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**DOCTORAL DISSERTATION  
(ABSTRACT)**

**MECHANISMS AND METHODS FOR  
ADAPTING THE CONTRACT**

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## INTRODUCTION

The social and legal reality that inspired the topic of this doctoral dissertation was the introduction, as a novelty in the new Civil Code, of the provisions of Article 1.213 regarding the adaptation of the contract in the event of error–defect of consent, as well as the provisions of Article 1271 concerning unpredictability, regulated for the first time in national legislation.

It is noteworthy that the Romanian legislator expressly uses the term "*contract adaptation*" both in relation to the provisions of Article 1213 concerning the adaptation of the contract in the event of a defect of consent due to error, and in relation to the regulation of unpredictability in Article 1270(2)(a) of the Civil Code.

This new institution of contract adaptation for defects of consent is provided for by the Romanian legislator as a preferable alternative to contract nullity in certain circumstances, being a particular application of the concept of *favor contractus*. As it has only recently been introduced into the Romanian legal system, the institution of contract adaptation for defects of consent has not been dealt with or analysed in depth in Romanian legal doctrine. At the same time, there is a lack of judicial practice related to this subject, as the courts have not been seized with requests for the adaptation of contracts in cases of error, in accordance with the provisions of Article 1213 of the Civil Code.

Based on this situation, we set out to research the subject through a theoretical approach to the specific legal mechanism through which this institution operates, so that, after correctly identifying the legal regime, also in relation to the purpose of the regulation provided by the legislator, we can observe the effective manner in which this institution can be implemented in contractual practice. The need to correctly identify the legal nature of this institution also lies in determining its scope of application, in the sense of establishing whether this mechanism can also be applied in the case of other defects of consent, to save the act from the sanction of nullity.

From this point of view, this study aims to answer the question of whether the institution of contract adaptation for defects of consent will have direct practical application based on the will of the parties involved in the contract, i.e., whether it provides for a conventional adaptation mechanism that can be implemented without the involvement of the court or, on the contrary, whether the intervention of the court is necessary to adapt the contract in accordance with the legal provisions.

Of course, the issue of contract adaptation is not limited to the case provided for in

Article 1213 of the Civil Code, so the research will also cover, to a large extent, the case of contractual unpredictability, a legal institution under which the court is empowered by law to order the adaptation of the contract by distributing fairly the losses and benefits resulting from the change in circumstances that caused the contractual imbalance.

Unpredictability, being a legal institution that can only be applied following the occurrence of exceptional socio-economic circumstances, has not yet benefited from the necessary context to become applicable in contractual relationships in private and public law, except for situations beginning in 2020, the year of the Covid-19 pandemic, followed by the energy and security crises triggered by the military conflict on Romania's borders, circumstances that culminated in a significant increase in inflation and an explosion in construction prices around 2022, a context that continued until the end of 2023.

These circumstances were, in fact, good enough opportunities to test the mechanism of unpredictability in contracts, as this institution is regulated by the provisions of common law – Article 1271 of the Civil Code. However, due to the numerous special legislative interventions made by the legislator during this period, regarding the adaptation of various categories of contracts that were in progress at the time of the exceptional situations, the opportunity to conduct a real test of common law unpredictability through the courts was missed.

We believe that this is the reason why the case law of the courts on the application of common law unpredictability is virtually non-existent, since, when the social context allowed for the application of unpredictability in contracts, the legislator intervened with special derogatory rules, and other legal mechanisms were provided for the adaptation of contracts, most often legal mechanisms, so that the possibility for the court to intervene in the contract was excluded, thus considerably restricting the scope of application of unpredictability.

From this perspective, the research in this paper will consider both the manner in which contracts were adapted based on common law unpredictability, with reference to theoretical considerations, but also to current judicial practice, and, above all, the manner in which the legislator transposed unpredictability into the special rules it adopted during periods of crisis affecting contracts affected by exceptional changes that occurred during those periods, derogating from common law.

This is why the research topic is relevant, because the adaptation of the contract for unpredictability, as regulated in common law, has not yet found a place in court practice, even though there have been certain crises, so the way remains open for future scientific debates and practical applications of unpredictability, once other exceptional situations arise, which may be marked by extensive economic, legislative, or other changes that justify the application of

unpredictability in contracts.

At the same time, identifying the theoretical basis for contract adaptation will remain relevant, as unpredictability is justified rather by reference to a series of concepts such as good faith, fairness, contractual balance, proportionality, interest, and the useful nature of the contract. All these concepts define the theory of contractual solidarity, a demonstrative principle of law, a creation of legal doctrine, and not a principle that benefits from express normative regulation.

In view of these aspects, we can say that the usefulness, importance, and relevance of the subject studied are given by the identification of those legal arguments for which contractual solidarity should be recognized and accepted at the jurisprudential level, so that the courts can rule, with greater openness, on solutions for adapting the contract based on the unpredictability of common law.

## **SCIENTIFIC RESEARCH METHODS**

This paper will be developed using a combination of different scientific research methods. On the one hand, we will use the *logical-deductive* research method, given that the starting point of the study is structured according to the normative provisions and existing general data, ultimately arriving at specific data, which will be explained theoretically through an elaborate development of the theses and ideas extracted, as well as practically, in an applied manner, by presenting specific and concrete cases. On the other hand, we will also use the *hermeneutic* research method, based on the application of the theory of interpretation of legal norms, as the subject studied will include numerous personal analyses, observations, critical statements, as well as the presentation of argued points of view on the subject studied.

This paper will highlight both the ability to study doctrinal legal aspects through a purely theoretical and in-depth approach to the topic analysed, with reference to the relevant legal doctrine, and the ability to research how the topic analysed has been put into practice. In addition to studying the current judicial practice cases on the various national case law portals, this paper will also be based on the author's personal research into existing practical cases at the level of public administrative authorities, with particular reference to the practical and concrete mechanisms and methods of implementation, at the administrative level, of the legal provisions that allow the adaptation of public procurement contracts.

These aspects demonstrate the complex research carried out on the topic of the doctoral dissertation, so that the proposals made in the paper correspond to the current needs of theorists

and, equally, of legal practitioners, these being extracted from the theoretical problems but also from the judicial and administrative practice generated by the institution of contract adaptation.

## **STRUCTURE AND SUMMARY OF THE PAPER**

In **CHAPTER I**, entitled "*General aspects of contract adaptation*," the first part presents general aspects related to the contract and its theoretical foundation, with an exposition of the classical theory of autonomy of will, contractual freedom, and the causes that led to the decline of autonomy of will, while the second part begins the analysis of aspects related to the concept of contract adaptation.

In addition to the agreement of wills, the contract also sums up the combined interests of the parties. Each party seeks to satisfy a particular interest by entering into the contract, this economic component of the contract having its roots in the cause of the contract and its object, i.e., in the content of the contractual rights and obligations. Will is only the means used by the party to achieve the desired result, that of achieving its interest.

When the will is absent or limited or altered—in the case of contracts that are not negotiated, i.e., forced, adhesion contracts, etc.—the interest of the parties is the essential element that justifies the usefulness of the contract, which is why the contract also has a utilitarian function and must be viewed from the perspective of its effectiveness, which means the achievement of the parties' interests.

Through the agreement expressed at the conclusion of the contract, the parties seek to achieve their own interests, but at the same time, they also assume the achievement of the interests of their contractual partner. The contract must function in a balance of the parties' performances in order to ensure its useful effects for each of them. The balance of the parties' performances should reflect the reconciliation of their interests, being an expression of good faith, fairness, and contractual solidarity.

The contractual relationship between the parties may suffer from contractual imbalance, generated by the disproportionate value of mutual performances, which may arise during the execution of the contract, especially in the case of long-term contracts with successive execution, as these are most exposed to the risks associated with monetary devaluation or excessive inflation.

Reconciling the interests of the parties in the event of a breach of contractual balance and the risk of a deadlock in the contractual relationship is the way forward, allowing them to restore the contract to its original state and thus save the contractual relationship in order to

achieve the purpose of the contract.

