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CHANGE OF CIRCUMSTANCES AND FORCE MAJEURE CLAUSES IN SERBIAN LEGAL SYSTEM AND SOURCES OF INTERNATIONAL UNIFORM LAW

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Abstract: The effects of globalisation are many. One of them is the effect that globalisation has on commercial contracts and contractual relations between contracting parties. Due to a fast pace of economy and the speed and volume of the conclusion of contracts in international trade, participants must rely on stable and reliable legal framework for contractual obligations. In globalised economy, traders from different countries bring with them individual trade practices and norms of national legislation, often diametrically opposed, and sometimes the legal institutes that are regulated in one country don't even exist in another. This is the case with the institutes of force majeure and a change of circumstances. Due to large differences in the regulation of these two institutes in national legal systems, there have been demonstrated some attempts of standardisation and creation of a unified system of exemption from liability for non-performance, due to force majeure or a change of circumstances. This problem becomes even more evident when dealing with the long term contracts, which are prone to the effects of unforeseen circumstances. This paper aims to explore the nature of the above mentioned legal institutes in some of the most important sources of international commercial law. With a special attention paid to the Serbian regulatory solutions, in order to further understand the similarities and differences between the national legal systems and sources of international law. The first part of the paper deals with applicable legal framework in Republic of Serbia, concerning

force majeure and a change of circumstances. The second part of the paper deals with the international sources of commercial law, such as UN Convention on Contracts for the International Sale of Goods of 1980; UNIDROIT Principles of International Commercial Contracts; Principles of European Contract Law; Draft Common Frame of Reference; and Common European Sales Law.

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1. Introduction

To keep a promise and fulfil obligations is the corner stone of every legal system and order. These demands are expressed in the principle "*pacta sunt servanda*" (promises must be kept), which represents an irreplaceable element of contractual law and the functioning of civilised society and commerce as a whole.

Due to the very dynamics of legal relations, especially contract law, it has become evident that the principle "*pacta sunt servanda*" can't be blindly followed and therefore, it needs to be supplemented and amended. Certain events can come to play that with their sudden and unexpected effects can render the contractual obligation impossible to fulfil, despite all the efforts of the debtor to fulfil the obligation. In such situations, the fulfilment of an obligation can become unexpectedly and extremely hard or even impossible to accomplish. Insisting on the principle of "*pacta sunt servanda*" would in such cases, when execution is impossible, lead to absurd and unjust situations. In such circumstances, it is necessary to find the balance between the principle of "*pacta sunt servanda*" and the principles of "*jus est ars boni et aequi*" (The law is the art of goodness and equity).

As a correction to the rule "*pacta sunt servanda*", two legal doctrines have emerged in most legal systems. Those principles are: force majeure (*vis major, casus fortuitus*) and a change of circumstance (*clausula rebus sic stantibus*, hardship). Both clauses act as an "escape clause" to the general rule of "*pacta sunt servanda"* and can release both parties from liability or obligation due to an extraordinary event or circumstance beyond the control of the parties. The aim of this paper is to present how these two doctrines are regulated in international commercial law through analysis of the provisions of the most important sources of uniform law. Furthermore, this paper also discusses the applicable legal provisions on force majeure and hardship in Serbian legal system, in order to note and better understand the differences, similarities and positions of Serbian legal system, on one hand, and international commercial law, on the other.

2. Force Majeure and Changed Circumstances in Serbian law

2.1. Force Majeure – Applicable Legal Framework

Although the term "force majeure" is often used in legal life, legal theory and case law, however, it is not entirely defined what this term entails. The inconsistencies in determining this term today arise from the inconsistent solutions proposed by the Serbian Law on Obligations (*Official Gazette* of the SFRJ No. 29/78 of May 26th, 1978; Amendments in Nos. 39/85 of July 28th, 1985, 45/89 of July 28th, 1989 (YCC) and 57/89 of September 29th, 1989; Final amendments in the *Official Gazette of the* SRJ, No. 31/93 of June 18th, 1993). The provisions of the Law on Obligations sometimes use the term "force majeure" and sometimes a descriptive definition that, in fact, contains the essential elements of force majeure.

