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Changed Circumstances as Ground for Non-Performance of Contracts (An Overview of Macedonian Contract Law)

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Abstract

The purpose for which parties enter into a contractual relationship is to create relevant rights and obligations, which means that the interest of these parties is that the created obligations must be performed as agreed. As such, this purpose is supported since Roman law, through the principle of pacta sunt servanda. This principle meant that a party to the agreement is responsible for non-performance, while not entering into the reasons, respectively to the nature of the impediments that led to that non-performance. However, the case law quickly proved that the implementation of this principle frequently charging the party with responsibility for which it cannot really be responsible. After the conclusion of the contract but before the contract is performed a party's situation may change due to changed circumstances, change that make it impossible or excessively difficult to perform for any of the parties. Which means, the situation and circumstances have changed since the moment of signing the contract, that the parties would not have entered into the contract, or would have made it differently had they known what was going to happen. This paper examines exclusion of party's liability due to changed circumstances by provisions in the Law on Obligations of the Republic of Macedonia. The review includes the conditions that must be met to consider as changed circumstances, the obligation to give notice to the other party, and excluding the possibility of invoking the changed circumstances.

Key words

Changed circumstances, Law on Obligations

1. INTRODUCTION

The purpose of the signed contract is to define the rights and obligations of the parties of that contract. The interest of both parties, at least at the time of concluding the contract is, the contract to be performed as agreed, i.e. in accordance with generally accepted principle pacta sunt servanda. The parties are strictly bound to respect their obligations and deemed to have foreseen events which could interfere with the equilibrium of the contract. However, this principle of strict respect of the agreed obligations, reached its review in the modern laws. This is so because the fact that today's trade is increasingly characterized by complexity, dynamism, flexibility and uncertainty. Although the cases in which a party that does not performs is exempt from responsibility for non-performance of contractual obligations are not the same in all national legislations, considering the events that could lead to discharge in the legal doctrine and almost all legal systems distinguish between events that absolutely prevents the performance of obligations; and events that not prevent, but significantly hamper or hinder the performance. The first ones are covered with the institute of force majeure, while the latter with the institute of changed circumstances.

As force majeure (vis maior or casus maiores) are considered all the circumstances that could not be foreseen, the consequences that could not have been avoided even if they are foreseen: quibus humana infirmitas resistere non potest – that led to their inability to perform obligations and then the obligations of the debtor terminated and he was not forced to perform the promised obligation. For the case law, legal doctrine and the legislations, force majeure is the main reason for exemption from liability. On the other hand, after the conclusion, but before the performance of the contract, the situation of one of the parties may change due to changed circumstances, particularly where the contract need to be performed within a specified period of time or in the distant future. In accordance with what can be called the foundation of contract law – pacta sunt servanda – however, it will not be considered reasonable if it required the party to perform the contract, regardless of what happens.[1] This led to the emergence of the clause rebus sic stantibus, to protect the party where the performance of the contract has become excessively onerous or difficult for one of the parties due to unforeseen circumstances after the conclusion of that contract. This situation today is covered by the doctrine of so-called hardship in common law, imprévision in French law and Wegfall der Geschäftsgrundlage in German law.

2. NOTION

Unforeseeable changed circumstances are probably one of the major problems parties – especially those who are party to a long or longer term complex contract – may face in international trade. Indeed, with globalization these problems are increased as the involvement of more and more countries in production and procurement entails even greater imponderables.[2] Changed circumstances create a situation in which it is clear that the contract no longer meets the expectations of the parties and due to the general opinion it would be unfair the contract as such remains in force.[3] This situation causes disruption of the equilibrium of the contract. Specifically, the equilibrium of the contract can be affected in two principal ways. First, the cost of performance to one of the contracting parties can increase. Second, the equilibrium can be affected as a result of a diminution in the value of performance to a contracting party.[4] According to some legal systems, the unforeseen changes in circumstances that make the contract excessively onerous, but not impossible for performance, authorize the party to as for termination or to renegotiate the contractual terms. The paradigm of pacta sunt servanda or sanctity of contract simply places the burden of such a change of circumstances upon the party on which it falls. However, since the old Roman days the principle of impossibilium nulla est obligatio, or there is no obligation to perform impossible things, has been recognized.[5]

