DOI 10.7251/ZRPIM2001184K

STRUČNI RAD – PROFESIONAL PAPER

FORCE MAJEURE AND CHANGE OF CIRCUMSTANCES IN INTERNATIONAL TRADE – CONDITIONS FOR EXEMPTION FROM LIABILITY IN CASE OF BREACH OF CONTRACT

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ABSTRACT

The rapid technological development and the development of the global market continually contribute to the development of international trade as well as to the increasing the number of concluded international sales contracts. The conclusion of the sales contract always requires respecting the principle of "pacta sunt servanda", namely fulfilling the contract as it is written or as the parties have agreed. Furthermore, the international rules that regulate the sales contracts and the different national laws have incorporated provisions that exempt from liability the contracting parties when a breach of contract occurs as a result of certain circumstances that cannot be foreseen.

The exemption from liability of the contracting party, that has not performed its obligations, can be seen through the institutes of "force majeure" and "change of circumstances". The definition and application of these institutes differ in various national systems, as well as in the international sources that regulate the rights and obligations of the sales contract. Therefore, the paper aims to make a distinction between "force majeure" and "change of circumstances" in international trade through the analysis of the provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law (PECL), UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), as one of the most significant sources of the sales contract in the international law and in Macedonian Law on Obligations as well.

Keywords: force majeure, change of circumstances, international trade, sales contrac.t

INTRODUCTION

In common practice, many international sales contracts are concluded, whereas the contracting parties are always expected to fulfill, as agreed. When concluding a sales contract, it is essential to respect the principle of ***pacta sunt servanda***, i.e. to fulfill the contract as it is written. However, the contracting parties may not always fully comply with this rule, as certain unforeseen circumstances may arise in their day-to-day operations, which may impede the regular fulfillment of the obligations of the contracting parties and which circumstances may arise after the conclusion of the contract. In such instance, an absolute observance of the principle pacta sunt servanda would usually lead to serious damage to the interests of one party, and it might also affect the interests of the other party due to circumstances for which the affected party is not guilty (Petrić, 2007, p.108). Certainly, due to the occurrence of such unpredictable and unforeseen circumstances, the party that expects contract fulfillment may lose interest in it or due to those circumstances, he may not be able to fulfill its side of the contract; so, it is quite reasonable to end with contract termination or contract amendments, whereas the contracting party would be exempt from liability.

EXEMPTION FROM LIABILITY UNDER CISG

Exemption from liability under CISG is elaborated in more details in Articles 79 and 80, which are common provisions for the contracting parties, i.e. both the seller on one hand and the buyer on the other.

In fact, through these provisions, CISG addresses the problems arising from liability of non-performance of obligations under the international sales contracts created by the contracting parties that derived from the existence of certain impediments which one party could not foresee and could not avoid, or overcome such an impediment and its consequences.

Thus, according to Article 79, Paragraph 1, *if one party fails to perform its obligations, he will not be liable for non-performance if he proves that the non-performance occurred due to an impediment beyond his control and was not expected at the time of the conclusion of the contract to take into account the impediment and to avoid or overcome such an impediment and its consequences.*

Given that certain circumstances cannot be foreseen and on which basis the principle pacta sunt servanda cannot be observed, CISG has incorporated rules that exempt from liability the contracting party when a breach of contract occurs. In such scenario, CISG provides to respect the concept of force majeure[27] (Vis major) and Changed circumstances (also known as Change of circumstances or hardship, or Rebus sic stantibus)[28], although it is not explicitly provided for, i.e. force majeure and changed circumstances are not used in institutions.

