Sarbu Partners

The risk of occurance of an unforseen event while performing a contract for execution of works

Drd. Eugen Sârbu, attorney-at-law

Abstract

No matter if we are discussing the case of a material, an intellectual work or of a provision of services, the contract for the execution of works is of the utmost importance in the economic dynamics, having a large object that includes basically any kind of service procurement or execution of works, which are not expressly regulated as being a different special type of contract. Considering the practical importance of this type of contract, we wanted to focus on an aspect which is essential, but sensitive at the same time- the subject of risks in the contracts for the execution of works. In order to incur the practical issues, we will draw our attention especially on those risks which may lead to the obstruction of works. After presenting the categories of identified risks, we will point out the party responsible for each of these risks and also the different types of liability that may be applicable. Lastly, in order to identify the most suitable solutions for practitioners, we will discuss those situations in which one of the parties of the contract for the execution of works intends to suspend or to terminate the contract and also the possibility of the parties to revise the price of the contract.

Keywords: *contract for execution of works, allocation of risks, unforeseen event, price revision, suspension and termination of contract*

1. The contractor's obligation of information concerning the occurrence of an unforeseen event

Art. 1858 c) of the Romanian Civil Code stipulates that the Contractor is obliged to inform the Employer, "with no delay", regarding the existence or occurrence of any circumstances for which the Contractor is not liable for.

Thus, this provision exonerates the Contractor from being liable for unforeseen events, with the condition of promptly informing the Employer, as stated above.

However, the Contractor is liable in the case in which he/she assumed the risk for unforeseen events in the contract. For example, if in the contract the Contractor stated that he/she will ensure the security of the site through the execution of the contract, including the time for obtaining the necessary documentation for obtaining the building authorization, he/she will no longer be allowed to claim that the delays in obtaining these documents caused additional costs with the security of the site during this period.

Concerning the Contractor's diligence, according to art. 1480 (2) of the Romanian Civil Code, the professionals' diligence is valued taking into consideration the nature of their activities. Therefore, if we are discussing a contractor whose regular object of activity consists in the execution of works, the diligence will be appreciated more strictly. For example, the moment from which the obligation of informing the Employer is applicable is the objective moment in which any professional would be able to notice that event and not the subjective moment when the Contractor actually noticed the occurrence of that event.

Another issue concerns the situation in which both the Contractor and the Employer are professionals in the construction of works[1].

In our opinion, this aspect is not relevant concerning the Contractor's obligation of information, taking into consideration n the fact that that he/she is the only one actually working on the site and having immediate access to any information regarding the occurrence of an unforeseen event.

The quality of professional of the Employer does influence his/her diligence regarding the efficiency of the measures that he/she implements after he/she was notified by the Contractor.

Another problem that we should consider in relation to art. 1480 (2) of the Romanian Civil Code is the use of the term "without any delay", in which the Contractor shall inform the Employer concerning the occurrence/discovery of an unforeseen event.

In the FIDIC Contracts, this term is of 28 days. There are authors who consider that the term of 28 days used by the FIDIC forms of contracts is of general usage, and, considering art. 1 (1) and art. (2) of the Romanian Civil Code, it could be applied in all the contracts for the execution of works in which both the Contractor and the Employer are

[1] C. Popa, C. Tăbîrță, *Noutăți privind răspunderea antreprenorului potrivit Codului civil (I),* „Revista Română de drept al afacerilor" no. 1/2013.

professionals in this area of work.

However, when one of the parties is not a professional (in most cases the Employer), then we are no longer entitled to apply this general usage, because we can no longer presume that both parties are familiar with these practices.

In this case, if the Contractor is a professional, the term "with no delay" will receive a restrictive interpretation. However, in our opinion, this interpretation cannot be more restrictive than the one in the general usage, as for example the term of 28 days used in the FIDIC forms of contract. If the contractor is not a professional, the term "with no delay" will be interpreted less restrictively, according to art. 1480 (1) of the Romanian Civil Code, which stipulated the obligation of diligence of the owner.

If this term is not respected, it will attract major consequences. The passivity of the Contractor will lead to an increase in the value of the prejudice and he/she will be liable for the part of the damage that could have been avoided if he would have fulfilled his/her obligation in time (according to art. 1371 of the Romanian Civil Code). For example, if part of the works is damaged as a consequence of the Contractor's inactivity, he/she will be liable for it.

