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The Impact of the CoVid-19 Pandemic upon the Contracts in Progress. Special View upon the Unforeseeability in the Regulation of the Romanian Civil Code

Keywords: Romanian Civil Code, unforeseeability, the conditions of unforeseeability, the effects of unforeseeability, CoVid-19 pandemic, the limitation of the binding force of the contract

Abstract. In the context of the deep economic changes generated by the SARS-CoV-2 pandemic, the debates regarding the institution of unforeseeability have returned. It is a fact that the measures ordered by the authorities to limit the spread of the pandemic affect the possibility of fulfilling contractual obligations, so that the contracting parties are put in a position to analyze the contractual mechanisms available to remedy the situation. The Romanian legal system considers the unforeseeability as an exception from the principle of the binding force of the contract, being expressly stated by the current Civil Code. It is applicable, as a rule, for the synallagmatic, onerous, commutative and with successive or continuous execution contracts. This exception may be invoked if the execution of the contract has become excessively onerous for one of the parties, because of the occurrence of certain events independent of the will of the parties and which caused an imbalance between their services, impossible to foresee at the time of concluding the act. Invoking the unforeseen allows the contract to be renegotiated. If the parties do not reach an agreement, at the request of one of them, the court may adjust or order the cessation of the contract. Starting from the fact that there are multiple situations in which the spread of the CoVid-19 has determined a contractual imbalance, which needs to be remedied, as well as the fact that practically there is still a confusion between the application of the unforeseeability and the situations in which the major force occurs as an exonerating cause of liability, the objective of the current article is to analyze the concept of unforeseeability and the legal regime applicable to it, by emphasizing the conditions which need to be met in order to be in the presence of this exception from the principle of the binding force of the contract.

Wpływ pandemii COVID-19 na wykonywanie umów. Szczególne spojrzenie na nadzwyczajną zmianę stosunków w przepisach rumuńskiego kodeksu cywilnego

Słowa kluczowe: rumuński kodeks cywilny, nieprzewidziane okoliczności (nadzwyczajna zmiana stosunków), skutki nieprzewidywalności, pandemia CoVid-19, ograniczenie obowiązywania umowy

Streszczenie. W kontekście głębokich przemian gospodarczych wywołanych pandemią SARS-CoV-2 powróciły debaty na temat instytucji nieprzewidzianych okoliczności (nadzwyczajnej zmiany stosunków). Faktem jest, że środki nakazane przez władze w celu ograniczenia rozprzestrzeniania się pandemii wpływają na możliwość wypełnienia zobowiązań umownych, wobec czego umawiające się strony zmuszone są przeanalizować dostępne mechanizmy umowne służące naprawie sytuacji. Rumuński porządek prawny traktuje nieprzewidziane okoliczności jako wyjątek od zasady mocy

wiążącej umowy, co zostało wyraźnie określone w obowiązującym Kodeksie cywilnym. Ma on zastosowanie co do zasady do umów dwustronnie zobowiązujących, uciążliwych, przemiennych oraz z sukcesywnym wykonaniem. Na ten wyjątek można się powołać, jeżeli wykonanie umowy stało się dla jednej ze stron nadmiernie uciążliwe z powodu zaistnienia określonych zdarzeń niezależnych od woli stron, a które spowodowały niemożliwy do przewidzenia w chwili zawarcia umowy brak równowagi świadczeń. Powołanie się na zaistnienie nieprzewidzianych okoliczności umożliwia renegocjację umowy. Jeżeli strony nie osiągną porozumienia, na wniosek jednej z nich sąd może zmienić postanowienia umowy lub orzec o jej wygaśnięciu. Począwszy od tego, że istnieje wiele sytuacji, w których rozprzestrzenianie się CoVid-19 spowodowało brak równowagi kontraktowej, co wymaga wyrównania, a także biorąc pod uwagę, że faktycznie nadal istnieje niejasność pomiędzy sytuacją zajścia nieprzewidzianych okoliczności a wystąpieniem przyczyny wyłączającej odpowiedzialność, celem niniejszego artykułu jest analiza pojęcia nieprzewidzianych okoliczności i reżimu prawnego, który ma do nich zastosowanie, poprzez określenie warunków, które muszą zostać spełnione dla istnienia tego odstępstwa od zasady związania umową.