The reconciliation of the interests of the parties affected by the contractual imbalance that arose during its execution is achieved by *adapting the contract*, i.e., by revising it to restore the balance between the parties' performances that was affected by circumstances beyond the parties' control.

The concept of adaptation can have several meanings, according to the definition in the Romanian explanatory dictionary, in the sense that by this we mean *adjustment, matching, modification, revision, transformation, accommodation, the action of adapting, and its result*.

The mechanism for adapting the contract refers to the specific procedure by which the parties can adapt the contract, as well as the specific conditions that must be met, depending on the specific nature of each type of contractual adaptation, and the method of adaptation refers to the specific way in which the contract will be adapted (*for example*, by adjusting the price; by postponing the performance of certain obligations; by exempting from the performance of certain obligations).

The contract may be adapted by *mutual agreement*, by virtue of contractual freedom, through the mutual will of the parties, or by *judicial* means, in the absence of agreement between the parties, in which case the court will intervene in the contract between the parties for its revision.

As we will see in this paper, there are numerous situations in which the legislator has adopted various regulatory documents on the basis of which certain types of contracts have been adapted, thus identifying a third way of adapting the contract, namely by *legal* means.

*Conventional adaptation* is an expression of contractual freedom, as the parties are *free to adapt the contract* in accordance with their own convictions and in whatever way they wish, but with a view to achieving their individual interests and the purpose of the contract.

The freedom to adapt the contract gives the parties the opportunity to reassess the contractual claims and obligations, which have suffered a significant imbalance due to various external and objective causes and circumstances, and to reconfigure the contract, even if it differs from the initial one under which the contract was created.

The parties are not required to restore the contract to its state before the breach of its balance (perhaps this is no longer feasible in contracts with successive performance that have been carried out over several years, because the socio-economic context at the time of the conclusion of the contract is no longer the same at the time of its adaptation), but they have the possibility of giving new contractual content to the contract, adjusted in accordance with the new objective realities, which corresponds to the new conditions under which it can be performed

with advantageous effects for both parties, to be able to achieve the purpose pursued by them and satisfy its utilitarian character.

However, nothing prevents the contracting parties from restoring the original configuration of the contract following its adaptation if this is possible, because only in this way can the contract remain of interest to the parties.

All these possibilities for the contracting parties to determine the specific manner of adapting the contract and to resort to any legal solution that would allow the contract to be saved by revising it, in the manner agreed upon by them, is an expression of *the freedom to adapt the contract* that the parties have by virtue of the law and which gives them the prerogative to decide on all aspects of the legal process of adapting the contract.

Essentially, the freedom to adapt the contract implies both the freedom of the parties to decide whether they wish to make use of the institution of contract adaptation in the event of contractual imbalance or inequality in the mutual performances of the parties, and their freedom to choose the specific manner in which the contract will be adapted, i.e. the concessions they will make to rebalance the contract.

*Judicial adaptation* is the method of contract adaptation carried out by the court, which is vested with the power to restore the contractual balance, at the request of the party harmed by the breach of the equivalence of performance due to a change in circumstances.

A typical example of judicial adaptation of a contract is unpredictability, which gives the party whose obligations have become excessively onerous the right to request the court to adapt the contract in order to restore the balance lost during its performance.

In the case of judicial adaptation of the contract, the court does not have the prerogative to create new obligations for the contracting parties, i.e., it cannot intervene in changing the structure of obligations that the parties to the contract have agreed upon, in accordance with their legal will. The court's intervention is limited to what is provided for by the objective rule that allows it to intervene in the unbalanced contractual relationship between the parties.

Thus, for the situation provided for in Article 1270 of the Civil Code in the event of unpredictable circumstances, the contract will be adapted by distributing the losses and benefits resulting from the change in circumstances equally between the parties, the court having no other possibility of restoring the balance than by this method of redistributing the burdens and gains resulting from the contract.

Unlike judicial adaptation, there are more concrete mechanisms through which conventional adaptation of the contract can be achieved, with the parties having the possibility to decide how they wish to adapt the contract to the new economic and social realities that have

caused the imbalance in the contract.

At the same time, by virtue of their status as authors of the contract, the parties are the ones who can most consistently restore the contractual balance that the contract had at the time of its conclusion, as they are the ones who know best how the performance of the contract has been influenced by the external change in circumstances and what would be the most appropriate way to revise the contract to preserve its usefulness and ensure its continuity.

*The legal adaptation* of the contract requires that the parties use the contract adaptation mechanism expressly provided for by law, and the contract will be adapted in a manner also provided for by law, and not chosen by the parties or determined by the court, so that they cannot deviate from the legal provisions stipulated in this regard.

It is very important to note that the legal adaptation of the contract can be implemented either directly under the law, i.e., by operation of law, without the parties being able to object, or it is left to the discretion of one of the contracting parties, as a discretionary right which, if exercised within the limits and conditions stipulated by law, will lead to the adaptation of the contract or to the creation of an obligation for the other party to proceed with the adaptation of the contract in the manner expressly provided for by law.

By *contractual balance*, we essentially mean that state of the content of the legal obligation in which the tasks, risks, and profits generated by the contract are fairly distributed and maintained between the parties, thus ensuring *the proportionality of mutual performances*.

For a long time, judicial intervention in the content of a contract was viewed with reluctance, under the aegis of the theory of the autonomy of the parties' will, according to which the contract is binding between its parties, and the same binding force is imposed on the court, the parties being required to perform the contract even if their obligations become more onerous or even excessively onerous, with no third party interference in the relations between the contracting parties being permitted.

With the legal recognition of the court's ability to intervene in the contract between the parties to adapt it to unpredictable circumstances, when the judge sanctions the disproportionate excess value of the parties' performances that arose during the performance of the contract, it is necessary to identify *objective criteria* to which the judge must refer in his or her intellectual assessment of the specific manner of restoring the contractual balance by redistributing the benefits and losses resulting from the contract.

In order to adapt the contract and restore its balance, the legislator has provided that the distribution of losses and benefits resulting from the change in circumstances that led to the breach of the contractual balance shall be done *fairly*, i.e., through the rational application of

*the principle of equity*. However, given that the notion of fairness is a concept with a very broad scope of understanding that can give rise to subjective interpretations by the judge, we consider that other objective criteria to which the court must refer are also necessary in order not to jeopardize the legal certainty of the contract.

*Proportionality* is an assessment tool available to the judge, as a unit of measurement by which the court restores the necessary balance. Viewed individually, this assessment tool may be misused in the parties' contract through the intervention of the court which, in its desire to save the contractual relationship, may make a subjective assessment of how the contractual balance will be restored through the specific method of distributing losses and benefits, which gives rise to a risk of contractual and legal uncertainty related to the power of the judge to assess the maintenance of the contract by adapting it.

**CHAPTER II** deals with the adaptation of the contract in the case of defects of consent, in which aspects relating to consent and its conditions of validity are first analysed, and then the institution of contract adaptation for defects of consent is dealt with in detail.

Article 1213 of the Civil Code is inspired by the provisions of Article 1432 of the Italian Civil Code, as well as the regulations provided by the UNIDROIT Principles (2010) in Article 3.2.10. and the provisions of Article 4:105 of the PECL.

The possibility of adapting the contract established by the legislator comes to resolve the shortcomings that the classic sanction for error–defect of consent–imposed on the parties who concluded such an act, namely its annulment. This mechanism makes it possible to maintain the contractual relationship, being an alternative to the penalty of nullity, available to the contracting party who was not in error to adapt the contract, with the well-determined purpose of saving the contractual legal relationship.

The adaptation of the contract is a legal remedy intended to save the contract affected by a cause of nullity, thus protecting both the security of the operations carried out and the consent expressed by the party in error. By establishing this legislative option available to the contracting party who was in error, the legislator has given effect to a demonstrative principle of *favor contractus*, to avoid the specific effects of the penalty of nullity, and to safeguard the contractual relationship.

In this case, the adaptation of the contract involves a modification of it, exclusively in the aspect in which the error occurred, which will operate only based on the freely expressed agreement of the *errans* (*party in error*). The adaptation of the contract will be made only in the manner in which the contract was initially understood by the *errans*, i.e., in accordance

with the latter's real will, and not in accordance with the intrinsic content of the contract.