In commercial law, before the adoption and entry into force of the Law on Obligations, the notion of force majeure was less used. The main source of trade rules were codified business ethics rules that did not use the term force majeure, but did contain provisions on extraordinary events that could fall under today's definition of force majeure.

As previously mentioned, the Law on Obligations uses the term Force Majeure in multiple places through its text, but more often a descriptive approach is taken. For example, as one way of termination of the contract, Art. 137 p. 1 states the impossibility of fulfilment, for which neither side is responsible. It should be emphasized that the impossibility of fulfilment happened after the contract has been made. So it is necessary that the contract is validly made, and that it becomes impossible to fulfil its obligations later. On the other hand, if partial impossibility of fulfilment is in question (Paragraph 2 of the same article), it does not lead to the termination of the contract, but only gives the other party the right to terminate the contract, if partial fulfilment does not meet its needs. However, in both situations, the assumption is that the failure to fulfil is due to events for which the contracting parties are not responsible. (Stojanović & Perović, 1980)

We can see that the Law sets forth certain requirements, in order for the contract to be terminated. The circumstances in question have to be of such strength that the fulfilment of the contract becomes impossible and that neither of the parties are to be blamed for that. Also, the impossibility of fulfilment has to happen after the conclusion of the contract, which implies that neither of the parties knew of such possibility at the moment of the conclusion of the contract. Furthermore, in accordance with the general rule "*genera non pereunt*" (generic goods do not perish), the subject of the contract has to be individually determined and an irreplaceable thing or a specific action.

In case of impossibility of fulfilment within the meaning of Article 137, Paragraph 1, the obligation shall be extinguished and the debtor shall be released

from liability. The contract ceases to exist and, in that sense, a court decision would have only a determining effect. Also, with the termination of the main obligation the securities, warranties and other connected rights are also extinguished. (Stojanović & Perović, 1980).

Speaking of the release of the liability for damages, the Law on Obligations in Art. 263 prescribes that the debtor will be relieved of liability for damages if he proves that he was unable to fulfil his obligation, or that he was late in meeting the obligation due to the circumstances arising after the conclusion of the contract that he could not prevent. Starting from the rule that liability is based on the guilt of the debtor, the rule contained in Article 263 constitutes a deviation from that principle.

The inability to execute the obligation, or the impossibility to honour the deadline, and eventual release of the debtor from liability for the resulting damages, may be of importance only for those obligations in which, the execution of the contract happened some time after the conclusion of the contract. If the impossibility existed at the time of the conclusion of the contract, then the debtor's obligation would not have arisen, because, according to the known rule, "the impossible is no legal obligation" (*Impossibilium nulla obligatio*). (Stojanović & Perović, 1980)

The circumstances that arise after the conclusion of the contract, and because of which the debtor was unable to fulfil his obligation or failed to execute on the deadline, and is requesting exemption from liability for damages, must have the character of objective facts, i.e. the circumstances that the debtor did not induce by their behaviour, but they happened independent of his will, or his actions. In this case, the Law on Obligations does not require that these circumstances be of external origin. In other words, they are not required to have the character of force majeure. Of course, if they have the character of force majeure, then the debtor will be relieved of liability for damages. Furthermore, it is not only important that the circumstances were objectively unforeseen, it is also important how the debtor handled the unforeseen circumstances. If he, despite his best efforts, was unable to mitigate the circumstances, he is considered free from liability, which introduces a subjective element to the situation.

By reading the aforementioned articles and their comments, we can roughly look at the position and scope of the institute of force majeure in the Serbian legal system. However, the Law on Obligations also provides some more precise provisions, regulating the special situations of release of liability for damages.

Some special cases are outlined, for example in the provisions of Article 724, Paragraph 2 of the Law on Obligations, caterers' liability for the things brought by the guests to the catering facility is excluded due to the destruction or damage of the thing "due to circumstances that could not be avoided or eliminated". A similar terminology is then used by Article 731, Paragraph 1, which stipulates that the warehouse holder is liable for damages on the goods, unless it proves that the

damage was caused "due to circumstances that could not be avoided or eliminated". In spite of the fact that the Law on Obligations does not provide a definition of force majeure, in several articles it uses that term, regulating some special situations. For example, Article 187 of the Law on Obligations, regulating the special situation of compensation of material damage, envisages that a responsible person is obliged to give compensation in money if the thing that was seized by the holder has perished in an unauthorized manner "due to force majeure". Or, in Article 598, Paragraph 1, it is stipulated that the lease is terminated if the leased item is partially destroyed by some case of force majeure. The subheading preceding this article states: "The ruin of things due to force majeure".