2. The situation in which the unforeseen event is the consequence of one of the parties' error

Even if the situation which affects the execution of works was not foreseen by any of the parties at the moment of concluding the contract, it is still highly probable that the cause of the event lays in the omission of one of the parties.

For example, the source may consist of the omission of execution of the necessary studies by the Employer, who is obliged to give the Contractor the correct information regarding the condition of the site (geotechnical studies, feasibility study). Moreover, the source of the unforeseen event may consist of a superficial inspection of the site by the Contractor, which, with a minimal diligent, could have foreseen which elements may affect the future completion of works. In appreciating the level of guilt, we shall take into consideration art. 16 and 1358 of the Romanian Civil Code which stipulated a difference in the treatment of professionals.

Taking into consideration the particularities of the contract for the execution of works, the legislative body tried to also cover the situation in which a third party, the designer of works, is the one that acted in a faulty manner and cause an event which led to the interruption of works. (art. 1877 of the Romanian Civil Code).

In the situation in which the Contractor discovers errors in the design, he is obliged to inform the Employer and the Designer as soon as possible.

However, it won't be enough to simply inform them, but also the Contractor is obliged to propose any remedies, as long as he is qualified for this.

Therefore, if both conditions, which are cumulative, are not fulfilled, the informing and

proposal of solutions, we consider that the risks of errors in the design is not totally transferred from the Contractor to the Employer. Of course, that if the Contractor does not have the professional capacity of proposing solutions, the risk shifts to the Employer by simple informing him about the existence of the faults in the design.

From this moment, the obligation of cooperation imposes to the Employer to act in a proactive manner, in order to unblock the contract. Also, he has the obligation of information concerning the measures he adopted and these measures have to be adequate in order to remove the notified errors or risks.

The notion of "suitable measures" is an important one, because as long as the measures taken by the Employer are not suitable, the Contractor is entitled to suspend the works, according to art. 1877 of the Romanian Civil Code.

Thus, taking into consideration the fact that the Contractor is the one deciding if he/she will suspend the execution of works or not, we draw the conclusion that he/she is also the one entitled to appreciate if the measures taken by the Employer are suitable or not.

This kind of situation has to be managed properly, because the possibility of suspension of works and of qualifying the Employer's measures as being improper even if they were not, could lead to the Contractor being in a position of abuse, which, according to art. 15 of the Romanian Civil Cod, will make him liable for damages.

3. The distribution of risks when an unforeseeable event occurs

In order to properly discuss this matter, firstly we have to consider the definition of the contract for the execution of works provided in art. 1851 of the Romanian Civil Code, which states that the contract for the execution of works is that contract in which the Contractor is obliged to execute, on his own risk, a certain work.

Therefore, this contract stipulates an obligation of result, the execution of a work, for which the Contractor assumes any risk that may occur regarding the execution of the contract.

The case law reffering to the previous civil code stated that: "On the other hand, if the risk of the contract is beared in all circumstances by the Contractor, in what conncerns the contract for the execution of Works, the risk is beared by the Employer- res perit domino"[2].

Indeed, as a general rule, the risk of the contract is beared by the Contractor. However, when unforseen events occur, which are not the consequence of the fault of any of the parties, after the Contractor informs the Employer, the risk for these situations is transferred to the Employer, according to art. 1859 of the Romanian Civil Code, a special provision which referrs exclusively to the contract for the execution of works and not

[2] C. S. J. – Commercial Section, Decision no. 4371 of 21th June 2002, *Contract de antrepriză. Termen de garanție. Riscul contractului. Renunțarea de către beneficiar la clauza* contractului, published in "Revista romana de drept al afacerilor" no. 5/2003.

to the contract for services.

According to art. 1859 of the Romanian Civil Code, the Contractor faces two options when the Employer does not take the neccesary measures regarding the unforseen events: to terminate the contract or to continue to execute it on the risk of the Employer.

The legislative body does not specifically encourage any of these two solutions. However, by applying the general principle of progressive operation of the contractual remedies, according to which the termination of the contract is a solution of last resort[3], we consider that the execution of contract will prevail, with the condition of informing the Employer regarding the risks attracted by the change in circumstances.

The solution of termination of the contract will be adopted when the execution becomes impossible or when the Contractor no longer has any interest of executing it from an economic point of view, especially in the case when the revision of the price is no longer possible (for example in the case of a global price).