The solution offered by the Romanian legislator has multiple foundations, as shown, mainly in the need to save the contract affected by error from the penalty of nullity, the protection of the freely expressed consent of the parties, the security and stability of civil transactions, as well as good faith, seen as a corollary of all the principles governing the contract from its inception to its termination.

**The legal mechanism** for adapting the contract provided for by the legislator reveals the particular importance of the conduct of the parties in achieving its purpose.

*A priori*, we note that this method of contractual adaptation is eminently *conventional*, left to the discretion and exclusive power of the contracting parties. Thus, the contract will be adapted as a result of the declaration of performance or even the performance of the contract made by the contracting party of the party in error, in accordance with the latter's perception of the contract. The conclusion drawn from this is that the intervention of the court is excluded, as the judge is not allowed to intervene in the manner in which the contract concluded under the auspices of the error can be adapted, this being the exclusive prerogative of the contracting party who can invoke the annulment of the flawed act due to error, nor can he suppress the effect produced by the adaptation of the contract made by the interested party.

*The conventional adaptation* of the contract results from the fact that, on the one hand, it is done directly by the parties applying the legal mechanisms available to them, and, on the other hand, from the fact that it will be done in accordance with their will, i.e., the contract is considered to have been concluded as it was initially understood by one of the parties, but with the express agreement of the other party.

The adaptation of the contract due to error is also distinct from the adaptation of the contract on the grounds of unpredictability. Firstly, the difference concerns the temporal element of the determining causes of the two types of adaptation. The error will be assessed in relation to a moment before or concurrent with the conclusion of the act, while the adaptation of the contract for unpredictability becomes applicable only for causes after the conclusion of the act.

Similar to a lesion, the adaptation of the contract for unpredictability also implies an imbalance in the value of the contractual performances, except that this imbalance occurs during the performance of the contract, and the adaptation is to be achieved by equitably restoring the contractual balance.

The categorical difference is that while the adaptation of the contract for error is carried out exclusively by agreement, by the party that is not the victim of the essential error, the

adaptation of the contract for unpredictable circumstances is essentially judicial, only the court, at the request of the party whose obligations have become excessively onerous, is able to ascertain the occurrence of unpredictable circumstances and to order, in an equitable manner, the distribution of losses and benefits.

From the very fact that this is left to the exclusive discretion of the party who was not in error, we can appreciate in favour of the existence of a *discretionary right* of the *errans*, who has the power to express a new agreement whereby the contract will be adapted in the manner perceived as erroneous, but excusable, by the *errans* at the time of concluding the contract.

The agreement expressed by the contracting party will be objectified by a *declaration of conformity* stating that they wish to perform the contract as it was envisaged by the party in error, or even by the *actual performance* of the contract, exactly as it was represented by the *errans*. In practice, by expressing their agreement, the contracting party accepts the error made by the other party and, by their own power and will, weighing up what is most likely, the advantage of maintaining the contract as opposed to the alternative of cancelling it, restores the contract by redrafting it in the manner intended by the *errans*.

Thus, we consider that the institution of contract adaptation regulated by the provisions of Article 1213 of the Civil Code has its own legal nature, *sui generis*, precisely by reference to the existence of those particular elements that define it and by which it distances itself from the legal institutions with which it has similarities.

The adaptation of the contract due to error constitutes a genuine measure of reparation in kind for the damage that the party who has fallen into error may suffer if the content of the contract concluded remains as set out in the written document. The *errans* is protected from the possible adverse effects of the error in which he found himself and its consequences if his contracting party makes use of this possibility and offers to adapt the contract.

Since the adaptation of the contract due to error is an alternative to the penalty of nullity, the contract in question must be affected by the cause that leads to relative nullity, namely the defect of consent due to error. In practice, the premise of contract adaptation presupposes the existence of the reason that determines the nullity of the act, namely, that one of the parties had a false representation of reality at the time of concluding the act.

The existence of the voidable act, but not yet annulled, is insufficient to enable the contracting party to adapt the voidable act. In principle, a contract is presumed to be validly concluded until its termination (the finality of the court decision to terminate it). In the matter we are investigating, the presumption of validity of the act is not changed in any way, but what is specific is that the right to obtain the adaptation of the contract arises validly only after the

victim of the error understands that they can invoke the nullity of the act.

Until the moment when the *errans* invokes the nullity of the act derived from the error in which it found itself, the right to adapt the contract does not arise in favour of the contracting party. Even after the invocation of the ground for nullity by the *errans*, the contract continues to be presumed valid, but with the proviso that from that moment on, the contracting party has the opportunity to remove the suspicion hanging over the contract regarding its validity by offering to adapt the contract in the manner misunderstood by the victim of the error.

Invoking the nullity of the contract requires, in accordance with the provisions of Article 1213(2), first sentence, informing the other party of how the party whose consent was vitiated by error perceived reality and the element on which the error was based.

The information provided by the *errans* may be given either by written notification to the other party or directly through a lawsuit seeking the annulment of the contract on the grounds of error. It is very important and useful for the information provided by the victim of the error to be as comprehensive as possible and to identify as accurately as possible how they understood the contract at the time of its conclusion and what element the error concerned, so that the other party has sufficient information to make an informed decision on the possibility of adapting the contract and offering the appropriate consideration, in accordance with how it was erroneously envisaged at the time of concluding the contract by the *errans*.

After the contracting party has been informed by the *errans* of how they understood the contract, the contracting party has the *discretionary right* to adapt the contract. This right shall be exercised in accordance with the provisions of Article 1213(2) of the Civil Code, second sentence, namely that within three months of receiving the notification from the *errans* or from the date of communication of the summons to appear in court for the annulment of the contract on the grounds of error, but before obtaining the annulment, the contracting party shall issue a statement expressing its agreement to the performance of the contract or (even) offer to perform the contract in accordance with the erroneous representation made to the victim of the error.

A few preliminary remarks are necessary in order regarding the interpretation issues raised by the text of Article 1213(2) of the Civil Code, which cannot go unnoticed and require careful analysis of the wording of the legal provision.

*A first aspect* that we note is that the adaptation of the contract seems to be achievable through *two different mechanisms*, as it offers the party wishing to adapt the contract two different possibilities: (I) either to declare that it wishes to perform the contract as it was perceived by the victim of the error, (II) or to perform the contract without delay, in accordance with the erroneous perception of the party entitled to cancellation.

Unfortunately, the normative text does not provide further guidance to outline a distinct legal regime for each of the two paths that the party interested in offering the adaptation of the contract may follow. However, this difference, both terminological and in terms of content, between the two possibilities is not without practical importance since, as we will demonstrate below, they have different applicability depending on the specific circumstances of the case in which the contract will be adapted.

Thus, one of the scenarios in which this distinction made by Article 1213(2) of the Civil Code is relevant is the situation in which *the performance of the contract is urgent* for the *errans*, and the need to satisfy their interest cannot be postponed, otherwise the party entitled to cancel the contract could be prejudiced by a late adaptation of the contract offered by the other party through a *declaration of performance* followed by the actual performance after a period of time.

In this regard, we consider that *the enforceability of the performance* that should be received by the party that can invoke the nullity of the act from the other contracting party is a criterion according to which the mechanism provided for by the legal provision by which the contract is to be adapted will be distinguished. *The maturity of the contracting party's obligation* will determine the type of action that the latter will have to take to be able to resort to the mechanism of contract adaptation, in the sense that either the performance is not due and they have the necessary time to allow them to declare, for the time being, that they wish to perform the contract as it was understood by the *errans*, or the performance is due and they will have to perform the contract without delay/immediately, by offering the performance incumbent upon them.

More specifically, if, at the time when the other party is informed and receives from the victim of the error the notification declaring their intention to cancel or the request to bring legal proceedings invoking the nullity of the act, *their obligation is due*, to be able to resort to the benefit of contract adaptation, they should offer (even) the *performance itself*, one that is consistent with the reality envisaged by the *errans*, without the possibility of communicating only a declaration of performance to the other party in error, this declaration being insufficient, in itself, to restore the contract in accordance with the representation made by the *errans* at the time of its conclusion.

