between the parties' services, significant imbalances may appear.

The goal of imprevision is to restore the contractual balance which had been broken, through the revaluation of the mutual services of the parties [1] .

The second view presents the imprevision theory as an extension of the force majeure, assimilating the hypothesis regarding the absolute impossibility of contract enforcement with the hypothesis of its enforcement due to a manifest disproportion between counter-performances, occurring during execution and which was not foreseen when concluding the contract.

On this basis, it will be considered that no "actio in rem verso" would be excluded when introduced by the party invoking the obvious disproportion between the counterperformances.

In the earlier legal literature, it was considered that the theory of imprevision was founded on an abuse of rights, assuming that if a party requests the other party to perform its benefit given that the consequences would cause serious prejudice to the debtor, the abuse of rights can be invoked by the creditor. It was also considered that the theory of imprevision has as theme the principle of good faith and equity or that it is based on the need to ensure a balance between fair and useful. In the recent legal literature [3] it was found that imprevision, seen as an exception from the principle of the binding force of the contract represents a review of the legal document due to the breach of the contractual balance following the change of circumstances considered by the parties when concluding the contract because the effects of the legal act get to be others than those that the parties at the time of signing the document had agreed to determine and which were to be mandatory to them.

3. The features of the prejudice, respectively of the imprevision

From the statutory regulation of the two institutions, we note that the prejudice involves an original imbalance of services that existed at the time of concluding the contract. In the case of the imprevision, the contractual imbalance occurs during the execution of the contract, on its completion the mutual services between the parties being proportional.

Being a vice that alters the consent, the question arising is that of the validity of the convention concluded between the parties in case of prejudice, while in the case of imprevision, the validity of the contract is not disputed, but the question that arises is the derogation from the principle of *pacta sunt servanda.*

In light of that principle illustrated by art. 1270 par. 1 of the Civil Code, the valid contract has the force of law between the contracting parties. In case of imprevision, an exception is made from the law of parties in order to give effect to the principle of good faith and fairness, in the sense that it would be inequitable that one party be held by the binding force of the contract, when exceptional circumstances, not assumed and unexpected at the conclusion of the contract have distorted its original contents.

Both prejudice and imprevision have an exceptional character.

Thus, even if, according to the new regulation, the prejudice is admissible in case of the contracts concluded between adults, these latter contracts can be abolished only if the imbalance exceeds half of the value it had had when concluding the contract and the disproportion must subsist until the claim for annulment.

On the other hand, the prejudice will cancel the contract only if the contract cannot be maintained through its adaptation by the court, if the advantaged party provided equitably, a reduction of their claims or, where appropriate, an increase in their obligations. The imprevision is an institution of civil law that can be invoked only in situations where the performance of the contract has become excessively onerous due to exceptional changes of the circumstances contemplated by the parties at the conclusion of the contract.

4. The applicability of the prejudice and of the imprevision

Regarding the applicability of the prejudice, the distinction between the prejudice invoked by the minor and the person of age must be made.

In case of the prejudice invoked by the minor, this may be invoked if it is a legal document that meets the following requirements:

-to be a legal managing document;

-to be a bilateral legal act, for consideration and commutative;

-to be signed by the minor between 14 and 18 alone (the minor with limited exercise capacity), without the consent of the legal guardian;

-to be detrimental to the minor, in the sense that by that act, the minor assumes an excessive obligation in relation to its patrimonial state, the services s/he gets from the contract or in all circumstances.

In case of the prejudice caused by the person of age, the bilateral legal documents may be appealed, for consideration and commutative, whether they are of management or of disposition. According to art. 1224 Civil Code, the aleatory contracts, the prejudice as well as other agreements expressly provided by law cannot be appealed for prejudice. Challenging an aleatory contract is not possible because the existence or extent of the services is subject to an uncertain

event, whose production is independent of the parties' will.

They conceded to become indebted to one another since the time of concluding the contract, intentionally running the chance of winning and the risk of loss, which means that none of them can claim to have been harmed in case the chance of winning was not capitalized on, but on the contrary, they were the victim of the risk of loss, which depended on the production of the uncertain event, established in the contract by their free and uncorrupted will [6] .Regarding the transaction, it represents that contract through which the parties prevent or extinguish a dispute, including the phase of foreclosure through concessions or reciprocal waiving of rights or the transfer of rights from one to the other.

The aim of the transaction is to prevent or settle the dispute, which determines the sides to make concessions, sometimes disadvantageous to them. The prejudice is incompatible with the transaction because the disproportion which may arise between the parties' services is due to achieving the goal of concluding this transaction, the consent of the parties not being vitiated. The imprevision, as a rule, targets bilateral contracts, for instance, commutative contracts with successive execution.