4. How does an unforeseen event influence the content and evolution of the contract?

4.1. The revision of the quantity of works or of the methods of works, price and time for completion

One of the first consequences of the intervention of an unforeseen event consists of the change in the quantity of works or in the method of work.

The Employer is obliged to take certain measures, according to art. 1859 of the Romania n Civil Code and the Contractor will have to implement these measures.

By doing so, a change of contract takes place. According to the law, this change may appear as an unilateral change that the Employer in entitled to, considering the fact that he should be able to decide on the manner of execution of the work that will enter his patrimony.

Another consequence consists of the change in the time for completion of works, which will usually be prolonged. However, a decision for discarding part of the works can be made, which will lead to a decrease in the time for completion.

Furthermore, such an incident that may occur in the development of a contract for the execution of works will also lead to a revision of the contract price. Basically, by notifying certain measures that generated additional costs, the Employer should also accept the costs for this additiona l work. In order to do so, it is necessary for the Contractor to quantify the additional costs and to infor m the Employer in this respect.

Regarding the update of the price, we discussed it in a different section of the article and for this reason we shall not analyze it again in the current section.

[3] B. Oglindă, *Principle of Progressive (Gradual) Use of Contractual Remedies,* „Juridical Tribune - Tribuna Juridica", Volume 4, Issue 2, p. 226-239, December 2014.

However, we would like to emphasize the fact that in the case in which the Employer will prevail of the initial price and he/she will not agree to adapt the contract according with the notification regarding the additional work, the Contractor also has the possibility of adapting the contract based on the theory of unpredictability regulated by art. 1271 of the Romanian Civil Code. In order to do so, the mechanism implemented by art. 1858-1859 of the Civil Code will not suffice. In addition, there must be a prior stage, in which the Contractor shall try to adapt the contract in an amicable manner. This is a matter of substance and a procedural one at the same time and, in its absence, the action in front of the court is inadmissible[4].

4.2. The suspension of the contract

Firstly, the provisions regarding the contract for the execution of works stipulated in the civil code regulate a special case of suspension of contract in the case in which the errors or the lacks in design prevent the development of the contract and the Employer either fails to adopt any measure or the measures adopted by him/her prove to be unsuitable.

However, nothing prevents the parties from prevailing from the exception of non-performance regulated by art. 1556 of the Romanian Civil Code and, given the failure to respect a contractual obligation of the other party, to suspend the execution of its own obligations.

This method can save that party from paying considerable damages because if the contract is not suspended, its obligations remain demandable, and the failure to fulfill them may lead to the termination of the contract by the other party.

4.3. The dissolution of contract

Mainly, the dissolution of the contract is an option that both parties are given in the case in which the other party fails to fulfill one of its main obligations. In our case, such an essential obligation would be the Contractor's obligation of informing the Employer or the Employer's obligation of taking the necessary and adequate measures.

Also, the provisions of the contract for the execution of work lead to two atypical situations. In the first situation, the dissolution of the contract is the mandatory remedy for the Contractor. The second situation represents a legislative confirmation of the institution of anticipated dissolution, which the legislative body failed to regulate as general institution[5].

The mandatory dissolution is incident when the Employer fails to adopt the necessary

[4] B. Oglindă, *Contractual balance in the context of the post-economic crisis and the new romanian civil code*, *Journal of Accounting and Management Information Systems (JAMIS*), vol. 13, no. 4/2014, pp.755-774.
[5] Study Group on a European Civil Code, Research Group on EC Private Law Principles, *Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition*, vol. I, Ed. Sellier, Munich, 2009, p. 887-890; I.-F. Popa, *Rezoluțiunea și rezilierea contractlor în noul cod civil*, Ed. Universul Juridic, Bucharest, 2012, p. 222-224.

measures and the continuation of works may endanger the health and corporal integrity of persons.

The sanction for infringing this obligation of the dissolution of contract consists of the fact that the risk for the liability towards third parties is shifted to the Contractor.

Thus, this provision also has effects in the field of the liability of the principal for the acts of the agent, because the victim of such damages will no longer be able to hold the Employer accountable, taking into consideration the fact that the Contractor no longer works under his supervision and direct control. So, even if the Contractor decides to disregard the obligation of dissolution of the contract and the contract is still in force, the law acts like if, in relation with third parties, the contract no longer exists. The liability towards third parties is a tort liability for its own deed, which can no longer be attracted alternatively with the liability of the principal (the Employer). A second case of dissolution of the contract is regulated by art. 1872 a) of the Romanian Civil Code which entitles the Employer to dissolute the contract in advance when the compliance with the agreed term became manifestly impossible.