If the other party's performance *isn't due* when they're informed about the *errans's* plan to cancel the contract because of an error, the contract can be adapted by informing them about the *declaration of performance* as understood by the party entitled to cancel it, and not in accordance with the contractual clauses objectively expressed in the content of the contract.

*A second aspect* resulting from the interpretation of Article 1213 of the Civil Code is that *the adaptation of the contract is mandatory* for the party that fell into error if the other party decides to pursue this course of action.

In our opinion, the agreement of the party in error is not necessary to adapt the contract, but it becomes mandatory for the *errans* after the issuance and communication of the declaration of performance or the performance of the contract in accordance with the erroneous perception of the party in error, and the right to obtain the annulment of the act is considered extinguished, in accordance with Article 1213(4) of the Civil Code.

We argue that the declaration of performance of the contract has the legal nature of a *unilateral instrument*. Among unilateral instruments, the declaration of performance belongs to the class of acts that are subject to communication, because it extinguishes a right of the recipient, namely the right to request the annulment of the act concluded under conditions of material error, in accordance with Article 1326(1) of the Civil Code.

As an instrument, the declaration of performance must also meet all the substantive conditions of validity required by law for its valid conclusion, as provided for in Article 1179(1) of the Civil Code, namely the capacity required by law, validly expressed consent, a specific and lawful object, and a lawful and moral cause, given the reference made by Article 1325 of the Civil Code to the applicability of the legal regime of contracts and unilateral instruments accordingly. Concerning the *formal requirements* that the unilateral instrument of the declaration of performance should meet, we note that the normative text of Article 1213 of the Civil Code does not make any express mention of the need to comply with any formality in this regard. For this reason, we consider that the declaration of contract performance is governed by the *principle of consensualism* of civil instruments, which is validly created by the simple manifestation of will that the contracting party makes in the sense of declaring acceptance for the performance of the contract in the erroneous manner represented by the victim of the error.

**Concerning the method of adapting the contract**, we note that, pursuant to the provisions of Article 1213 of the Civil Code, the contract shall be adapted *in only one way*, namely by offering exactly the performance that the party in error intended to obtain when concluding the act. The option of adapting the contract is open to the party only if it declares that it wishes to perform or proceed with the direct performance of the contract *as understood by the party that can invoke the annulment of the act*.

In other words, the contract will be redrafted in accordance with the status and content imagined by the party that was the victim of the error. In practice, this method of adapting the

contract will create a new legal situation, different from the initial one. The element that differentiates the two legal situations is the obligatory content that the party offering the adaptation of the contract is required to perform, in the sense that it will have to perform other services than those for which it had expressed its consent in the previous legal situation.

From our point of view, the adaptation of the contract produces a certain main legal effect, namely that the contract will be considered concluded in accordance with the way it was perceived by the party who was in error.

Thus, following the express (by issuing and communicating the declaration of performance) or tacit (by direct performance) adaptation of the contract, it will be considered, by law, retroactively modified in accordance with the perception that the *errans* had from the moment of its conclusion. The ground for nullity (essential error) that initially affected the contract is definitively and retroactively removed by the other party applying the adaptation of the contract, and the party whose consent was vitiated no longer has the right to request the annulment of the act.

This has the following consequences: (I) the contract, in its original form, is considered never to have existed and, therefore, there was no reason for nullity, and (II) the contract, in its adapted form—corresponding to the modality prefigured by the *errans*—will be valid in all respects, no longer affected by the cause of nullity that it had before the adaptation.

The effect provided for in Article 1213(3) of the Civil Code regarding the extinction of the right to obtain the annulment of the contract is not an independent one, but is a natural consequence of the fact that the ground for nullity itself is considered never to have existed, being completely removed, retroactively, as a result of the adaptation of the contract. In practice, the extinction of the right to obtain annulment is a secondary effect deriving from the main effect of considering the contract to have been concluded in the form understood by the *errans*, as provided for in the final sentence of Article 1213(1) of the Civil Code, an effect produced as a result of the adaptation of the contract by the party who was not in error.

**CHAPTER III** concerns the adaptation of the contract for unpredictable circumstances and is structured in two important and defining subchapters, namely the adaptation of the contract in the case of unpredictable circumstances under common law and the adaptation of the contract in the case of unpredictable circumstances under special law.

The purpose of the institution of unpredictability is to restore, through the judge's discretion, the contractual balance and the interests of the contracting parties in the continued performance of the contract, in relation to the new economic and social circumstances in which

the contractual relationship will take place, through specific mechanisms and concrete methods of contractual adaptation.

The real test of the functioning of the mechanism of unpredictability in common law – the case law of the courts – has brought to light the way in which the legal institution that allows the contractual relationship between the parties to be reconfigured in the event of unpredictable events leading to an excessive burden on the debtor in the contract has been received and applied in practice. Unfortunately, judicial practice relating to the application of Article 1271 of the Civil Code is virtually non-existent in the period between 2011 and 2017.

The manner in which unpredictability was reflected in judicial practice, in particular the very limited scope of solutions favourable to the adaptation of contracts, as well as the tensions related to the situation of consumers who had concluded loan agreements in foreign currency and whose position, during the performance of the contract, was seriously deteriorated in relation to the time of conclusion of the contract, prompted the legislator to intervene by adopting special and derogatory laws to regulate the situation of these contracts, which were financially reasonable at the time of their initial conclusion but which, as they were performed, became dramatically burdensome for consumers, rendering them unable to pay.

The epicentre of the loan agreements that generated unpredictable over-indebtedness for consumers is represented by loan agreements granted in Swiss francs, which were concluded before the new Civil Code came into force. For these reasons, the legislator adopted Law No. 77/2016 on the transfer of immovable property in lieu of payment in order to settle obligations assumed through loans, as well as other special laws, which we will present in the following subsections.

After this period, due to the unpredictable situation regarding the emergence of the global health crisis with SARS-COV-2 since March 2020, a context favourable to the application of common law unpredictability, force majeure, or fortuitous impossibility of performance, the Romanian legislator intervened once again by adopting special and derogatory rules, which meant that what could have been a real and pure test of the application of common law on unpredictability in situations of social crisis could not be fully applied and another real opportunity to crystallize a judicial practice related to common law was missed. At the same time, the health crisis and the economic effects that followed this period, as well as the energy crisis and the increase in construction costs, had a real impact on the execution of public procurement contracts. To prevent economic deadlock and a halt to public investment works, the legislator intervened and adopted a package of special legislative acts derogating from common law, designed to cover crises in ongoing contracts.

In the legislator's view, Law No. 77/2016, in its original form, was a legal application of unpredictability in loan agreements that allowed for the forced and total termination of mortgage agreements through the transfer of the properties in lieu of payment, whereby debtors were no longer required to prove the excessive onerousness of their obligations and the contractual imbalance between the parties' performances, these being absolutely presumed by law in favour of those debtors who had the status provided for by law and who fell within the provisions of Article 4, which establishes the conditions of admissibility for transfer in lieu of payment. Nor was the court entitled to analyse and verify the conditions for the intervention of unpredictability.

The constitutional court has issued several decisions providing important clarifications on how contractual unpredictability interferes with the general legal framework of Law No. 77/2016.

*First*, in Decision No. 623/2016, the Constitutional Court upheld the exception of unconstitutionality and found that the provisions of Article 11, first sentence, in relation to the provisions of Article 3, second sentence, Articles 4, 7, and 8 of Law No. 77/2016, are constitutional *to the extent that the court verifies that the conditions relating to the existence of unpredictability are met.*

In light of this decision, the constitutional court ruled that the court has the power to apply unpredictability in contracts only to the extent that it analyses and finds that the conditions for the existence of unpredictability are met. Moreover, in paragraphs 120 and 121 of the grounds for Decision No. 623/2016, the constitutional court states that the court may and must apply the theory of unpredictability in loan agreements, being independent in its assessment and able to apply the theory of unpredictability in the absence of agreement between the parties, pursuant to the provisions of Articles 969 and 970 of the Civil Code of 1864 and Law No. 77/2016, by issuing a decision ordering either the adaptation of the contract in the manner it deems appropriate or its termination.