The doctrine [2] made the consideration that imprevision might apply to a uno ictu contract with execution, to the extent to which the circumstance that breaks the contractual balance occurs thereafter, but before the time when the obligations of the parties had to be executed. Also, it was shown that the theory of imprevision is compatible with some unilateral contracts as far as and when it would be possible to raise the issue of an equitable distribution of losses arising due to the external circumstance that made the performance become an excessively onerous obligation for its debtor [2] .

5. Conditions to be met for invoking prejudice and imprevision

In accordance with the provisions of art. 1221 of the Civil Code, there is no prejudice when one party, taking advantage of a state of need, inexperience or lack of knowledge of the other party, stipulates in their favour or of another person’s an amount considerably higher, at the date of concluding the contract than the actual value of their services.The existence of prejudice must be assessed in relation to the nature and purpose of the contract.

Unlike the previous regulation which only referred to minors, in the view of the new Civil Code, the prejudice has become a vice of consent with general vocation, being liable to apply, when a contract had been concluded, whenever there is a significant disproportion between the parties' services.

The New Civil Code promoted the subjective conception of the person of age, the structure of the prejudice thus consisting of two elements: the obvious disproportion between counter-performances to the detriment of the party filing for prejudice, as an objective element, and the attitude of the party who benefited from the more consistent counter-performance. As a subjective element manifested in taking advantage of a party’s state of need, of their lack of experience or knowledge of which the other party was aware and profited from.

Regarding the minor, the new Civil Code illustrates the concept of objective, there is a single prejudice structure element or value disproportion between mutual services.

The existence of this disproportion between services shall be assessed according to the state patrimony of the minor, the services they get from the contract or by all the incumbent circumstances.

It should also be noted that in the case of a person of age, if the annulment of the damaging act is wanted, the prejudice must exceed half the value it had had at the time when the contract had been concluded, performance promised or enforced by the aggrieved party, with the necessity that this disproportion subsist until the date of the claim for annulment. Such a condition is required only if one wants to cancel the contract, not if the damaged party seeks to restore it by reducing its obligations to the amount of damages that would be justified.

Thus, in order to invoke imprevision it is necessary that the change of circumstances occur after the conclusion of the contract. It is also necessary that the changing of circumstances and their extent have not been, nor could have been envisaged by the debtor reasonably at the time of concluding the contract.

A third condition concerns the fact that the debtor should not have assumed the risk of change in circumstances, or that it could not be reasonably considered that they had taken this risk.

The legislator adds a procedural condition, instituting a mandatory procedure, preliminary to the court referral, meaning that the debtor must seek, within a reasonable term and in good faith, the fair and equitable negotiation of the contract.

Thus, art. 1006 of the Civil Code provides that "if, due to certain situations which are unforeseeable and not attributable to the beneficiary, arising from the acceptance of the liberality, the eligibility or the execution of the tasks that affect the liberality has become extremely difficult or excessively burdensome for the beneficiary, this may require the revision of charges or conditions."

In compliance, if possible, with the ruler's will, the court hearing the application for revision may rule qualitative or quantitative changes of the conditions affecting the liberality or to group them with the similar ones from another liberality.

The court may authorize the partial or total alienation of the object of the liberality, setting a price to be used for purposes consistent with the ruler's will and any other measures in order to maintain as much as possible the destination targeted by him/her.

6. Penalties applicable in case of prejudice and of imprevision

In case the prejudice is appealed, the court may cancel the contract or it can uphold it, adapting it equitably, so that the sanction intervening in case of prejudice is relative nullity, namely the contract by the court.

If imprevision is invoked, the court may rule either by adapting the contract in order to distribute equitably between the parties the losses and benefits resulting from the change in the circumstances envisaged in the contract, or its termination, setting the time and the conditions of termination.

It has to be pointed out that both in the case of prejudice, and in the case of imprevision, the court may order the adaptation of the contract, this institution being governed by the provisions of art. 1213 of the Civil Code.

According to Art. 1213 par. 1 of the Civil Code, if a party is entitled to invoke the annullability of the contract for an error, but the other party declares himself/herself willing to perform or performs the contract as it was understood by the party entitled to the claim for annulment, the contract is deemed to have been concluded as understood by the latter part.

In our case, the text of the law must be adapted in the sense that it applies in situations where the advantaged party agrees to reduce its claim equitably or,

where appropriate, to increase their liability so that the mutual services between the parties become proportional.

