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Phenomenon of changed circumstances in international arbitration

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The two core legal issues devoted to the problem of changed circumstances are force majeure and hardship. They are a kind of an exception from the *pacta sum servanda*rule. The qualification of these two issues in international arbitration is drafted from two documents: the CISG Convention (theUN Convention on Contracts for the International Sale of Goods) and the UNIDROIT Principals of International Commercial Contracts. They have similar content for the most part. The difference between the documents lies in the fact that the UNIDROIT Principals govern contracts referred not only to the international sale of goods, it should be stressed that it has a wider sphere of implement, as Principals regulate the validity of an issue, for instance [1]. However, in case these documents require different measures, the CISG will prevail due to its binding nature. The UNIDROIT Principle can still fill the legal gaps, while interpreting the Convention.

The first thing to be discussed is if these two phenomena are clear on the theoretical level. It is important to understand their further interpretation. The word «force majeure» is deduced from the words' collocation «an irresistible compulsion», taken from the Code Napoleon. It always finds its reflection in contracts as something outside human control, events which nobody is in charge of and can have any responsibility for. As a reason for restricted liability it is seen in the Hague-Visby Rules. But the arbitrage practice widens this issue, according to the judgment, the words force majeure can cover the dislocation of a business due to a strike or accidental events, but would not embrace bad weather conditions, sporting events, or a funeral [2]. In my opinion, the possible definition of force majeure could be: force majeure clause arises, when either party's to the contract performance of obligations has become completely impossible due to the circumstances, that cannot be expected by a reasonable man. A definition of force majeure is formulated in the Article 7.1.7 of the UNIDROIT Principals, the core characteristics, mentioned there, are: firstly, there must be a «non-performance by a party», secondly, it must be «due to an impediment beyond its control» and **«it could not reasonably be expected to have taken the impediment into account**» [5]. «Failure to perform» can be ether complete or partial, also defected or delayed.

Article 6.2.2 of the UNIDROIT Principals provides a definition of a hardship clause: "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." The detailed analysis shows that

there are three main elements for hardship to exist: it must be out of the parties' control, it is unforeseen and specially noted that it is fundamental in its nature. Whether changes are fundamental, of course, will be decided in every particular case. Due to the Notes on Article 59 of the Draft Convention on the Law of Treaties as recommended for Adoption to the United Nations Conference on the Law of Treaties by its Committee of the Whole in 1968: «A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for termination withdrawing from the treaty unless: (a) the existence ofthose circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty» It is told to be a doctrine of fundamental change. An important fact to be mentioned is that in the UNIDROIT Principals' edition of year 1994, an alteration connected with monetary terms was included and the exact figure was given. It was said that: «if the performances are capable of precise measurement in monetary terms, an alteration amounting to fifty percent (50%) or more of the cost, or the value of the performance, is likely to amount toa «fundamental" alteration» [4].

Article 79 of CISG relates to the doctrine of impossibility of performance and contains an obligation of a breaching party to give notice about its inability to perform. Does it mean that the party cannot avoid liability for delivering defective goods? Some people believe that a seller might not avoid it even if a situation suits Article 79's conditions perfectly, as it will not be able to inform the buyer about the impediment, especially when the defect is not obvious [3]. Other specialists point out that Convention does not make any distinction between the parties' obligations: «any of his obligations», also this document provides similar remedies for a breach of contract by both parties. We can come to the conclusion that conditions under which contracting parties will be exempted from liability of non-performance are the same. Arbitrage practice confirms this position.

In reality it is really difficult to distinguish hardship from force majeure, because they both deal with changed circumstances. The difference is that the hardship clause appears when the performance of obligations has become difficult or economically worthless, while force majeure is applicable only in the case of its impossibility, at least a temporary one. From the classic understanding of the concept, it is drafted that the main purpose of applying a force majeure clause is to settle the conflict between parties through termination or at least suspension of a contract, at the same time hardship requires firstly, renegotiations and after that adaptation of a contract. It should be stressed that the exact translation of «force majeure» into the English language is «acts of God», which is why the best example of circumstances, where it can apply is an earthquake or avalanche, something that nobody can influence, while the basis of hardship is a change of core circumstances of a contract in a way parties could not foresee at the moment of concluding. They are mainly affected by economic factors.

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