In practice, the legal unpredictability envisaged by the legislator was transformed into judicial unpredictability, subject to the control of the court. Following this ruling, the Constitutional Court offered its own interpretation and version of the Law on transfer in lieu of payment, considerably reducing the scope of the law compared to the applicability it would have had if it had remained in the form in which it was adopted by the legislature.

The Constitutional Court's assessment did not stop there, but also offered its own theory regarding contractual risks. In this regard, we refer to the considerations set out in paragraph 96 of Decision No. 623/2016, the argument of the Constitutional Court that contractual risk

requires a two-pronged analysis, both from the perspective of *inherent risk*, which the parties voluntarily assumed when concluding the contract, based on their autonomy of will, and from the perspective of the *additional risk*, which could not have been foreseen by either of the contracting parties at the time of concluding the contract, which was beyond their power of prediction and which relates to the intervention of elements that could not have been taken into account at the initial moment of agreeing to conclude the contract.

In practice, the distinction between the two categories of risk is determined by their degree of predictability. While inherent risk (currency risk relating to normal or reasonable fluctuations in the value of the currency of the loan) is predictable, additional risk (relating to an excessive increase in the value of the currency in which the mortgage loan was granted compared to the national currency) is unpredictable, given its exceptional nature. Only the additional risk makes unpredictability applicable for the rearrangement of the obligations to which the parties have committed themselves in relation to the new economic/legal conditions and realities.

The constitutional court concluded that the only interpretation of unpredictability, subsumed within the constitutional framework, is that the court, in the absence of the parties' consent, has the competence and, at the same time, the obligation to apply unpredictability in ongoing loan agreements, only if it finds, through its own research and analysis, that the conditions for its existence are met.

*In a second phase*, the Constitutional Court intervenes with new clarifications on how the institution of unpredictability should be applied in loan agreements by the courts of general jurisdiction. Thus, by Decision No. 731/2019, the Constitutional Court invalidated the manner in which the common law courts applied the institution of unpredictability, namely by administering complex evidence regarding the debtor's financial and personal situation in order to determine the degree of disruption of the contractual balance.

From this point of view, the constitutional court held that the contractual balance in the case of a loan agreement shall be assessed by strict reference to the intrinsic content of the agreement, only concerning the contractual clauses, and not by reference to the debtor's entire financial and personal situation and their material possibilities for repaying the loan granted.

Following these interpretations and principles resulting from the case law of the Constitutional Court, the legislator adopted Law No. 52/2020, amending and supplementing Law No. 77/2016, thereby transposing into law the aspects established by the constitutional court regarding the application of unpredictability.

Thus, through the amendments made to Article 4 of Law No. 77/2016, the legislator expressly provided that an increase in the exchange rate of more than 52.6% compared to the date of conclusion of the loan agreement, as well as the fact that the monthly payment obligation increases by more than 50%, and this legal presumption is absolute.

Therefore, through these legislative amendments, the legislator has returned to the initial manner of applying Law No. 77/2016, regulating a case of legal unpredictability that is imposed with the force of an absolute presumption, without the possibility for the court to assess the fulfilment of the conditions for the intervention and operation of unpredictability, the unpredictable nature of the event disrupting the contractual balance, as well as the excessive onerous nature of the debtor's obligation.

Due to the major impact that the Covid-19 pandemic had on the economic environment, compounded by the effect of the exceptional measures adopted during the temporary state of emergency, gradually imposed by the public authorities to prevent the spread of the epidemic, there was a need to implement legislative solutions to protect the business environment and the entire national economic system from the negative economic effects of the health crisis, so that, through this specially created legal framework, business relationships could be adapted to the new social challenges and economic difficulties they are facing.

The best form of protection for the economic system is to encourage the continuation of the production and consumption process, but adapted to the new social conditions created by the global pandemic context. Given that the contractual obligations assumed by economic agents could no longer be fulfilled in the new social context, it was imperative that, in relation to this new context, which had undergone significant changes, the measures adopted by the legislator should aim at renegotiating and adapting contractual relationships to these social conditions, rather than abandoning the contractual relationship.

Thus, Article X(1) of Government Emergency Ordinance No. 29/2020 provided that, during the state of emergency, small and medium-sized enterprises whose activity was totally or partially interrupted as a result of decisions issued by the central public authorities during the state of emergency and which hold an emergency certificate, benefit from a deferral of payment for utility services - electricity, natural gas, water, telephone and internet services, as well as a deferral of rent payments for the property used as their registered office and secondary offices.

In legal terms, this method of contract adaptation is a genuine legal adaptation, as the deferral of payment will occur directly under the law, without the need for court intervention or the creditor's consent. It is the law that allows for the delay in the performance of the

obligation and the exemption from the payment of penalties for this period. This form of contractual adaptation is distinguished both by the way it operates and by its legal regime, because, on the one hand, the law provides for the specific legal mechanism by which the contract can be adapted by establishing express conditions that economic operators must meet, and the law also provides for the typical manner in which the contract is to be adapted to the new social realities.

The entry into force of Law No. 62/2020 created a legislative framework regarding the legal fate of lease contracts for properties registered as headquarters, working points, and dwellings, in which sense the facility of deferring rent payments, without interest and penalties, was established for a period equal to the duration of the state of emergency as well as for the month following the month in which the state of emergency ended, at the request of economic operators, liberal professionals, and private legal entities whose activity was interrupted or whose income or revenues decreased by at least 15% in March 2020 compared to the average of the last calendar year during the state of emergency, for the use of properties registered as headquarters or working points, as well as for individuals affected economically throughout the state of emergency, for properties used as dwellings.

It should be noted that the method of adapting the contract differs depending on the contracting party in question. For the tenant, the contract is adapted by applying the measure of deferring the obligation to pay rent, without applying penalties and interest, and upon expiry of the deferral period, the rents for this period shall be paid to the body that advanced these amounts, in equal instalments, until December 31, 2020. In return, for the lessor, the contract will only be adapted in terms of the person from whom the due payment will be received, i.e., the rent payment will be made by the tax authority for the entire period during which the tenant's payment deferral was applied, as well as the impossibility of the lessor to charge penalties and interest on these rents.

Government Emergency Ordinance No. 37/2020 established the possibility for individual debtors, as well as legal entity debtors in leasing contracts, to request bank and non-bank financial creditors to suspend the enforcement of loan instalment payment obligations, interest, and fees for a period of between a minimum of one month and a maximum of nine months, but no later than December 31, 2021.

In this case, the method of adaptation is of a legal nature, but its implementation is left strictly to the debtor, representing a right for the debtor and not an obligation. As can be seen, the discretionary right of debtors to request the adjustment of the contract arises directly from the law. This right is exercised through a unilateral instrument, namely the formulation of a

request/application for the suspension of the payment obligations of the loan granted. It follows that the adaptation of loan agreements is unilateral, as only debtors have the legal prerogative to request the granting of legal facilities, without being bound by the agreement of creditors. At the same time, we can also state that this method of adaptation has another specific feature, namely that it is voluntary, as it depends on the debtor's expression of will in this regard, so that the adaptation of the contract does not operate by law.

It should be noted that, in this context, there is no suspension of the contract, but only a suspension of the performance of certain contractual obligations, and not of the entire contract. This is evidenced by the fact that during the suspension of loan repayments, interest continues to accrue, even if it is capitalized and paid in instalments after the suspension measure expires.

We note that all the elements and circumstances that the legislator had in mind when enacting the rule concern the direct financial situation of the debtor and his family, and are external to the contractual relationship in which they are engaged, without any connection to the contractual imbalance and excessive increase in the payment obligation, as reported in the contractual provisions, compared to how it should have been executed if the exceptional situation had not occurred. From this point of view, we can strongly affirm that the measures adopted by the legislator on this occasion were not based on contractual unpredictability, but on the debtor's over-indebtedness, aspects that transcend the contractual relationship.