1. Introduction

The historical fundaments of the unforeseeability are found in the Roman law. Although it was not generally regulated at that time, it was still in the form of interpretative directives applicable in specific cases. Subsequently, it was developed by the representatives of canon law by generalizing the *rebus sic stantibus* clause, and in the old Romanian law one can observe the tendency of a partial consecration of the contractual contingency by Art 1254 of the Calimach Code.

Until 2011, the theory of unforeseeability did not enjoy in Romania a unitary consecration in jurisprudential and legislative plan, but there were only a series of special legal provisions that allowed its application. Such legislative application of the unforeseeability was also found in Art 43 Para 3 of the Law 8/1996 on the copyright and related rights: "in the case of an obvious disproportion between the remuneration of the author and the benefices of the person who received the assignment of the patrimonial rights, the author may request the jurisdictional organs with competence to revise the contract or to convenient increase in remuneration". Also, another application of the theory of unforeseeability is identified by Art 54 of the Government Emergency Ordinance No 54/2006 on the regime of public assets concession contracts, which stated that: "the contractual relations between the grantor and concessionaire based on the principle of financial balance of the concession, between the rights which are granted to the concessionaire and the obligations imposed to him". Exceptionally, the legislator enshrined the theory in the case of the volunteer contract. Thus, according to Art 14 of the Law no 195/2001, "if during the performance of the volunteer contract, regardless of the will of the parties, a situation occurs that would make it difficult to perform the obligations of the volunteer, the contract will be renegotiated, and if the situation makes it impossible to continue the contract, it will be fully terminated".

The Romanian Civil Code, entered into force on 1st October 2011, has answered the social-economic realities and aligned with the European legal systems, by expressly stating the unforeseeability as exception from the principle of the binding force of the legal act. Therefore, Art 1271 Para 1 of the Civil Code states that "*The parties are required to perform their obligations, even if their execution has become more onerous, either due to the increase in the costs of performance of their obligation or due to the decrease in the value of the consideration*". As an exception, according to Para 2 of the same Art 1271, if the performance of the contract has become excessively onerous due to an exceptional change of the circumstances which would make unfair the compelling for the debtor to perform the obligation, the court may order: a) the adjustment of he contract, in order to fairly distribute between the parties the losses and benefices resulting from the circumstances' shift; b) the termination of the contract, at the moment and under the conditions it establishes. These effects may occur only if the requirements listed by Art 1271 Para 3 are met, namely: a) the change of circumstances occurred after the conclusion of the contract; b) the change of circumstances, as well as its extent, were not and could not reasonably have been considered by the debtor at the time of the conclusion of the contract; c) the debtor did not assume the risk of changing circumstances and could not reasonably be considered to have assumed that risk; d) the debtor has tried, within a reasonable term and with good faith, the negotiation of the reasonable and fair adjustment of the contract.

2. The notion of unforeseeability

According to Art 1270 Para 1 of the Romanian Civil Code, "the valid contract concluded has the force of law between the contracting parties". Therefore, the principle resulting from this provision is represented by the binding force of the contractual parties.

The exceptions from this principle are those cases in which the effects of the contract occur in other manners than the one established by the parties in the content of its clauses. These involuntary changes of the effects of the civil legal act may aim both the limitation of the binding force, as well as its extension[1].

Among other things, the extension of the binding force of the contract takes place in case of revision of the effects of the legal act due to the rupture of the contractual balance as a result of the change of circumstances considered by the parties at its conclusion. This case registers in the so-called theory of unforeseea-

[1] E. Chelaru, R. Duminică, *Partea generală a dreptului civil*, University of Pitești Press, Pitești 2016, p. 92.

bility (*rebus sic standibus*) and is expressly stated as an exception from the principle *pacta sunt servanda* in Art 1271 of the Civil Code, as above mentioned. In trying to define the notion of unforeseeability, most doctrinaires appreciated that this concept is closely related to the economic and financial phenomenon[2]. In the legal literature previous to the current Civil Code, the unforeseeability has been defined as being the damage suffered by one of the parties as effect of the imbalance occurred between the contractual performances during the execution of the contract, as a consequence of a considerable and unforeseen incrementation of prices[3]. The cause for the imbalance is an event external from the person and will of the debtor which does not entail an impossibility to perform the obligation, but just makes it more onerous[4]. The unforeseeability does not represent a violation in itself of the principle of the binding force of the contract accepted by the legislator, representing just a limitation for it.