Historically speaking, the UNCITRAL Working Group on the drafting of CISG decided to draft Article 79 in a stricter manner that would not provide relief for a party who has failed to perform simply because the performance has become unforeseeably more burdensome or unprofitable. At the Vienna conference where the debate was held, the drafters rejected the Norwegian delegation proposal of a supplementing Paragraph (3) of Article 79 on the grounds that it would allow commercial or economic hardship as a basis of claiming excuse for non-performance under the CISG. The drafters chose the word "impediment" after subjecting the Article to three stages of debates in order to define the extent of the promisor's liability for non-performance and that the Convention will only exempt liability for physical or legal impossibility and not for theories of imprevision or hardship that are based on the changed circumstances.[29]

According to the definition in Article 79, the changed circumstances may be considered only if they lead the party to an absolute impossibility of performing the contractual obligation, and not to a difficulty in performing. Therefore, it can be concluded that CISG does not take into account the principle of Rebus sic stantibus, and the changed circumstances are taken into account only if there is a complete impossibility of performing the contractual obligation, whereby the exemption from liability only works during the impediment. Contrary, when the application of the changed circumstances is concerned, another group of academic scientists and practitioners see through the prism of Article 7 and the application of the general principles, but in the absence of such principles and in conformity with the law applicable by virtue of the rules of private international law. They suppose that Article 79 can be extended through Article 7 of the Convention, which is in good faith to adapt to the concept of changed circumstances. However, these are academic opinions that have no binding legal effects.

Therefore, according to Article 79, Paragraph 1, in order to be exempt from liability the party obliged to achieve the performance of the obligation, three conditions must be fulfilled cumulatively,

[27]Force Majeure applies to cases where performance has become (temporarily) impossible due to an event beyond one party's control although all reasonable precautionary measures have been taken.
https://lorenz-partners.com/download/international/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-Contracts-Mar20.pdf p. 2

[28]Hardship deals with cases where the agreed performance is still possible. However, some underlying facts have substantially changed, so that proper fulfilling of the contractual obligations is still possible in principle, but does not make any economic sense.
https://lorenz-partners.com/download/international/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-Contracts-Mar20.pdf p. 2

[29]https://topeadebayollp.wordpress.com/2011/06/10/force-majeure-and-hardship-to-what-extent-does-article-79-of-s'cisg-excuse-liability-for-non-performance/

i.e. there must be an impediment to fulfilling such an obligation, **which was beyond his control.** With this, although CISG does not refer to "force majeure", it can be still concluded that it is the same concept because the party that has to perform the contractual obligation, due to certain external influences, is prevented from performing them. Such external influences may be strike, war, natural disasters - influences which the party could not reasonably foresee at the time of concluding the contract **(unpredictability)**, nor avoid or overcome such an impediment, i.e. its impact and its consequences (**unavoidability**).

Accordingly, impediments within the scope of CISG Article 79 should include: Acts of God (*e.g.* earthquake, lightning, flood, fire, storm, crop failure, etc.); events relating to social and/or political circumstances (*e.g.* war, revolution, riot, coup, strike, etc.); legal impediments (*e.g.* seizure of the goods, embargo, prohibition of foreign funds transfer, prohibition or restriction of foreign imports and/or exports, etc.); and other types of impediments (*e.g.* loss of a vessel, theft, robbery or sabotage during storage or carriage, general strike, general power supply cut etc.). The occurrence of any of the aforesaid events may (1) destroy the seller's premises or factory, (2) prevent the seller, the carrier, or the warehouse operator from delivering the goods to the buyer or his agent, (3) cause damage to or total or partial loss of the goods, or (4) prevent the buyer from paying the price.[30]

On the other hand, events within the promisor's personal sphere of responsibilities and risks shall not be considered as impediments for purposes of CISG Article 79. Accordingly, business failures, personal incapability, liquidation or bankruptcy, failure in production or accounting systems, failure in data processing equipment, failure to maintain the necessary personnel, illness, death or arrest of the promisor, incapability of the promisor's supplier to provide him with raw material, strike constituting internal confrontation at a factory (a general strike, however, shall constitute an impediment) or excessive increase in the price of the raw material should not discharge the promisor from his obligation to perform.[31]