It should be noted however that in the case of the prejudice, art. 1222 of the Civil Code refers to the provisions of art. 1213 Civil Code, showing that these provisions are applied properly and, while art. 1271, applicable to the imprevision, does not refer to the law text so that, in our opinion, the provisions of the legal text referring to the 3 months term within which the favoured part may prove that the contract is being performed in the manner desired by the other party are applicable only in case of the prejudice, not in the case of imprevision.

Thus, according to art. 1222 related to art. 1213 of the Civil Code, the favoured party may equitably provide a reduction of their claims or, where appropriate, an increase of their obligations within a period of 3 months from the time when the damaged party communicated the existence of the prejudice through a notification or at the time when s/he was notified regarding the summons on the claim for prejudice.

This offer must arrive before the party filing for prejudice, having obtained the nullity of the contract in court. In case the advantaged party makes this offer, the court will be able to uphold the contract if, in their opinion, the mutual services are proportionate and fair.

As a matter which requires the appreciation of the judge, we consider that paragraph. 3 of art. 1213 of the Civil Code does not apply in case of prejudice because the favoured party cannot appreciate on their own which would be the most advantageous offer to adjust the imbalance that exists between the parties' services.

If the damaged party shows the other party which would be their claims regarding the manner in which their own debt would have to be reduced or, where appropriate, to increase their own obligation and the advantaged party would agree with this proposal, that would represent a transaction that would be enforced on both parties equally by the court, in the light of the principle of disposition of parties in a trial, namely the contractual freedom.

It should also be noted that in the case of prejudice, the party invoking this breach of consent cannot require the other party to reduce their own debt or, where appropriate, to increase their own obligation, but only to ask at will, the annulment of the contract or the reduction of his/her obligations with the amount of damages-interests to which they would be entitled.

These latter observations are necessary in the case of imprevision, the court having the possibility, depending on the position of the parties, to adapt the contract so as to distribute in an equitable way between the parties the losses and the benefits resulting from the changing of the circumstances taken into consideration at the conclusion of the contract.

If the cancellation of the contract for damage is requested, the action for annulment is admissible only if the damage exceeds half the value it had at the time of concluding the contract, service promised or performed by the defaulting party.

In the case of minors, the action for annulment is admissible regardless of the value of the prejudice, it can be less than half the value it used to have at the time of conclusion, the benefit promised or performed by the defaulted party.

Besides the condition of admissibility that is related to the objective side of the prejudice, the defaulted party must prove, in the case of the adult and of the subjective element, the fact that the other side has taken advantage of the state of

need, inexperience or lack of knowledge in which the respective minor was.

In the case of minors, the subjective element need not be proven. It can be appreciated that there is an absolute presumption regarding his/her lack of experience and that the favoured party took advantage of this situation.

According to art. 1223 of the Civil Code, the right of action for annulment or reduction of the obligations for prejudice prescribes within one year from the date of conclusion. That means that in the case of the action for annulment for prejudice, the limitation period is lower than the general limitation period of three years, subject to art. 2517 of the Civil Code.

According to art. 1249 par. 2 of the Civil Code, there is a general rule that relative nullity can be invoked at any time by way of exception, even after the expiration of the period of limitation of the right to action for annulment. In the case of the prejudice, there is a waiver from this general rule, mentioned by art. 1223 par. 2 of the Civil Code that the annullability of a contract cannot be opposed by way of exception when the remedy is prescribed.

Regarding the time when the limitation period begins to run, it is regulated by art. 2529 par. 1 letter c of the Civil Code, respectively from the day in which the person entitled, his/her legal representative or the one requested by the law to give his/her approval or to authorize the documents knew the cause for the annullement, but no later than 18 months from the day of signing the legal document.

Regarding imprevision, we ascertained that the court may order either the adaptation of the contract or its termination. We believe that in order for the termination of the contract to be ruled, we must find that exceptional circumstances arising after the time of concluding the contract are similar to the force majeure or the unforeseeable circumstances making it absolutely unjust to force the debtor to continue performing his/her duties. For this reason, it can be argued that sometimes imprevision can be assimilated to unforeseeable circumstances or force majeure.

In our opinion, the distinction to be made between imprevision and force majeure or unforeseeable circumstances is that in the case of force majeure or unforeseeable circumstances, the inability to discharge the obligation of the debtor is objective, whereas the imprevision has a subjective character.

This means that in case of imprevision, the court does not find an objective impossibility of performance, but considers that the circumstances make it unjust to continue to discharge the obligation incurred by the debtor.

Regarding the action by which the imprevision was alleged, this must be entered in the general limitation period of three years, which shall start from the time the debtor knew or ought to have known the occurrence of those exceptional circumstances which made obligation become excessively onerous.

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