Concerning our theme, an unforeseen event will usually lead to a delay in the time for completion of the contract.

In our opinion, on one hand, if the measures adopted by the Employer, as a consequence of the information received from the Contractor, represent an increase of the time for completion of works, than the Employer no longer has the right of dissolution the contract and such a behavior is obviously abusive.

On the other hand, when the unforeseen event is a consequence of the Contractor's fault, an extension of time will automatically cause the initial completion time to become impossible. I this case, the Employer is allowed to dissolute the contract in advance. Nevertheless, if the Employer orders the implementation of certain remedies, we consider that it is illegal for him/she to change his/her mind and to prevail from the delay of the initial term, because by ordering a remedy, this noncompliance is covered.

5. The distribution of risks concerning the appearance of an unpredictable situation when selecting a method of payment

5.1. The estimated price

Art. 1865 of the Romanian Civil Code regulates the estimated price in a manner which leads to the conclusion that it is a maximum price, a price that shall be respected by the Contractor. For this reason, the doctrine[6] stated that the estimated price represents a method of payment that favors the Employer because the expenditures of the Employer become more predictable.

The revision of this price, although possible, it is done in a restrictive manner, for situations that could not have been foreseen at the moment of concluding the contract,

[6] C. Popa, C. Tăbîrţă, *Noutăţi privind răspunderea antreprenorului potrivit Codului civil (I),* published in „Revista Română de drept al afacerilor" no. 1/2013.

which, in conjunction with art. 1351 (3) of the Romanian Civil Code, place these situations in the sphere of the fortuitous case.

Another important aspect presented by the doctrine concerns the fact that an estimated price can be reduced by the Employer in the situation in which the real cost of works is lower than the estimated price "without the necessity of proving the unforeseeable character of the event that justifies the decrease in price"[7].

A revision of the estimated price, by reference to the real registered cost would lead to the application of art. 1866 of the Romanian Civil Code (a price that is established in accordance with the value of the works or services), which would lead to the ineffectiveness of art. 1866.

On the other hand, the benefit of the predictability of price must be in the advantage of both parties, in order to stay true to the principle of the contractual equilibrium.

For this reason, if there are encountered unforeseeable conditions, the Contractor shall prove that these conditions enter the sphere of the fortuitous case, in order to be entitled to ask for an increase in the price, initially established as an estimated price.

5.2. The price established according with the value of works or services (the estimated price)

The revision of price in accordance with the unpredictable situatioans that may be discovered when executing a contract of works is the most lucrative method, since it has the highest degree in flexibility.

The established price does not refer to the whole work, but only to segments of it. The total price of the worl will be established at the end, according to the final quantity of the works actually accomplished[8].

For this reason, if there are any unforeseen situations that may determine the neccesity of additional works that are not stipulated in the initial project, an additional act to the contract will be neccesary. In order to do this, it will be neccesary to present the estimation of the supllementary work.

Thus, the estimation payment suprreses the Contractor's risk of bearing the costs of the works which may appear as a result of unforseen siuations. The Employer will be the one bearing these risks.

For this reason, the doctrine states that the method of estimated payment: *„presents the most advantaged for the Contractor, who is protected from the risks generated by the changes in the nature of the soil or by the increase in the market price of materials and so on"*[9].

[7] C. Popa, C. Tăbîrță, *loc. cit.*
[8] C.E. Mangu, *Riscul în principalele contracte civile potivit noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2013, p. 230.
[9] E.C. Mangu, *op. cit.*, p. 231.

5.3. The global price

The global price is established at the moment of concluding the contract.

According to art. 1867 of the Romanian Civil Code, on one hand, the Employer cannot ask for a decrease in price based on the fact that the cost of works was lower than the one initially established and, on the other hand, the Contractor cannot ask for a price increasement.

Not even the courts are entitled to grant the Contractor a higher amount, even if he/she proves by means of an experts report that the real price of the works is higher than the one established by the parties[10].

The jurisprudence decided, erroneously in our opinion, that when a global price was established, the value of works cannot be requested based on the concept of unjust enrichment, unless the modification of the initial project was made with the written agreement of the Employer[11]. In our opinion, as long as the necessity of works can be proved and moreover, in the absence of this additional work, the contract could not have been properly executed, the Contractor is entitled to the payment of additional work, on the *actio de in rem* basis, no matter if the Employer gave his/her written consent or not.