3. THE APPROACH OF MACEDONIAN LAW

Law on Obligations of the Republic of Macedonia does not contain specific provisions for the definition and regulation of the institute changed circumstances. It speaks for this institute within the part in which regulates the termination of the contract, provided certain articles (five of them) under the common title "Termination of the contract or modification due to changed circumstances." The provisions contained in these articles after giving the definition of changed circumstances, they directly released into the consequences that arise, respectively the rights arising for the party affected by such circumstances, as well as the conditions to be satisfied that the party concerned may rely on them. Although these provisions do not expressly exclude the possibility of changed circumstances being invoked in respect of other kinds of contract, changed circumstances will normally be of relevance to long-term contracts, i.e. those where the performance of at least one party extends over a certain period of time. According to the first sentence of the article 122: "If after the conclusion of the contract occurred such circumstances that hinder the performance of the obligation of one party, or if because of them it cannot be realized the aim of the contract (…)." In international terms, a precise definition may found in the Principles of International Commercial Contracts (PICC): "There is hardship where the occurrence of events fundamentally alerts 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."[6]

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[1] Niklas Lindström, "Changed Circumstances and Hardship in the International Sale of Goods", *Nordic Journal of Commercial Law* (2006/1), http://cisgw3.law.pace.edu/cisg/biblio/lindstrom.html, [12 May 2016]

[2] Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts", 39 *Victoria University of Wellington Law Review*, 709-725, 709.

[3] Article 122 of the *Law on Obligations of the Republic of Macedonia*, No. 18/2001. Amended by the Law amending the Law on Obligations, Official Gazette, No. 4/2002, No. 5/2003, No. 84/2008, No. 81/2009, No. 161/2009. Decision of the Constitutional Court of Republic of Macedonia, No. 121/2001, No. 78/2001, No. 67/2002, No. 59/2002.

[4] Stefan Vogenauer, Jan Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, New York: Oxford University Press, 2009, 717-718

[5] Ingeborg Schwenzer, op. cit., 709-710.

[6] Article 6.2.2 of PICC.

3.1. Circumstances should arise after the conclusion of the contract

The general condition is that circumstances must have occurred "after the conclusion of the contract", i.e. not have existed at the time of conclusion of the contract.[7] This is the position taken from article 6:111(1) of the Principles of European Contract Law (PECL) "(…) if performance has become more onerous (…)." If that party had known of those events when entering into the contract, it would have been able to take them into account at that time. In such a case that party may not subsequently rely on changed circumstances.

3.2. Circumstances could not reasonably have been taken into account by disadvantaged party or to have avoided or overcome them

Even if the change in circumstances occurs after the conclusion of the contract, paragraph (2) of article 122 makes it clear that such circumstances cannot cause changed circumstances if "they could reasonably have been taken into account at the time of the conclusion of the contract, or have avoided or overcome by the disadvantaged party." This second condition, which the circumstances to cause an exemption will have to fulfill, describes in a very flexible manner the criterion of foreseeability.[8] This does not necessarily mean that the provision can only apply to circumstances that arise after the conclusion of the contract. It may be the case that the circumstance already existed at that time, but that it was not recognisable to the party.[9] The reference here is thus the reasonable person (bon père de famille), in accordance with the general concept of the Law. The element of foreseeability in judicial and arbitration practice proved to be the most difficult for the non-performing party to prove. All potential circumstances to the performance of a contract are foreseeable to one degree or another.[10]