To illustrate: a German seller, (claimant) brought a claim against a Russian buyer (respondent), in connection with the buyer's failure to pay for equipment supplied under a contract concluded between the two parties. The buyer acknowledged that the goods had indeed been delivered under the contract but stated that the non-payment was due to the failure of the bank responsible for the buyer's foreign currency transactions to provide instructions for the amount payable for the goods under the contract that need to be transferred to the seller. The bank did not transfer the foreign currency amount to the seller on the grounds that there were no funds available in the buyer's account in freely convertible currency to pay for the goods. Citing these facts, the buyer requested the tribunal to discharge it of liability since, in its view, the fact that it did not have available foreign currency resources should be regarded as *force majeure* discharging it from liability for the non-performance of its contractual obligations. The tribunal was not in agreement with the buyer's view that its lack of foreign currency should be regarded as *force majeure*, since the contract agreed between the two parties gave an exhaustive list of *force majeure* circumstances discharging him from liability for non-performance of its contractual obligations. The buyer's lack of foreign currency was not included in that list of force majeure. In addition, the tribunal stated that, under Article 54 CISG, the buyer's obligation to pay the price of the goods included taking such measures and complying with such formalities as might be required to enable payment to be made. On the basis of the case materials and the clarifications offered by the buyer during the proceedings, it was established that the only action taken by the buyer was to send instructions to the bank for the amounts payable under the contract to be transferred, but that it had not taken any measures to ensure that the payment could actually be made. The tribunal found in favor of the seller and ordered the buyer to make the payment for the goods supplied.[32]

Paragraph 2 of Article 79 refers to the non-performance of the obligation, but by a third person, if according to the contract the third person is engaged in the performance of the contract in whole or in part, i.e. only part of the contract. In such instances, the contracting party shall be exempt from liability for non-performance of the contractual obligation only if certain conditions are fulfilled:

[30] https://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html
[31] Ibid. https://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html
[32] http://cisgw3.law.pace.edu/cases/951017r1.html

- If the contracting party is exempt from liability based on the existence of an impediment that was beyond its control, and that he could not reasonably foresee, avoid or overcome it (Article 79, Paragraph 1) and
- The person engaged would be exempt if the provisions of Paragraph 1 of Article 79 were applied to him only.

This means that to exempt the party from liability when a third person is engaged to perform the contract in whole or in part, the above conditions must be fulfilled cumulatively and from both sides. That means that the party could not exempt the obligations by simply proving the impediment that was unpredictable and could not be avoided, but will have to prove that this is the case with the person engaged to perform or fulfill the contractual obligations.

However, the importance of the third party should also be taken into account, i.e. the person considered as a third party, so that the contracting party can be exempt from liability.

In practice, it is suggested that only the person that acts independently and is not related to the organizational structure of the contracting party can be considered. For example, the seller's suppliers should not be considered as third parties, since such persons simply create the preconditions or assist in the preparation for the performance of the promisor's obligation without performing the whole or part of the specific contract.[33]

In the afore-mentioned context, a German seller, defendant, sold vine wax for the treatment of grapevine stocks to an Austrian buyer, plaintiff. When some plants were damaged after the wax treatment, the buyer claimed lack of conformity of the goods and sued the seller for damages. The seller denied liability, arguing that it had acted purely as an intermediary and that the failure of the product was due to defective production by its supplier, an impediment that was beyond its control… The court noted that a delivery of defective goods may constitute as an impediment under Article 79 (1) of the CISG. It was also noted that, to be exempted from non-performance, the seller would have to prove that the non-performance was due to an impediment beyond the seller's control, that the impediment was not taken into account at the time of the conclusion of the contract or that the impediment or its consequences could neither have been avoided nor overcome by a reasonable seller (Article 79 (1) CISG). The court held that, in the given circumstances, the defect had not been beyond the seller's control; despite the on-going business relationship, and it was not reasonable for the seller simply to have relied on its supplier's product without tests, because it was a newly developed product. The court further held that, even if the seller has acted only as an intermediary, it was still liable for the lack of conformity of the goods. In such cases, the supplier of the intermediary could not be regarded as a third party according to Article 79 (2) of the CISG.[34]

Furthermore, according to the same Article, Paragraph 3, it is stated that exemption from liability is provided only for the duration of the impediment. This means that the exemption is temporary, i.e. after it is being implemented, the contracting party becomes responsible again for the performance of its obligations.

The party that fails to perform must give notice to the other party of the impediment and its effect on their ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for the damages resulting from such non-receipt.[35]

In any case, in accordance with Paragraph 5 of the same Article, the contracting party may use any right other than claiming the damage under the Convention.