Although, the terminology in the Law of Obligations is used quite freely and somewhat inconsistently, which we have seen in the aforementioned articles, the Law on Obligations, in fact, accepts and defines in greater detail the notion of force majeure, emphasizing the essential features of this legal institute.

2.2. Change of Circumstances – Applicable Legal Framework

In the legal system of Republic of Serbia, the *rebus sic stantibus clause* is regulated as a general institute of contract law, which applies to both civil and commercial contracts. With the adoption of the Law on Obligations, this institute has received its present-day legal framework. The Law on Obligations regulates this institute in Articles 133 - 136 under the heading "Termination or modification of the contract due to changed circumstances".

According to the Law on Obligations, if after the conclusion of the contract there are circumstances that hinder the performance of one party, or if the purpose of the contract cannot be realised due to them, and in either case to the extent that it is obvious that the contract no longer corresponds to the expectations of the contracting parties and it would be, according to the general opinion, unfair to maintain it in force in its present form, a party who has difficulty in fulfilling the obligation, or a party that, due to changed circumstances, cannot achieve the purpose of the contract, may demand that the contract be terminated.

The termination of a contract can not be enacted if a party calling for changed circumstances was obliged, at the time of conclusion of the contract, to consider those circumstances or to avoid or overcome them.

Stipulating that changed circumstance, as an event by which "the purpose of the contract can not be realized", the Law introduces criteria characteristic of Anglo-Saxon law, especially expressed in English law through the Doctrine of Frustration. Such criteria is uncommon among the continental legal systems and opens a debate on the purpose and intended vagueness of this provision. Deducing the purpose of the contract and gauging the intention of the contracting parties can be quite a challenge facing the courts.

On the other hand, in order to have the right to terminate the contract, a cumulative fulfilment of two criteria is necessary - that it is obvious that the contract no longer corresponds to the expectations of the contracting parties and that in the general opinion, it would be unfair to maintain such an agreement in force. The above criteria does not seem to provide an answer to the whole range of questions that can be posed in practice. They range from problems related to the finding that the contract "obviously no longer meets the expectations of the contracting parties", which is, as a rule, the basis for different interpretations and disputable situations, to the problem of applying the "general opinion" standard to a particular case. Furthermore, by requiring that it be an event which the party calling for changed circumstances was not obliged to "consider" when concluding a contract, the Law on Obligations essentially sets the requirement of unpredictability of the event. (Perović, 2012)

It seems that here it was necessary to start from the principle of equity, which should be the basic explanation of the possibility of termination of contract or change of contract due to changed circumstances, but this criterion should have been expressed in the Law by more concrete and precise instruments, not so broad terms as "general opinion" and similar terms. Although inspired by the best motives, such wide and diffuse criteria can cause a lot of difficulty in the practical application of the institute. (Stojanović & Perović, 1980)

Apart from defining the institute, the Law on Obligations further develops the rules and consequences of changed circumstances. Therefore, in Art. 134, The Law stipulates a rule concerning the duty to notify the other party of the intention to terminate the contract due to changed circumstances. In this respect, the party affected by the changed circumstances shall be obliged to inform the other party of its intention to terminate the contract as soon as it has learned that such circumstances have occurred. If the party has not done so, they are liable for the damage suffered by the other party because of the failure to notify them in time. In addition to the termination of the contract due to changed circumstances, the Law recognizes the change of contract as a possibility, although indirectly, by stating the rules that the contract will not be terminated if the other party offers or agrees that the appropriate conditions of the contract are fairly changed. The provisions of the Law on Obligations that relate to changed circumstances show the influence of jurisprudence and the theory of German law, in particular the theory of "disruption of the basis of the contract", i.e. the theory of the extended interpretation of the institute of force majeure.