Pointedly, the mentioned definition was maintained even after the entrance into force of the Civil Code, being amended and detailed. Thus, for the recent legal literature, the unforeseeability is being defined as an exception from the principle of the binding force of the legal act if the contractual balance is affected by the changes of circumstances considered by the parties at the conclusion of the legal act, because the effects of the legal act are other than those which the parties, at the time of concluding the act, understood to establish and which are binding on them[5].

If the parties have stipulated in the contract a clause that provides for the review of the effects of the contract in case of change of circumstances taken into account at the time of its conclusion, we will no longer be in the presence of an exception to the principle of binding force, but finds its application the principle of contractual freedom.

3. The delimitation of the unforeseeability from the other legal institution

In the context of the SARS-CoV-2 pandemic, the debates regarding the delimitation of the unforeseeability from other legal institutions to which it is similar, have returned to present days. Therefore, the unforeseeability needs to be delimited mainly from the *major force, from the resolutive condition, from loss caused by unconscionability and error*.

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[2] B. Starck, *Droit civil. Obligations. Contrats*, 2nd Volume, Litec Publ.-house, Paris 1993, p. 476.

[3] *Ibidem.*

[4] G. Anton, *Teoria impreviziunii în dreptul românesc şi dreptul comparat*, “Law Magazine” 2000, No 7, p. 25.

[5] G. Boroi, C.A. Anghelescu, *Curs de drept civil. Partea generală*, 2nd Edition, Hamangiu Publ.-house, Bucharest 2012, p. 212.

3.1. Major force and unforeseeability

The Romanian legislator has stated by Art 1351 Para 1 of the Civil Code that the major force is a cause removing the contractual civil liability. According to Art 1351 Para 2 of the Civil Code, "the major force is represented by any external, unpredictable, absolutely invincible and inevitable event". From the legal definition it results that in order to invoke the major force it is necessary that the event which occurred cumulatively fulfill the following requirements: to be external, unpredictable, absolutely invincible and inevitable[6].

By comparison, while force majeure absolutely prevents the debtor from performing his contractual obligations, they either cease or are suspended, the unforeseeability does not make it impossible to perform the benefits, but only makes them much more onerous, affecting the balance that must characterize any contract. Under the aspect of the legal nature, the major force is a cause for exoneration from liability, while the unforeseeability is an exception to the theory of binding force of the contract and raises the issue of its adaptation.

In the current context, there may be many cases in which the spread of CoVid-19 will fall within the definition of major force by the fact that the execution of the contract has become impossible, but not in all cases. Specifically, if the major force is not applicable regarding a certain contract concluded between the parties, it is useful to analyze the possibility of invoking the unforeseeability, enabling the parties to renegotiate the terms of the contract in such a way that the losses and benefits caused by the change of circumstances are distributed equitably between the parties. If the parties fail to reach an agreement, the court may adjust or rule the termination of the contract[7].

Of course, the solution is not a general one, the possibility of invoking the unforeseeability and renegotiating the contract shall be analyzed for each contract separately, in particular as to whether or not there is a clause accepting the risk of unforeseeability. In practice, it has been ascertained that from many contracts it is removed the possibility of invoking a possible cause for unforeseeability[8].

3.2. The resolutive condition and the unforeseeability

[6] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile conform noului Cod civil*, Universul Juridic Publ.-house, Bucharest 2012, p. 441.

[7] C. Șeulean, D. Popa, *Impreviziunea. Considerații teoretice. Aspecte practice*, available online at https://www.universuljuridic.ro/impreviziunea-consideratii-teoretice-aspecte-practice/ [access: 19.06.2020].

[8] In the same meaning, see also C. Bojică, R. Dunca, *Coronavirus și contractele comerciale*, available online at https://www.universuljuridic.ro/coronavirus-si-contractele-comerciale/ [access: 19.06.2020].

The resolutive condition is the one on whose achievement depends the dissolution of the civil legal act. Art 1401 of the Civil Codes states that "the condition is resolutive when its fulfilling determines the cessation of the obligation. Until the contrary, the condition is presumed to be resolutive every time the deadline of the main obligations precedes the moment in which the condition could have been fulfilled"[9].

The analysis of the legal provisions allows us to state that the similarity with the contractual unforeseeability is represented by the cessation of the contract, the differences being far more important. Specifically, the condition is stated by the legal act, being a future and uncertain event, bur predicted by both parties.