Article 80 constitutes an independent basis for exemption from liability and concretization of the principle of good faith under Article 7 (1), i.e. it embodies the general idea that none of the contracting parties should impede or prevent the other party from performing it. In other words, it would be contrary to the principle of good faith and fair dealing if one contracting party could benefit from its harmful act (Фишер – Шобот, 2013, 451).

[33] https://www.cisg.law.pace.edu/cisg/biblio/liu6.html
[34] http://cisgw3.law.pace.edu/cases/980331g1.html
[35]Article 79 (4) United Nations Convention on Contracts for the International Sale of Goods - Конвенција на обединетите нации за договорите за меѓународна продажба на стоки („Службен лист на СФРЈ“ бр. 10/01 од 1984 година).

According to Article 80, *a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission*. Having this provision in mind, it can be concluded that to apply Article 80, several conditions must be fulfilled cumulatively: 1) the contracting party must make a breach of obligations, 2) there should be a certain behavior by the contracting party (act or omission) and 3) that act or omission is the cause for breach of the obligation which the contracting party should perform (Фишер – Шобот, 2013, 452).

Here is such example: the buyer may be obliged to deliver draft plans to the seller for the manufacture of the goods that are subject to the contract or to provide additional specifications for the goods subject to the contract, or to join voluntarily in the construction of the goods. Of course, according to Sandra Fisher Shobot, the buyer will then be responsible for any defects in the goods resulting from such an act. Also, the act taken by the buyer may consist of giving incorrect or incomplete instructions regarding the transport of the goods or the attempts to deliver the goods directly from the manufacturer, bypassing the seller, which is contrary to the concluded contract (Фишер – Шобот, 2013, 453-454).

In contrast, an example for omission is when the buyer has not taken all the necessary measures to obtain, for example, the necessary import licenses, and is not in accordance with the contract that the buyer should undertake. Such omissions may include a failure to provide the delivery address, failure to receive the delivery, failure to provide sufficient data to the seller to obtain the necessary licenses, non-payment of the price for which the seller has not delivered the rest of the goods (Фишер – Шобот, 2013, 454).

It can be concluded that the contracting party may, in certain circumstances, be exempt from liability for non-performance of contractual obligations if the contracting party meets the already stated conditions elaborated in Articles 78 and 80.

EXEMPTION FROM LIABILITY UNDER PECL

PECL defines the exemption from liability through the provision set out in Article 8:108. In fact, PECL in its part set forth the term "Excuse Due to an Impediment" to describe situations of force majeure (Tessema, 2017, 35).

It is noticeable that compared to CISG, the temporary exemption from liability is more broadly regulated, indicating that if the delay in performing the obligation is fundamental, and amounts to a fundamental non-performance, the contracting party may act as if it were a matter of fundamental non – performance, i.e. a fundamental breach.

In that sense, Article 8:101 (2) of the PECL clearly states that where a party's non-performance is excused alongside with the right to claim damage, the right to performance is also excluded. Whether the exemption under Article 79 CISG also extends to the promisee's right of performance has been a subject of considerable debate because of the somewhat misleading wording of the Article 79 (5) CISG (Schwenzer, 2014, 377). Unlike Article 79 (5) CISG which only expressly discharges damages and which "seems to warrant the right to claim performance even if performance has become permanently impossible, the excuse under Article 8:108 PECL excludes, as stated in Article 8:101 (2) PECL, not only damages but also the right to claim performance.[36]

Unlike CISG, PECL contains provisions that regulate changed circumstances and thereby PECL uses the term "a change of circumstances".

According to 6:111

(1) PECL, a party is bound to fulfill its obligations even if the performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to begin negotiations with a view to adapting the contract or terminating it, provided that:

a) the change of circumstances occurred after the time of conclusion of the contract,

[36] http://www.cisg.law.pace.edu/cisg/biblio/liu6.html

b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach an agreement within a reasonable period, the court may:
a) terminate the contract at a date and on terms to be determined by the court; or
b) adapt the contract to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

EXEMPTION FROM LIABILITY IN ACCORDANCE WITH THE UNIDROIT PRINCIPLES

Similar to CISG, the UNIDROIT Principles, through its provisions, provide the exemption from liability of the contracting party which failed to perform the contractual obligation. But unlike CISG, UNIDROIT principles, through the provision in Article 7.1.7, refers to force majeure. Although CISG does not use force majeure, it can be seen that, from the constitution of the provision itself, it could be seen that it is the same concept.