That being the case, it follows that the implementation of such legislative provisions represented a genuine social protection measure, through which the legislator sought to combat the negative effects that influenced the economic situation of these debtors.

Given the legal nature of public procurement contracts, which are public law contracts, the parties are not allowed to modify the contractual clauses based on their free will, as a result of a specific negotiation process between them regarding the restoration of contractual balance by means of price adjustment, as may happen, for example, in the case of private law contracts, where free negotiation plays an essential role. Any amendment to a public procurement contract must comply with the legal rules in force and the standards provided for by law.

Even though the regulatory framework for public procurement – Law No. 98/2016 – provided for the possibility of stipulating clauses in the public procurement contract whereby it could be revised, including with regard to adjustments to the contract price, nevertheless, in most of the contracts that had already been concluded and were being executed in 2021, these types of clauses were either missing or, where they did exist, they did not cover the situation generated by the accelerated and unpredictable increase in the prices of construction materials,

so that the contracting authorities were faced with a situation where they had no legal possibility to make changes to the contracts in order to adapt them to the new realities.

The public interest plays a different role in public law legal relationships, as opposed to the private interests that animate private law, in the sense that if the public authorities had applied a strictly legal approach to the problems generated by public procurement contracts in difficulty, this would have led to the blockage of the private sector and, implicitly, to the halting of public investment works. That is precisely why the public interest led to the adoption of economic decisions whereby construction contractors were supported with concrete and real measures to adjust prices so as to meet current needs and allow them to continue and fully execute ongoing public procurement contracts, to the detriment of purely legal decisions that could have led to the bankruptcy of a large part of the private sector and a blockage in the implementation of public investment projects.

The entry into force of Government Ordinance No. 15/2021 and Government Emergency Ordinance No. 47/2022 created a special regulatory framework, derogating from the common law on public procurement, which implemented a legal mechanism for adjusting the contract price, specifically for those public procurement contracts that did not contain price review or clauses. In practice, those contracts that included price revision clauses followed the adjustment procedure provided for in the agreement between the parties and did not fall within the scope of the provisions of the aforementioned normative acts, which applied to contracts lacking these conventional adjustment mechanisms, with the exceptions that we will show below.

Government Ordinance No. 15/2021, as provided for in Article 1(1), established the possibility of adapting public procurement contracts/sectoral contracts/works concession contracts in force at the time of adoption of the normative act, by adjusting the contract price already established, with the updating of prices for construction materials, applying an adjustment coefficient provided for by the normative act, to take into account any increase or decrease in the cost of construction materials on which the contract price was based.

Concerning the legal mechanism by which the actual adjustment of public procurement contracts could be carried out, Government Ordinance No. 15/2021 provided that, within 15 days of the entry into force of the normative act, economic operators could send the contracting authorities a request for price adjustment, and the latter had a legal obligation to take the necessary steps to implement the contractual price adjustment by concluding addenda to the public procurement contracts. The penalty for failure to comply with the mandatory deadline by which economic operators could submit their request for price adjustment was the forfeiture

of the right to request the adjustment of the contract price, in accordance with the provisions of Article 2(13).

We are therefore witnessing a forced modification of public procurement contracts in terms of their adaptation through the adjustment of the contract price, as a result of the exercise of a discretionary legal right enjoyed by economic operators who have concluded works contracts falling within the scope of the special legislative act.

The shortcomings of Government Ordinance No. 15/2021, but also the fact that, following the adoption of this normative act, the effects of the exceptional situation that were taken into account when the norm was enacted, namely the increase in the price of construction materials, did not cease, but on the contrary, accelerated and spread to other cost elements with an impact on the construction sector, prompted the legislator to adopt Government Emergency Ordinance No. 47/2022, which introduced solutions for adjusting the contract price to meet the current needs of the entire business environment involved in public investment.

Thus, Government Emergency Ordinance No. 47/2022 brought some welcome changes to the public procurement market, primarily by extending the scope of the legal benefit regarding the possibility of adjusting the contract price to public procurement contracts for *products or services*. At the same time, the new regulation stipulated that the contractual price would be adjusted to take into account *any increase or decrease in the costs on which the contract price was based*. Therefore, the essential difference from the provisions of Emergency Ordinance No. 15/2021 is that price adjustment is possible for a wider range of contracts, and that it covers any fluctuation in the costs on which the contract price was based, and not just for the increase in the cost of construction materials.

To avoid any confusion, we would like to point out that the price adjustment, even under these conditions, was not total, because, as in the case of Emergency Ordinance No. 15/2021, that the adjustment only took into account the remaining work to be performed/supplied/provided on the date of entry into force of the ordinance, which is why the losses incurred by the economic operator before the entry into force of the normative act can no longer be recovered and are not subject to adjustment.

If the contracting authority refuses to complete the formalities necessary for the conclusion of the addendum to the procurement contract and, therefore, refuses to adjust the contract price, we consider that the economic operator can apply to the court with a request to oblige the contracting authority to conclude the addendum to amend the procurement contract (request for specific performance) or, moreover, to request that the contracting authority be required to adjust the contract price and pay the amounts resulting from the adjustment (request

for restoration of contractual balance and claims).

To avoid any confusion, we consider it necessary to specify that the court may even rule on the adaptation of the contract (in the context of an action seeking to restore contractual balance), but only as a legal mechanism that has not been implemented by the contracting authority administratively as a result of the economic operator's request, without the possibility of ruling on the specific manner in which the procurement contract will be adapted.

Finally, we would like to point out that changes to the public procurement contract made based on these special regulatory provisions are assimilated to the situations provided for by the common law of public procurement, namely the case provided for in Article 221(1)(e), which provides for the possibility of amending the contract without going through a new award procedure when the changes made are not substantial. Paragraph (7) of the same article supplements the previous provision by indicating those causes that constitute substantial changes and which, therefore, are not permitted to be made to the procurement contract without organizing a new award procedure. Among these, we find, with relevance to the subject matter under investigation, the situation in which the change made would alter the economic balance of the public procurement contract in favour of the contractor in a manner not provided for in the public procurement contract concluded.

The adoption of Law No. 208/2022 brought several changes to Law No. 98/2016, and some of the most important and substantial changes concerned the regulation of legal mechanisms according to which the price of the public procurement contract could be adjusted. As previously mentioned, some of the price adjustment mechanisms were already provided for in ANAP Instruction No. 1/2021, but with the entry into force of the legislative act under review, the possibility of adjusting the contract price based on special review clauses, whether optional or mandatory, as appropriate.

In this regard, Article 222<sup>2</sup>(1) of Law No. 98/2016 expressly provided that the contract price may be adjusted by updating it when certain conditions arise on the market, resulting in an increase/decrease in the price indices for the constituent elements of the tender, the effect of which is reflected in an increase/decrease in the costs on which the price of the framework agreement/contract was based. At the same time, paragraph (2) of the same article stipulated that price adjustment is only possible if the tender documentation and the procurement contract to be concluded contain special review clauses.

In other words, the revision clause takes on paramount importance in the overall economy of the possibility of adapting the contract by adjusting the price and becomes the main legal instrument/mechanism available to the parties. From this point of view, we can say

that Law No. 208/2022 established the general rule of following a conventional mechanism for adapting the contract, based on the agreement of the parties, materialized by the insertion of a special clause for reviewing the public procurement contract with regard to price adjustment.

In this regard, the legislator has provided, through Article 222<sup>2</sup>(3), the essential and fundamental elements that must be included in the necessary review clause to be provided for in the tender documentation and in the procurement contract, namely the specific method of price adjustment, the reference indices to be used, and the source of information on their evolution, such as official commodity exchange quotations or statistical bulletins.

It is very important to note that this price revision clause is not the result of the free will of the parties, as is the case in private law, since in the case of public procurement contracts there is no amicable negotiation between the contracting authority and the economic operator, but the review clause must have a content that complies with the standard provided for in Article 222<sup>2</sup>(3) and is inserted in the tender documentation and the procurement contract by the contracting authority, the economic operator has no role in relation to this clause, as the creation of the clause and its content are not the result of its will.