Thus, the parties have agreed from the very start upon the possibility to terminate the contract if the event mentioned by it shall occur. However, in the event of unforeseen circumstances, the parties could not reasonably have foreseen the occurrence of the unforeseeable situation or its effects on the contract. If they had stipulated the termination or adaptation of the contract following the occurrence of the event, the theory of unforeseeability would not be applicable, but the principle of contractual freedom. Last but not least, regarding the effects that occur on the contract, we mention that the fulfillment of the condition generates the annulment of the respective civil legal act, while the unforeseeability can determine its renegotiation by the parties or the adaptation of the contract by the court, not only its termination[10].

3.3. Loss caused by unconscionability and unforeseeability

The loss caused by unconscionability is a vice of consent referring to the material loss suffered by one of the contracting parties, because of the obvious disproportion of value between the prestation to which the party compelled himself and the prestation to be received in its return. The disproportion between the two prestations must exist at the conclusion of the contract. If the disproportion is determined by causes occurring subsequent to the conclusion of the contract, we are no longer in the presence of the loss caused by unconscionability, but we can talk about unforeseeability.

From the structure of the loss caused by unconscionability, the objective element of the imbalance between the prestation is the common element with the contractual unforeseeability. This similarity has determined certain authors to consider the unforeseeability as "a loss caused by unconscionability subsequent to the

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[9] A.G. Uluitu in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil – Comentariu pe articole*, C. H. Beck Publ.-house, Bucharest 2012, p. 1486.

[10] C.E. Zamşa, *Teoria impreviziunii. Studiu de doctrină şi jurisprudenţă*, Hamangiu Publ.-house, Bucharest 2006, pp. 23-24.

conclusion of the contract"[11] generated by unpredictable circumstances such as war or economic crisis, with their corollary, the inflation.

Regarding the essential difference between the loss caused by unconscionability and unforeseeability, though in both cases we are talking about an insufficient price, the loss is a vice of consent characterized by the fact that even from the cessation of the contract the price does not correspond with the asset's value, while the unforeseeability is the product of an imbalance occurring subsequent to the conclusion of the contract causing the revision of a validly concluded contract.

3.4. The error and unforeseeability

The error represents a vice of consent referring to the false representation of reality at the moment in which a civil legal act is concluded, unlike the unforeseeability which is a cause for revision of a legally concluded contract. The doctrine[12] has stated that the main similarities existing between the two institutions consist in the fact that both of them refer to a misrepresentation of reality and the fact that both can lead to the adjustment of the contract.

But, if for the error we are in the presence of a misrepresentation of reality when the contract is concluded, in the case of unforeseeability, there is a change in the reality data during its performance. Finally, regarding the generated effects, the adjustment of the contract works differently for both institutions. Thus, if the role of the court is a decisive one in the adjustment of the contract for unforeseeability, in case of error, the role of the court is passive. While the error offers the possibility to cancel the contract with retroactive effects and restoring the parties to the previous situation, for the unforeseeability, the termination of the contract generates future effects and does not assume the restoration of the previous situation for the parties.

4. The area of application

Determining the scope of the unforeseeability involves establishing those categories of contracts that are likely to be affected by the change in circumstances considered by the parties at the time of their conclusion. The analysis of the legal provisions in this area allows us to consider that outside the area of unforeseeabil-

[11] E. de Gaudin de Lagrange, *L'intervention du juge dans le contrat, thèse*, Paris 1935, p. 78; E. Chelaru, *Forţa obligatorie a contractului, teoria impreviziunii şi competenţa în materie a instanţelor judecătoreşti*, "Law Magazine" 2003, No 9, p. 49; E. Chelaru, *Teoria generală a dreptului civil*, C.H. Beck Publ.-house, Bucharest 2014, p. 160.

[12] J. Ghestin, *Traite de droit civil. La formation du contrat*, LGDJ, Paris 1993, p. 455.

ity, as a rule, are the synallagmatic, onerous, commutative, with successive or continuous execution contracts.

Traditionally, depending on the duration of execution, a distinction is made between contracts with instant execution and those with successive execution. Unlike contracts with immediate execution, whose performance occurs in a single moment, contracts with successive execution are executed gradually, over time[13].