Based on the analysis, it can be noticed that Article 7.1.7 (1) in similarly defines the conditions for the application of force majeure as in Article 79 (1) of the CISG.

In general, force majeure in most legal systems is defined in a similar way and has a general character. Article 7.1.7 (2) UNIDROIT principles, as in CISG, stipulates that when the impediment is temporary, non-performance, i.e. excuse from non-performance lasts not only for the duration of the impediment, but the excuse shall have effect for such period as is reasonable having regard the effect of the impediment on the performance of the contract. This means that if the impediment is of temporary nature, the exemption from non - performance will be temporary.

For example, contract A is to lay a natural gas pipeline across country X. Climatic conditions are such that it is normally impossible to work between November 1 and March 31. The contract is timed to finish on October 31, but the start of work is delayed for a month due to a civil war in a neighboring country which makes it impossible to bring in all the piping on time. If the consequence is reasonable to prevent the completion of the work until its resumption in the following spring, contract A may be entitled to an extension of five months even though the delay was itself of one month only.[37]

Another example: the arbitration decision of the Centro de Arbitraje de Mexico from November 30, 2006 may clarify the meaning of Art. 7.1.7. In a dispute between a Mexican farmer and an American distributor of vegetables, the accused Mexican farmer failed to deliver enough vegetables to the American buyer. As the contract explicitly accepted UNIDROIT Principles, the accused invoked force majeure, because the storm and the flood caused by the meteorological phenomenon, called el Nino, damaged his crops and that is why he did not succeed in producing sufficient quantities of vegetables. The Arbitral Tribunal concluded that this event was definitely beyond the control of the defendant and that he could not have caused it in any way. However, the court considered that the defendant could have foreseen this event due to his numerous years of activity in the agricultural sector and his acquaintance with similar events in the past, thus failing the foreseeability requirement. Further reason for not accepting the effects of a force majeure clause is that the accused failed to inform the other contracting party about the events that caused the impossibility of performance of the contract, which is one of the obligations prescribed in Article 7.1.7, Paragraph 3 (Ditrih et all, 2019, 77-78).

Of course, to be excused from liability the party will have to give notice to the other party for the impediment and its consequences, and if the other party does not receive notice in a reasonable time period, the other party is liable for the damage resulting from such failure.

[37]UNIDROIT Principles of International Commercial contracts 2016, p. 241 https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf

Instead, the counterpart of the UNIDROIT Principles phrases the potentially available remedies in less restrictive terms, stating that the aggrieved party who was to receive performance from the defaulting party that succeeded in establishing an excuse may nevertheless claim "a right to terminate the contract or to withhold performance or request interest on money due". Indeed, remedies other than damages are not limited to those listed in this provision of the UNIDROIT Principles, because the right to reduce the price (CISG Art. 50) and to compel specific performance (CISG Arts. 46 and 62) may remain as available as the right to avoid or terminate (CISG Arts. 49 and 64) and the right to collect interest on money due (CISG Art. 78).[38]

The difference with CISG can be seen in the stricter criteria defined by CISG, in order to leave legal gap as little as possible. Thus, according to CISG, the party may be exempt from liability if the non-performance of the obligation of that party is a consequence of the non-performance of a third party who was engaged to perform the whole or a part of the contract. In order for the party to be exempt from liability as explained above, the conditions set out in Article 79(2) of the CISG need to be cumulatively fulfilled.

Unlike the CISG, but like PECL, UNIDROIT principles except force majeure, and determine the changed circumstances in their application too. Thus, in Chapter 6, Section 2, Articles 6.2.1, 6.2.2 and 6.2.3 define and establish the institute "hardship" as well as the effect of such circumstances. Regarding the changed circumstances, it can be noted that both UNIDROIT principles and PECL contain provisions that regulate the issue of changed circumstances, but there is a terminological difference, thereby UNIDROIT principles use the term “hardship”, while PECL uses the term “a change of circumstances”. However, although CISG does not contain rules in its provisions for this legal institute, the hardship can still be applied through the UNIDROIT Principles. Thus, for example, the Belgian Supreme Court has applied the UNIDROIT principles to fill in the gaps in CISG regarding this field, although the parties did not refer to their application in concluding the contract.[39]

According to Article 6.2.1, where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations that are subject to the following provisions on hardship.