Unlike Government Ordinance No. 15/2021 and Government Emergency Ordinance No. 47/2022, which provided for a specific mechanism for applying the contractual price adjustment, in the sense of making an adjustment request based on which an addendum amending the public procurement contract was to be concluded, we note, this time, the legislator's failure to regulate in Law No. 208/2022 the specific and effective conditions for the practical implementation of the contract review clause based on which the contract price can be adjusted.

We consider that the legal mechanism for implementing the review clause should be similar to that provided for in Government Ordinance No. 15/2021 and Government Emergency Ordinance No. 47/2022, i.e. through a request by the economic operator to adjust the price, followed by the conclusion of an *addendum* to the public procurement contract regarding the price adjustment agreed upon in the review clause. The price adjustment of public procurement contracts involves amending the contractual clause relating to the price initially set when the contract was concluded, and such an amendment cannot be made without concluding an addendum.

For legal accuracy, we consider it necessary to specify that the element that generates the obligation to update the price is the review clause provided for in the public procurement contract, and not the addendum that actually materialises the change in the contract regarding the price. However, for effectiveness and compliance with special procedures in the field of

public finance, we consider that it is also necessary to go through the formality of concluding an addendum to the public procurement contract.

As we have already pointed out, the public procurement contract can be adapted by adjusting the contract price. The price adjustment will be made either by applying the formula provided for in the special normative act regulating this aspect, or by applying the criteria established by the adjustment clause provided for in the procurement contract. Therefore, similar to the operating mechanism, we can say that the method of adapting the public procurement contract can also be conventional if it operates based on a contractual clause, or legal if it is applied based on special and derogatory provisions.

It is very important to note that, in the situations analysed, the role of the court concerning the actual method of adapting the contract is non-existent, because the contract can only be adapted in the specific ways regulated by the legislator or established by the contractual clause, the judge having no possibility to order the adaptation of the public procurement contract by any other means than those indicated above.

Finally, the compatibility of unpredictability with the special provisions on public procurement was analysed. Pursuant to the provisions of Article 1271 of the Civil Code, the court is empowered to order the adaptation of the contract in situations where the performance of the obligation has become excessively burdensome for the contractual debtor, while Law No. 98/2016 and all normative acts adopted between 2021 and 2024 regulate the cases that allow the modification of the public procurement contract in terms of updating the contract price. From this point of view, it is very important to analyse how the general rule on unpredictability interferes with the special rules of public law that allow the contract to be modified and adapted to new circumstances. This is necessary to correctly identify the legal mechanism that can be applied to restore the contractual balance.

*Firstly*, since unpredictability is provided for by the general rules of the Civil Code, these are applicable only in the absence of special regulations. However, in the field of public procurement contracts, there are special provisions that require the direct adjustment of the contract price in certain expressly regulated cases. Since the public procurement contract is concluded under Law No. 98/2016 (the general rule on public procurement), any amendment to it by adjusting the price will have to be made on the basis of the same special rules or rules that derogate from this framework (*e.g.*, Government Ordinance No. 15/2021, Government Emergency Ordinance No. 47/2022). As special rules have been enacted to ensure contractual balance throughout the entire contract execution process, these will take precedence over the general rules from which the legislator has decided to derogate.

*Secondly*, although the special rules contain genuine specific applications of unpredictability applicable in public law, we note that there is a difference between the standard required for unpredictability in private law and the standard required to be able to amend the contract in public law. The legal elements that configure the special cases and conditions for which the public procurement contract can be modified by adjusting the price highlight the specificity of the way in which unpredictability has been transposed by the legislator into public law, by establishing a specific standard applicable to public procurement contracts, which is different from the general standard in private law.

As we have observed from court practice, as well as from the legal presumptions offered by various normative acts with an impact on unpredictability in relations between private individuals, the percentage standard against which unpredictability can be retained and applied in unbalanced contracts generally starts from an economic increase in the debtor's monthly payment obligation of at least 50%, while the legal applications of unpredictability in public law, with reference to public procurement contracts, transposed into the practice of contracting authorities, have resulted in a percentage standard lower than that of common law, namely a percentage of approximately 6.23% in the case of contractual price adjustment under Government Ordinance No. 15/2021, and a percentage of 37.41%.

The following conclusions can be drawn from this:

The intervention of the legislator to regulate cases of special application of unpredictability in public procurement contracts involved a derogation from common law in terms of the standard that must be met in order to be able to adapt contracts affected by the economic crises specific to the period 2021-2023.

The decrease in the percentage ceiling based on which the public procurement contract was adapted highlights, in our view, the prevalence of economic interest in the smooth running of contractual relations over the agreement of will, expressed by the parties at the conclusion of the contract, an aspect that reinforces the utilitarian function of the contract and its economic and legal construction.

Moreover, perhaps the most important effect of the legislator's interventions through the adoption of special normative acts on price adjustments in public procurement contracts was the speed with which it was possible to implement legal mechanisms to adjust public procurement contracts. Thus, the legal measures adopted by the legislator allowed the contracting parties to adjust the contract within a very short period of time by establishing the additional amounts that the economic operator could request for payment, so that the effect of the contract adjustment would benefit the contractor even during the crisis period that

necessitated the price adjustment.

The regulation of unpredictable circumstances through special legislation was justified by the acute need to adapt public procurement contracts to the new realities, the urgency of such measures being given by the need to complete public investment projects and avoid economic deadlock that could have occurred in the construction market if the legislator had not intervened quickly by adopting legal mechanisms for adapting the contract, which would have directly affected the implementation of investments and, implicitly, the general economy of Romania.

On the other hand, in the absence of such urgent legislative interventions, economic operators would have been forced to resort to the courts to request a possible adaptation of the public procurement contract based on common law on public procurement, also in relation to the unpredictability of common law. However, such legal action would have been disadvantageous for the economic operator, mainly due to the long time it takes to conduct and finalize such litigation. Even if we were to admit, in theory, that the economic operator would have been successful in such a dispute and would have obtained a solution whereby the court would have ordered the adaptation of the public procurement contract in the sense of increasing the contract price in relation to the new circumstances that had arisen, through a fair and equitable redistribution of the resulting benefits and losses between the parties, the passage of a significant period of time until such a solution was obtained and, subsequently, until the actual collection of the sums of money from the contracting authority as a price adjustment, could have had serious consequences for the economic operator, as it would have had to bear alone, throughout the entire period until the adjustment, the additional costs for completing the project, which could have led to the cessation of works and the economic operator's inability to pay its suppliers.

That is precisely why one of the main advantages of regulating, by means of special rules derogating from ordinary law, certain mechanisms for the legal adaptation of public procurement contracts is the promptness with which the actual effects of the adaptation of the contract can be enjoyed, namely the rapid collection by the economic operator of the sums of money resulting from the price adjustments made under the special rules, precisely during that difficult period of the contract's performance when the cause of the contractual crisis arose and necessitated the restoration of the economic balance of the contract.

## CONCLUSIONS

The agreement of the parties no longer plays a central role in the formation of the contract, as the parties are motivated by the pursuit of economic interests, with the contract being merely the instrument through which they satisfy their economic needs. The voluntarist theory based on the freely expressed agreement of the parties is clearly declining in the contemporary context of contracts, due to the emergence of numerous forced or adhesion contracts where the emphasis is on their utilitarian function, which has gained much greater force in modern civil law, a fact which, in our opinion, requires a reconsideration of the theory on which the civil contract and its binding force are based. The basis of the contract cannot remain isolated solely to the will of the parties and their freedom of will, but it is also necessary to reflect its useful character in satisfying an economic interest of the contracting parties.

Contractual balance is the factor that maintains the permanence of the contract and provides the parties with the necessary framework for the proper execution of the contract for the mutual benefit of each contracting party. The usefulness of the contract is the cornerstone of contractual solidarity, and the interdependence of the parties in achieving their respective contractual interests justifies the existence of the obligation to cooperate to work together to satisfy the contractual interests.