From the provisions of the Law on Obligations, it follows that these rules are *naturalia negotii* of trade contracts. The parties do not have to agree on this clause, either explicitly or implicitly. However, they have the possibility of prior waiver of the right to terminate the contract due to changed circumstances, unless it is contrary to the principle of conscientiousness and honesty, which is regulated by Article 136 of the Law on Obligations.

Analysing the provisions of the Law on Obligations, it can be concluded that the rules of the Law, in terms of certain issues, differ from the corresponding solutions of international conventions and other sources of uniform law, which will be discussed further in this paper. These differences primarily relate to the broadly set criteria for determining the events of changed circumstances and its consequences. Moreover, the Law does not leave room for the option of renegotiations between the contracting parties, and the possibility of amending the contract is only provided indirectly, through the rules that the contract will not be terminated if the other party offers or agrees that the appropriate conditions of the contract are fairly modified. This broad spectrum of what can be considered a change of circumstances and introduction of objective criteria, such as the frustration doctrine, further complicates the practical use and hinders the courts efficiency.

3. Force Majeure and Changed Circumstances in Sources of International Law

3.1. Force Majeure and Changed Circumstances in the UN Convention on Contracts for the International Sale of Goods of 1980 (CISG)

The UN Convention on Contracts for the International Sale of Goods (CISG) was adopted in 1980 in Vienna and is one of the most important sources of uniform law in the field of trade. Its goal is to establish a modern, uniform and fair system for contracts in international trade. CISG significantly contributes to the establishment of security in international commerce, as well as to the reduction of the costs of commercial transactions. To date, the Convention has been ratified by 85 countries, making it one of the most successful uniform laws.

The CISG does not provide for explicit rules on changed circumstances and force majeure, moreover, it avoids the terms of a changed circumstance (hardship) and force majeure (vis major). Avoiding legal terms specific to a particular country is a common practice adopted throughout the Convention.

We need to look at both legal institutes through the prism of Article 79 of the Convention, which deals with the release of the contracting party from liability for damages in the event of failure to perform a contractual obligation due to an interference that is beyond the control of the contracting parties. (Schwenzer, 2008)

According to Article 79 of the Convention, in order for the debtor to be released from liability for failure to fulfil the obligation, the following conditions must be met: a) that the failure to fulfil the obligation was due to an interference beyond the control of the debtor; b) that the interruption was unpredictable for the debtor at the time of the conclusion of the contract; and c) it was not reasonable to expect the debtor to avoid or overcome such an obstacle and its consequences. (Perovic, 2012)

It is important to note the time when an interference prevents the execution of the contract. In the case of force majeure, the legal theory almost unanimously accepts an opinion that it does not matter, if the disruption to the performance of the contract occurred after the conclusion of the contract or it already existed at the time of its creation. Thus, if the goods to be sold have already perished at the time of the conclusion of the contract, but the seller did not know or could not prevent the destruction of the goods, he may be exempted from liability in accordance with Article 79 of the CISG. Under changed circumstances, however, the disruption of contractual relations must arise after the conclusion of the contract. (Schwenzer, 2008). Although the provisions of that Article may apply when the circumstances have changed after the conclusion of the contract, they do not constitute rules that would fully cover the institute of changed circumstances. This Article regulates the exemption of the debtor from liability for damages, due to the failure to fulfil the obligation due to the circumstances that, at the time of the conclusion of the contract, the parties were not obliged to consider, anticipate, avoid or eliminate. With the terminology used, it is clear that it does not have to be a subsequent obstacle that prevented the contract fulfilment, but also the circumstances that existed at the time of the conclusion of the contract, and the parties could not take them into account with due care. Furthermore, there is a requirement that these circumstances must lead to an absolute impossibility of fulfilment of the contract, and not to a difficulty in fulfilment. Lastly, the consequence of the application of Article 79 is the loss of the right to compensation, and not the right to change or terminate the contract, which is the main right under classical conception of changed circumstances.