The difference between PECL and UNIDROIT principles is apparent. Unlike the PECL, UNIDROIT principles set the general principle which states that a change in circumstances does not affect the obligation to perform (Article 6.2.1), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. Whether an alteration is “fundamental” in a given case will, of course, depend upon the circumstances.[40] On the other hand, PECL goes a step further in narrowing the events that could be considered a change of circumstances, by stipulating that the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear (PECL 6:111(2)(c)). This means that in some areas of business, and in specific contracts, certain risks come with the trade, or that specific type of a contract. Such risks are considered foreseeable, since their occurrence is somewhat typical, or the risk is assumed by the contracting party, pursuant to the signed contract (Ditrih et all., 2019, 79).

Article 6.2.2 determines the conditions that define the legal institute "hardship".[41]

Article 6.2.2 of the UNIDROIT Principles explicitly uses the terms “cost of the party’s performance” and “value of the performance” when talking about contractual equilibrium. In practice, that means that in cases where the execution of a contractual obligation can be precisely

[38] http://www.cisg.law.pace.edu/cisg/principles/uni79.html

[39] http://cisgw3.law.pace.edu/cases/090619b1.html

[40] UNIDROIT Principles of International Commercial contracts 2016, p. 219 https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf

[41] According to Article 6.2.2 of the UNIDROIT Principles, there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

monetarily determined, a general criterion for assessing the existence of a significant imbalance should be the percentage of the increase in the cost of the performed obligation, or the reduction in the value received by the other contracting party. However, in legal theory and practice, there are contradictory perceptions of how huge this percentage of increase or decrease in value should be to consider it hardship (Ditrih et all, 2019, 76). This article points out that the party that must perform the obligations due to certain impediment that makes the obligation performance difficult, puts the contracting party in an economically and financially unfavorable situation. Considering this, the contracting party may request a renegotiation to reduce the consequences of the occurrence of such circumstances which were not and could not have been foreseen at the time of concluding the contract. In fact, the authority to renegotiate is contained in Article 6.2.3, whereby the request for renegotiation must be made without undue delay and must, of course, contain the grounds on which it is based. According to Paragraph 2 of the same Article, the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. If the parties cannot find a reasonable solution and reach an agreement, then the court may either terminate the contract (under certain conditions) or adapt the contract in such a way to restore the equilibrium**.**

EXEMPTION FROM LIABILITY IN DOMESTIC LAW

Macedonian Law on Obligations also defines the institutes "changed circumstances" and "force majeure" through its provisions.

It seems that the legislator, in a very clear way, has established the preconditions for referring the changed circumstances through which the affected party is allowed to terminate or amend the contract through the provisions of Articles 122-125.

Namely, in Paragraph 1 of Article 122 of the Macedonian Law in Obligations is stated that the termination of the contract due to changed circumstances is conditioned by four assumptions:

1) the circumstances that make it difficult to perform the obligation of one party should act after concluding of the contract
2) if due to the changed circumstances the purpose of the contract cannot be accomplished.

A cumulative fulfillment of the assumptions is unnecessary so that the party can refer to changed circumstances. This means that the termination of the contract is possible in one of the two cases, i.e. alternatively.

The third and fourth assumptions require cumulative fulfillment, so that the party could refer to the changed circumstances in both cases:

3) The circumstances that make it difficult to perform the obligation in the above-mentioned cases to such an extent that it is obvious that the contract no longer meets the expectations of the contracting parties and in the general opinion, it would be unfair to keep the contract in force as such.
4) The party referring to the changed circumstances may not have been able to foresee such circumstances at the time of concluding the contract or to avoid or overcome them.

Thus, Paragraph 1 concludes that in addition to the termination of the contract due to changed circumstances, i.e. due to difficult fulfillment, the law would expand the framework in a case when the purpose of the contract cannot be fulfilled due to changed circumstances.