With the pronouncement of Decision No. 623 of October 25, 2016, of the Constitutional Court, the theory of contractual balance took on a new perspective, being based, in the Court's opinion, on contractual solidarity, founded on principles such as good faith and fairness. Since the considerations of Decision No. 623/2016 are binding with *erga omnes* effect, it follows that the theory of contractual solidarity has acquired normative value in the Romanian legal system, which justifies reconsidering the theoretical basis of contract adaptation.

The *sui generis* legal nature of the institution of contract adaptation provided for in Article 1213 of the Civil Code for error is given precisely by its own specific characteristics, as well as by the essential difference it has from all other types of contract adaptation, including in cases of lesion, since it does not imply the existence of an imbalance in the value of the parties' performances, but rather the removal of the error in which the *errans* found himself, so that the contract is restored to the form intended by the latter.

The differences also affect the legal mechanism for implementing the adaptation of the contract, because, in the event of error, the adaptation of the contract will always be done by agreement, being left to the exclusive discretion of the party who was not in error, whereas the

adaptation of the contract for lesion and in case of unpredictability will always be done judicially, being the exclusive attribute of the court, as it involves restoring a balance of value between the parties' performances by redistributing the losses and benefits resulting from the exceptional changes that have occurred. While the adaptation of the contract for defects of consent has as its causal factor an element before or concurrent with the conclusion of the contract, the adaptation of the contract for unpredictability involves the occurrence of exceptional events during the performance of the contract.

The adaptation of the contract in the case of defects of consent is only possible concerning the defect of error or that of lesion. Violence is not conceptually compatible with the notion of contract adaptation, while fraud, being a fundamental error caused by the other party, is excluded from the scope of contract adaptation under Article 1213 of the Civil Code, since in the latter cases, the fault of the perpetrator is more serious than that of the party who took advantage of the situation in which the aggrieved party found themselves, and the legislator has made other possibilities available to victims of fraud and violence, namely the possibility of claiming compensation for the damage suffered through the payment of damages, in addition to the classic sanction of contract cancellation.

In view of these aspects, we conclude that the mechanism and method of adapting the contract for defects of consent have their own individuality, with specific elements that cannot be assimilated to other legal operations or institutions, these being the aspects that were of interest and importance in researching this topic.

The study of contract adaptation continued in the third chapter with an analysis of the institution of unpredictability, focusing on the study of the general legal regime of unpredictability, with reference to the mechanism and method of contract adaptation, especially in cases where unpredictability has found its place in the special legislation adopted by the legislator.

The first substantial debate on the application of unpredictability in Romanian law after the entry into force of the Civil Code was prompted by the adoption of Law No. 77/2016 on the transfer of real estate in lieu of payment to settle obligations arising from loan agreements, which was intended to be an instrument of legal presumption of unpredictability, with the effect of discharging the debt through the transfer of the immovable property in lieu of payment.

The successive interventions of the Constitutional Court on Law No. 77/2016 highlighted the Constitutional Court's own view on how the theory of unpredictability is perceived and received in Romanian law. Essentially, it has been established with binding force: (I) that unpredictability will also apply to contracts concluded before the entry into force

of the law on transfer in lieu of payment, i.e., to the future effects of ongoing contracts; (II) that unpredictability represented a definite gain for the case law and legal doctrine related to the old Civil Code of 1864; (III) that it offered its own interpretation of the theory of contractual risks within the framework of unpredictability.

The main effect of these decisions was to significantly reduce the application of legal unpredictability provided for by the law on transfer in lieu of payment, as it established the need and, at the same time, the obligation for courts to examine the merits of the case of unpredictability in ongoing contracts, although the initial legal purpose was to establish an absolute presumption of unpredictability, to exclude the possibility of judicial intervention regarding the retention of unpredictability in loan agreements that fell under the special normative provisions.

Following these decisions, the law on transfer in lieu of payment was amended to transpose into law all aspects established by the constitutional court regarding the application of unpredictability. Thus, the legislator expressly provided that an increase in the exchange rate of more than 52.6% compared to the date of conclusion of the loan agreement, as well as the fact that the monthly payment obligation increases by more than 50%, constitute unpredictability, which are legal presumptions of an absolute nature. In practice, through these legislative changes, the legislator has returned to the initial manner of applying Law No. 77/2016, regulating a case of legal unpredictability that is imposed with the force of an absolute presumption, without the possibility for the court to make its own assessments on the fulfilment of the conditions for the intervention and operation of unpredictability, the unpredictable nature of the event disrupting the contractual balance, as well as on the excessive onerous nature of the debtor's obligation.

With regard to the adaptation of the contract in the context of legal unpredictability, this is a measure that must be applied as a priority over the measure of extinguishing the loan agreement by forced payment of the immovable property. The specific methods of adapting loan agreements ordered by the courts mainly concerned the conversion of payment instalments into the national currency at an exchange rate set by the court according to the specific circumstances of the case, to rebalance the contractual relationship, which exchange rate may be that on the date of conclusion of the contract, that on the date of the unpredictable event, or that on the date of conversion. Of course, judicial practice could not be uniform, as each situation has its own characteristics, and it is up to the judge to determine, in particular, the level of imbalance that has arisen in the overall economy of the contract's performance.

Concerning the legal measures adopted by the legislator during the Covid-19 pandemic,

it can be observed that, on the one hand, these represented genuine legal and specific applications of unpredictability, reflected in the establishment of legal mechanisms and methods for the fair adaptation of contracts affected by the health crisis, and, on the other hand, some of the measures adopted were based on the direct financial situation of the debtor and his family, rather than unpredictability.

From this point of view, there is an important distinction made by the legislator, because in these cases, the effect of over-indebtedness of individuals was taken into account, so that the implementation of those legislative benefits had the legal nature of genuine social protection measures, through which the legislator limited the negative effects felt by those categories of debtors.

Finally, the issue of contract adaptation involved analysing the mechanisms and methods by which public law contracts, namely public procurement contracts, can be adapted as a result of the application of unpredictability during their execution.

Specific to public law is the fact that the contracting parties are not on an equal footing, and contracts are not concluded through direct negotiations, as is the case in private law. Therefore, the adaptation of contracts cannot follow the same conventional mechanism based on free negotiation between the parties, but only based on the special normative provisions governing this aspect.

In this sector, too, the legislator has intervened by adopting special and derogatory rules establishing specific mechanisms and methods for adapting public procurement contracts, which are particular applications of the principle of unpredictability in procurement contracts, namely by establishing clear and precise legal formulas for adjusting the contract price, so that the economic operator does not bear alone the losses resulting from the increase in costs on which the contract price was based.

As shown in the explanatory notes to the special legislative acts adopted between 2021 and 2023 in the field of public procurement, the need to regulate legal mechanisms for price adjustment was determined by the need to ensure equal treatment between economic operators and a fair distribution of contractual risks, as well as the need to complete public investment projects to avoid economic stagnation and the onset of an economic crisis. Therefore, the basis for the special legislative acts adopted to transpose the concept of unpredictability into public procurement contracts was both legal and, above all, economic.

In view of these aspects, we conclude that the general foundations of contract adaptation are complex and multiple, and cannot be reduced solely to the idea of good faith and fairness, specific to common law. Social life is diverse, and the current economic interests of individuals

are satisfied by the conclusion of an increasing number of consumer contracts, forced contracts, adhesion contracts, or contracts specific to public law, in which the freely expressed legal will of individuals is no longer the exclusive actor in the creation of the legal relationship.

In view of the legal nature of these types of contracts, the legal basis for the adaptation of contracts cannot remain indissolubly linked only to the theory of legal will, but also requires the admission of the concepts of contractual interest, utility of the contract, proportionality of the services, fairness, as well as stability and durability of the contract. All these aspects lead to the conclusion that, from the general perspective of the possibility of adapting contracts, contractual solidarity is the most appropriate concept, having the value not only of a demonstrative principle of law, but even of a normative principle, given the current legal context created following the pronouncement of Constitutional Court Decision No. 623/2016.

In conclusion, we affirm that the theory of contractual solidarity should be accepted and received more widely in court practice, including in cases where requests for contract adaptation are submitted based on the unpredictability of common law, regulated by Article 1271 of the Civil Code.