Characterized by the simultaneity between conclusion and execution, contracts with sudden execution cannot be included in the field of unforeseeability, unless the execution becomes staggered by the will of the parties. Consequently, contracts with successive execution or those affected by a suspensive term (legal, conventional, judicial) fall into the field of unforeseeability.

With regard to contracts for consideration and those with gratuitous effects, the rule is the applicability of the theory of unforeseeability, especially with regard to onerous contracts.

Starting from the way in which the legislator understood to state the revision of the conditions and obligations in the area of liberalities (Art 1006-1008 of the Civil Code), the legal literature[14] has stated the fact that the unforeseeability is possible including for gratuitous contracts. At the same time, it was shown that the unforeseeability could be admitted in the case of random contracts if the change of circumstances is foreign to the random element specific to the contract or exceeds its limit, except for essentially speculative contracts, where contingency is included in the element of chance[15].

As conclusion, we consider that the unforeseeability can be encountered only in the case of legal acts, not in the case of legal facts, in the narrow sense, whose effects are par excellence in the field of unpredictability. We will not be in the presence of unforeseeability either when the parties have inserted in their contract indexation clauses, which will make the price vary according to the evolution of an index chosen by them or have agreed to revise the contract by mutual agreement or by resorting to a judge.

5. Conditions of contractual unforeseeability

Art 1271 Para 3 of the Romanian Civil Code identifies two categories of conditions which need to be cumulatively met in order to have the review of unforesea-

[13] C. Stătescu, C. Bîrsan, *Teoria generală a obligațiilor*, All Beck Publ.-house, Bucharest 2002, p. 40.

[14] V. Sandar, *Configurația impreviziunii în noul Cod civil. Considerații cu privire la clauzele de hardship*, "Romanian Business Law Magazine" 2013, No 10, pp. 61-77.

[15] M.M. Pivniceru, *Efectele juridice ale contractelor aleatorii*, Hamangiu Publ.-house, Bucharest 2009, p. 78.

bility: the substantive (Art 1271 Para 3, Let a-c) and procedural (Art 1271 Para 3, Let d) conditions.

A first condition which is required for the application of unforeseeability is that the change of the circumstances would have occurred after the termination of the contract.

The moment of occurrence of the situation or unpredictable effect must be in time after the conclusion of the contract and before the execution of the obligation, not being able to request the application of unforeseen circumstances for an obligation that has already been executed fulfilling the obligation. Also, if the unpredictable event had already occurred at the time of concluding the contract, we are no longer in the presence of unforeseeability, but in the presence of an initial impossibility to perform the contract, stated by Art 1227 of the Civil Code[16].

The second substantive condition resulting from Art 1271 Para 3 of the Civil Code is that "the change of circumstances and their extent were not and could have not been taken into consideration reasonably by the debtor at the conclusion of the contract".

To mention the concept of unforeseeability means to determine its scope, the criterion according to which this feature is measured, as well as to establish other attributes that could characterize a situation of unpredictability[17].

According to a narrow vision, the constitutive situations of unforeseeability are reduced to the economic-financial events. Forecasting is a theory that deals only with contracts involving obligations expressed by a monetary unit. The unforeseeability is related to the currency[18]. According to a broader vision[19], beside the economic-financial circumstances, in the area of the elements constituting unforeseeability are included those situations which generate a disruptive effect on the contract, determining the interest of the disadvantaged party to request the adaptation of the contract.

We do not adhere to any of these conceptions, but to the one according to which the scope of unforeseeability is delimited mainly through the effect on the contract, an effect that must be par excellence economic-financial and with direct, immediate impact on the serious disruption of contract economics. In other words, it is not interesting the nature of the situation, but the nature of its effect

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[16] Art. 1227 of the Civil Code states that: "The contract shall be valid only if, at the moment of its conclusion, one of the parties is in impossibility to perform the obligation, outside the case in which the law states differently".

[17] C.E. Zamşa, *op. cit.*, p. 91.

[18] J. Ghestin,C. Jamin, M. Billjau, *Traité de droit civil : Les effets du contrat*, LGDJ, Paris 2001, p. 356.

[19] D.M. Philippe, *Changement des circonstances et bouleversement dès l'économie contractuelle*, Bruxelles 1986, p. 625.

upon the contract, so that the economic-financial attribute shall belong to the latter one, and not to the situation as such[20].