This provision is an example of a legal standard because its content is not fully and completely established and the court shall determine the content when applying this provision, i.e. when assessing whether there are circumstances that make it difficult to fulfill the obligation and purpose of the contract (Амповска, 2017, 4).

Furthermore, according to Paragraph 2 of Article 122, termination of a contract may not be required by a party referring to the changed circumstances if that party was obliged to take into account those circumstances to avoid or overcome them at the time of concluding the contract.

Also, the party requesting the termination of the contract cannot refer to the changed circumstances that occurred after the expiration of the deadline determined for performing their obligation (Paragraph 3).

Finally, Paragraph 4 of the same Article stipulates that the contract will not be terminated if the other party offers or agrees to change the relevant terms of the contract fairly.

In deciding to terminate the contract or its amendments, the court is guided by the principle of fairness in trade, taking into account in particular the purpose of the contract, the normal risk in the respective contract type, the general interest and the interests of both sides (Галев, Анастасоска-Дабовиќ, 2012, 498).

According to Paragraph 5, when a court declares termination of a contract, the court shall, at the request of the other party, oblige the party applying for the cancellation, to compensate the other party with an equitable amount for the damage suffered due to the termination.

According to Article 123, when a contracting party is entitled to request termination or modification of a contract in case of a change of circumstances, it shall inform the other party about such intention as soon as the change of circumstances comes to notice; if it fails to do so, it shall be liable for the damage suffered by the other party on account of not being informed in time. However, it should be noted that with such a provision, a party that has not given notice of its intention does not lose the right to seek termination of the contract, but only has the obligation to compensate for the damage caused.

Also, the parties in the contract may, in advance, waive their rights to invoke certain changed circumstances in the contract, unless that is contrary to the principle of good faith and fair dealing. This means that the circumstances must be precisely defined and in advance. This manner of waving invocation of the changed circumstances cannot be generally stated in the contract, but precisely defined, and must not be contrary to the principle of good faith and fair dealing. The court determines whether the contract is contrary to the principle of good faith and fair dealing, and in each case separately.

As previously stated, the Macedonian Law on obligations provides the possibility of exemption from liability when the performance of the obligation of one party has become impossible due to extraordinary external events. Article 126 regulates the non-performance of the obligation where neither party is liable for impossibility of performance. Also, the provisions of Article 126 state that non-performance of the obligation due to force majeure may be in whole or partial. The obligation performance may become impossible due to an extraordinary event, and it should meet three conditions:

a) the contract was concluded
b) the performance of the obligation became impossible before the arrival of the obligation
c) the performance of the obligation could not be foreseen in the moment of concluding the contract, nor could it be prevented, avoided or eliminated.

In this case, the obligation of the other party shall also cease, and if this party has fully or partially performed its obligation, he has the right to to return according to the rules on the return of that which was acquired unjustly.

In case of partial impossibility of performance of one party due to an event for which neither of the parties is liable, according to the Paragraph 2 of the same Article, the other party may terminate the contract, otherwise the contract shall remain valid. If the partial impossibility for the performance of the obligation does not meet the needs of the other party, the contract can be terminated. Otherwise the contract shall remain valid and the other party shall be entitled to request proportional reduction of its obligation.

According to Article 251 (5), the debtor may be exempt from liability for the damage caused if he proves that the subject of the performance would have been lost by accident even if the debtor had performed its obligation on time. The exemption from liability of the obligation under Paragraph 5 indicates that the accidental loss of the subject of the obligation refers to the loss due to a case and due a force majeure, if the subject of the obligation would accidentally lose and he would perform its obligation on time (Чавдар, Чавдар, 2012, 408).

Exemption from liability is possible due to force majeure cases, which according to Article 252, a debtor shall be exempt from liability for damage if he proves that he could not perform its obligation or that he is late with the performance due to external, extraordinary and unforeseeable circumstances arising after concluding the contract, which circumstances he could not have prevented, eliminated or avoided.