The circumstances must also be unavoidable. The non-performing party must have been reasonably unable "to have avoided or overcome" the circumstances. To "avoid" means taking all the necessary steps to prevent the occurrence of the impediment. In most cases, it will coincide with the idea of "beyond his control."[11] To "overcome", on the other hand, means to take the necessary steps to preclude the consequences of the impediment. It is closely associated with the condition of the external character of the impeding event. The attention here should be focused on the behavior of the non-performing party.[12] This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract.[13] Generally, it is suggested that the party will only be excused where extraordinary expenses and effort would be required in order to overcome the occurred circumstances.[14]

3.3. Circumstances should not occur after the period of time for performance of contract's obligation

Paragraph (3) provides that the circumstances which prevents a party from performing exempts the non-performing party from liability for damages only if the these circumstances occurred within the period of time for performance of contract, i.e. "A party may not invoke the changed circumstances which occurred after the deadline fixed for the fulfillment of his obligations." This rule, even though not with the desirable clarity as to the substance and the legal techniques, has the effect of termination or modification of the obligation to perform as it is often prescribed in international economic contracts and in some instances also in laws as the primary consequences of changed circumstances.

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[7] Peter Schlechtriem, Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, second edition, New York: Oxford University Press, 2005, 812-813.
[8] Fritz Enderlein, Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods : Convention on the Limitation Period in the International Sale of Goods (Commentary)*, New York: Oceana Publications, 1992, 323.
[9] Peter Huber, Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners*, München: Sellier European Law Publishers, 2007, 262.
[10] Paragraph 5 of article 65 [draft counterpart of CISG article 79] of the Secretariat Commentary of the 1978 Draft of the CISG, http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html, [02 May 2016].
[11] Cesare M. Bianca, Michael J. Bonell, *Commentary on the Internacional Sales Law*, Milan: Giuffrè, 1987, 581.
[12] Ibid.
[13] Paragraph 7 of article 65 [draft counterpart of CISG article 79] of the Secretariat Commentary of the 1978 Draft of the CISG, http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html, [02 May 2016].
[14] Peter Huber, Alastair Mullis, op. cit., 262.

3.4. The creditor has no right to terminate if the other party offers or agrees modification of contract's terms

Pursuant to paragraph (4) "The contract will not be terminated if the other party offers or agrees fairly changing of certain contract's terms." Paragraph (4) effectively provides that the debtor's right to change certain contract's terms takes precedence over the creditor's right to terminate the contract. As long as the debtor has a right for modification of contract's terms the buyer cannot rightfully and effectively terminate the contract.

3.5. Duty of notification

The party entitled to ask due to changed circumstances, termination of the contract is obligated for its intention to termination the contract to inform the other party after he knew that occur such circumstances and if fails to do so he will be liable for damages which the other party has suffered.[15] Through this provision, the Law expressly proves that it not allows the ipso facto termination, but the termination by declaration which notifies the other party for the termination of the contract. It should be noted that the damages for which the party is liable are only those arising out of the failure of the other party to have received the notice and not those arising out of the non-performance.[16]

4. CONCLUSION

From the examination of the changed circumstances in contracts under regulations prescribed by the provisions of the Law on Obligations of the Republic of Macedonia, some conclusions emerge. The provisions regarding the institute of changed circumstances are included in the section titled as "Termination or modification of the contract due to changed circumstances." As it can be seen by the place where they are assigned concerning the Law, but also by the name of the part that contains these provisions, it can be concluded that the changed circumstances are dedicated exclusively to the cases of termination or modification of the contract, and not conceived as an exception from liability that will be generally available for contracts. The second criticism that can be made to this section is that although its name includes the renegotiate of contract's terms due to changed circumstances, inside it does not regulate the authorization which is recognized as the various domestic legislations, as well as international convents and other international documents (such as ICC Hardship Clause 2003). Such a lack of principle do not contribute at all the accepted principle in legal doctrine, legislation and legal practice that the contract should be maintained in force as far as possible – favor contractus.

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[15] Article 123 of the Law on Obligations of the Republic of Macedonia.
[16] Paragraph 15 of article 65 [draft counterpart of CISG article 79] of the Secretariat Commentary of the 1978 Draft of the CISG, http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html, [02 May 2016].