Therefore, the main element of unforeseeability aims the unpredictability of the emerged circumstance, which is a "reasonable" one, the majoritian opinion[21] being that it has no absolute feature, but a relative one.

The last substantive condition which shall be fulfilled in order to be in the presence of unforeseeability is that "the risk generated by a situation of unforeseeability shall not fit among the assumed contractual risks". Thus, the existence of an express contractual clause by which the parties have assumed any risk generated by the modification of the contractual circumstances shall express the principle of contractual freedom with the elimination of any possibility of a subsequent adjustment of the contract by the exclusive will of the debtor.

Regarding the *procedural condition* it results from Art 1271 Para 3 Let d) from the Civil Code. According to the mentioned provisions, before addressing the competent court, the debtor of the contractual obligation that has become excessively onerous is obliged to try, within a reasonable time and in good faith, to negotiate reasonable and equitable adjustment of the contract. Failure to comply with this procedural requirement may result in the application being dismissed as inadmissible[22].

6. The effects of unforeseeability

In their turn, the effects produced by the intervention of unforeseeability are expressly stated by Art 1271 of the Romanian Civil Code. If the conditions of contractual unforeseeability are cumulatively met, we could be in the presence of one of the two situations: either the hypothesis of the debtor, who will not be imputed to fulfill the obligation that has become excessively onerous, or the hypothesis of the creditor, who will not be obliged to accept the consideration, drastically diminished by the occurrence of the unforeseen situation[23]. For solving any of these two hypotheses, Art 1271 of the Civil Code provides two effects of unforeseeability: adaptation or termination of the contract.

Thus, in the production of the effects of the unforeseeability on the contract, two moments must be highlighted: a) the negotiation initiated by the debtor in order to adapt the contract and b) the judicial stage, of intervention of the court. The court shall intervene at the request of any of the parties dissatisfied with the

[20] C.E. Zamşa, *op. cit.*, p. 98.

[21] L. Pop, I.-F. Popa, S.I. Vidu, *op. cit.*, p. 159.

[22] For the same opinion, see also Sevastian Cercel, Cornelia Munteanu (coord.), *Fișe de drept civil. Partea generală*, Universul Juridic Publ.-house, Bucharest 2018, p. 295.

[23] Cristina Zamșa in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod Civil – Comentariu pe articole*, C. H. Beck Publ.-house, Bucharest 2012, p. 1336.

failure of the negotiation phase and will rule either to terminate or to adjust the contract. Along with other authors[24], we consider that the role of the court is subsidiary to the idea of cooperation of the parties and becomes effective only in case of failure of negotiations.

Conclusions

Consequently, as demonstrated, the unforeseeability is not to be confused with the situation in which the major force arises as an exonerating cause of contractual liability, nor with the injury or error which are defects of consent.

The unforeseeability does not refer to an impossibility of performance, but to the case in which the performance of the contractual obligations is possible, but has become excessively onerous for one of the parties for cases which were not or could have not been taken into consideration, reasonably, at the conclusion of the contract. This institution is stated by the Romanian legislator as a mechanism to rebalance the contractual relations. In this meaning, the contracting parties shall apply the principle of good faith and equity in performing the contract.

From our point of view, having regard to the economic effects of the measures taken by the authorities to reduce the spread of the SARS-CoV-2 virus, if they have significantly affected the balance between the services of the parties to a contract, the affected party may invoke unforeseen circumstances. The situation experienced by our country, but also by a large part of the states of the world, is an exceptional change of circumstances that was not and could not be reasonably considered by the parties at the time of concluding the contract. If the rest of the conditions provided by Art 1227 of the Romanian Civil Code are satisfied, the affected party and who failed to obtain through negotiation, in good faith, the reasonable and equitable adjustment of the contract, may apply to the court to obtain either the revision of the contract or its termination, at the time and under the conditions established by the court.

Finally, however, we point out that the solutions proposed above are not of a general nature, but cases of diminished liability in the context of Covid-19 need to be analyzed on a case-by-case basis, by reference to the clauses stipulated in each contract and to the particularities of that case. Before deciding, we recommend a thorough analysis of all contractual clauses, and especially those referring to the liability of the contractual parties in case of failure of performance, of the clauses regarding the intervention of the major force and of the clauses assuming the risk of unforeseeability.

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[24] *Ibidem*, p. 1337.

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