However, when the errors in the documents of the Employer led to the necessity of additional works, the courts imposed the payment to the Employer, on the ground of unjust enrichment, but not on a contractual ground, given the fact that the global price eliminates any possibility of revision[12].

Concerning the matter of risks, by regulating a global price, the Employer makes himself responsible for paying a higher cost than the real one, while the Contractor bears the risk of not being able to ask for an increase in price for those situations in which he encountered higher costs than the ones foreseen at the moment of concluding the contract[13].

In accordance with art. 1867 (3) of the Romanian Civil Code, the global price remains unchanged, even if the initial conditions for the execution of contract change, unless the parties provided otherwise. It was considered that[14] this provision represents a legal exclusion of the applicability of the theory of unprintability (art. 1271 of the Romanian Civil Code), as long as the modification of the initial conditions have no effects in what concerns the global price.

On the other hand, it was considered that we should make the difference between a simple change of the initial conditions and an exceptional change of the circumstances which may lead to an obligation becoming extremely onerous[15].

---

[10] V. Terzea, *Noul Cod civil. Comentarul art. 1867*, Universul Juridic Publsihing House, Bucharest, 2012.
[11] Cas., s.com., dec. nr. 3799/2005, in V. Terzea, *op. cit.*
[12] C. as., s. civ. şi de propr. int., dec. nr. 5197/2004, in „Dreptul" no. 11/2005, p. 267.
[13] C. Popa, C. Tăbîrţă, *loc. cit.*
[14] Gh. Gheorghiu, *Comentariul art. 1867*, in F. A. Baias s.a., *Noul cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 1891.
[15] C. Popa, C. Tăbîrţă, *loc. cit*

We agree with the second opinion encountered in the Romanian doctrine and we consider that the theory of unpredictability is also applicable when the parties opt for a global price, if the unpredictable situation is one of an exceptional character, having effects on the obligations of the parties and manifestly affecting the contractual balance.

6. Conclusion

In this article, we analyzed the situation in which an unforeseen event occurs while performing a contract for execution of works.

We have seen what are the obligations of each party because of the occurrence of such an event, we observed the way in which the content of the contract is affected, the revision of the initial contract between the parties, and most important, we concluded which party will bear the risks that appear as a consequence of the change of circumstances in which a contract for execution of works was concluded.

Last, through this study we emphasized an important aspect for this type of contract, namely, the way of settling the price of the contract will influence the possibility of the parties to adapt the costs at the real situation appeared after the change of circumstances, the New Civil Code offering the possibility of using methods of flexible payment, revising the price or the possibility of settling rigid methods which will have the advantage of predictability, but the disadvantage of loading the unblocking of the contract in case of which the execution of supplementary works will be necessary.

In conclusion, we consider that this article will come in the support of the practitioners from the construction field, who will negotiate and draft their contracts being aware of the regulations which are not imperative and which will produce effects if the parties will not derogate in the clauses of the contract.

Bibliography

1. B. Oglindă**,** *Contractual balance in the context of the post-economic crisis and the new romanian civil code*, „Journal of Accounting and Management Information Systems (JAMIS)", vol. 13, no. 4/2014, pp.755-774.
2. B. Oglindă, *Principle of Progressive (Gradual) Use of Contractual Remedies,* „Juridical Tribune – Tribuna Juridica", Volume 4, Issue 2, p. 226-239, December 2014.
3. C. Popa, C. Tăbîrţă, *Noutăţi privind răspunderea antreprenorului potrivit Codului civil (I),* „Revista Română de drept al afacerilor" no. 1/2013.
4. C.E. Mangu, *Riscul în principalele contracte civile potivit noului Cod civil* , Ed. Universul Juridic, Bucharest, 2013,
5. Gh. Gheorghiu, *Comentariul art. 1867*, in F. A. Baias s.a., *Noul cod civil. Comentariu pe articole*, Ed. C.H. Bek, Bucharest, 2012,
6. I.-F. Popa, *Rezoluţiunea şi rezilierea contractlor în noul cod civil* , Ed. Universul Juridic, Bucharest, 2012,
7. Study Group on a European Civil Code, Research Group on EC Private Law Principles, *Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition* , vol. I, Editura Sellier, Munich, 2009, p. 887-890;
8. V. Terzea, *Noul Cod civil. Comentariul art. 1867*, Ed. Universul Juridic, Bucharest, 2012.