The difference between Paragraph 5 of Article 251 and Article 252 is noticeable in the following: Paragraph 5 of Article 251 stipulates that regardless of whether the debtor would perform

its obligation on time or with delay, the subject which was to be delivered, i.e. the subject of the obligation to be performed, in any case would have been lost by accident. For an accidental loss of an obligation to occur, it must be caused by a force majeure. So, because of the force majeure, the object would lose.

Article 252, on the other hand, stipulates that the performance of the obligation is not possible due to force majeure, but the performance can still happen with a delay; meaning that the reason for the untimely performance or non-performance of the obligation is the force majeure, but the subject still exists and the obligation can be performed, although it would be with a delay.

Similar to Article 251, as already noted before, CISG provides exemption from liability through the provision in Article 79, whereby the party requesting the performance of the obligation has no right to claim damages.

But unlike CISG, ZOO provides for contractual extension of liability in cases where the debtor would not normally be liable, as well as contractual restriction, i.e. contractual exclusion of liability.

However, since such contractual extension of liability or restriction, i.e. exclusion of liability, could be misused, Paragraph 2 of Article 253 stipulates that contractual extension of liability would not apply if it was contrary to the principle of good faith and fair dealing, and in Article 254, if the impossibility to perform the obligation resulted from intention or gross negligence of the debtor.

CONCLUSION

Events such as the breakdown of economic systems or other economic disasters, political tensions or upheavals, wartimes or exceptional weather conditions can considerably change the settings under which the parties had calculated their risks, costs and benefits under their contract.[42] The analysis in this paper concludes that the border is very thin to make a distinction between "force majeure" and "change of circumstances". As a reminder, force majeure is defined as an impediment that is beyond the control of the party that should perform the obligation, due to which the obligation was not performed, whereas changed circumstances are defined as a difficult performance of obligation, due to certain impediments that have been beyond the control of the party to perform the obligations, but their implementation is still possible.

It can be noted that in both cases the occurrence of an impediment is beyond the control of the party that has to perform the obligations, but the difference is that in force majeure such an obstacle prevents the party from performing its obligation, temporarily or permanently, i.e. partially or completely, and in this situation the party is exempt from liability throughout the duration of the impediment, while in change of circumstances such occurrence of an impediment that is beyond the control of the party that has to perform the obligation, only makes the performance difficult, but the performance is still possible. In such case, for the party to be exempt from liability, it is necessary to have a certain factor of risk in which, although the performance of the obligation is possible, however, the financial losses will have to be in fundamental proportion and would lead to an alteration of the equilibrium in performing the contractual obligations of both parties.

Of course, in the decision-making process, the last decision remains to the arbitrators and judges, deciding whether all the requirements for the application of these institutes have been met, taking into account all the circumstances of each case individually.

With this in mind, a terminological difference can be noticed. Namely, CISG and PECL are not used with the institute "force majeure", but with "excuse due to an impediment", while UNIDROIT principles are used with the institute "force majeure". The Macedonian law uses the "force majeure" institute. The situation is similar with the change of circumstances. Namely, CISG does not have provisions for change of circumstances. UNIDROIT Principles hereby use a special term of “hardship”. Meanwhile, PECL does not use the term of “hardship” but rather “change of circumstances”. And the Macedonian Law of obligations uses the term change of circumstances.

On the contrary, CISG does not provide provisions for the changed circumstances, unlike UNIDROIT principles, PECL and the Macedonian Law on Obligations on the other hand. However, between the theorists and the practitioners working in this field, the prevailing view is that changed

[42] https://www.trans-lex.org/100970/_/exemption-for-non-performance-in-international-arbitration-2009/

circumstances can also be applied in CISG through the prism of Article 7.2 using UNIDROIT principles as general principles since they are widely known in international trade. But given the fact that the application of the UNIDROIT principles in CISG as general principles is still a court decision, it can be concluded that such a solution poses a problem, as UNIDROIT principles can be applied to the contract only when they are called upon in the contract or when the parties call to *lex mercatoria*, i.e. the general principles of law.[43]

Different definitions of "force majeure" and "changed circumstances" can be seen in our Law on Obligations. The aim of this paper is to note that the law in a broader framework defines these institutes, as well as the assumptions that must be met for the party that has not performed their obligation to be exempt from liability.

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[43] See Preamble UNIDROIT Principles of International Commercial contracts 2016

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