Analysing the Article 79, we can conclude that the CISG does not know the *rebus sic stantibus clause*, but only covers this legal institution in cases where the execution of the obligation becomes impossible, and even then the Convention seeks to sanction the loss of the right to compensation, which is not otherwise achieved by the application of this clauses in national legislature. There is no doubt that the provisions of Article 79 of the Convention apply to situations where the fulfilment of the contract has become impossible due to force majeure, but the legal doctrine is divided into the question of whether the possibility of invoking the changed circumstances is regulated by the Convention or is it explicitly or implicitly excluded as a possibility for the parties. If we decide that changed circumstances are not excluded as an opportunity for a party to be called upon under the CISG, there are two possible solutions in the legal field. The first solution is: The issue of changed circumstances is not regulated by Article 79, but is a matter that falls under the scope of the Convention, although it is not specifically regulated therein, and must be resolved by applying the principles on which the Convention is based or the principles of international private law. The second solution is that the changed circumstances are regulated by Article 79, but the Convention does not regulate precisely the preconditions for dealing with cases of changed circumstances, and again the application of Article 7.2 comes into play, which refers to filling in legal gaps in the Convention. A sizable part of the legal

doctrine points out that a party can not claim exemption from a contractual obligation under rules other than those contained in Article 79 of the Convention and that excludes invocation of changed circumstances. (Uribe, 2011)

Much like the legal doctrine, the case law remains divided on the impact of changed circumstances under the scope of the Convention. Although currently prevailing attitude is that Article 79 relates to changed circumstances, the case law is not unique on this issue. It can be noted that the courts are very restrictive when invoking the article in question, and that the party can be released from contractual obligations only under the circumstances that led almost to the impossibility of fulfilment. (Uribe, 2011)

More recently, when dealing with changed circumstances under the CISG, the courts have found that applying the Art. 7.2 to fill the gap seems inadequate in the case of changed circumstances. Applying the Art. 7.2 leads to the application of domestic law systems which are widely divided on the problem of changed circumstances. That could lead to inequality and different solutions in same situations. That is why, the courts, have opted to use the principles on which the Convention is based on. More precisely, the principle of equity. Based on this principle and uniformity, which is the main goal of the Convention, the courts have opted to use UNIDROIT principles as a supplement to the CISG, since these Principles, not only contain separate clauses on changed circumstances (hardship) and force majeure, but are also based on equity and uniformity.

3.2. UNIDROIT Principles of International Commercial Contracts

UNIDROIT Principles of International Commercial Contracts were published in 1994 by the UNIDROIT Institute (International Institute for the Unification of Private Law), supplemented in 2004, 2010 and 2016 with the aim of harmonising the law of international trade contracts. As these principles have an optional character, parties in international trade transactions must agree on the use of UNIDROIT Principles in their contracts (soft law). In relation to CISG, UNIDROIT Principles are familiar with the force majeure and changed circumstances, and as previously mentioned, could be used to supplement the Art. 79 of the CISG based on the principles of equity and uniformity.

3.2.1. Changed Circumstances in UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles contain rules on changed circumstances, and the reason is the need to give an appropriate attention to the Institute of Changed Circumstances, since modern commerce is characterized by a large number of long-term contracts. Such contracts result in an increased risk of occurrence of extraordinary circumstances. Also, the great diversity between the solutions of certain national legal systems has led to the need to regulate this issue more

closely. UNIDROIT Principles are based on the principle of *pacta sunt servanda*, i.e. they emphasize that the contracting parties are in principle bound by the contract and foresee the institution of changed circumstances as an exception. The Principles use Anglo-Saxon term "hardship" for the changed circumstances.

According to Article 6.2.2. of the UNIDROIT hardship exists when the occurrence of an event significantly (fundamentally) changes the balance of the contract, either because the cost of executing an obligation on one side has increased or because the value received by the other party is diminished and a) those events occurred or became known the disadvantaged party after the conclusion of the contract; b) the disadvantaged party, at the time of the conclusion of the contract, could not reasonably consider the events; v) these events are out of control of the disadvantaged party; and g) the risk of the event was not assumed by the disadvantaged party. As we can see from the mentioned article, the Principles allow for the event to happen both after the conclusion of the contract and after, if these events were not known to the parties at the time of the conclusion.

The Art. 6.2.2. of the UNIDROIT Principles explicitly uses the terms "cost of the parties performance" and "value of the performance" when talking about contractual equilibrium. In practice, that means that in the case where the execution of a contractual obligation can be precisely 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 in order to consider it hardship. For example, there was an understanding that an event that results in a change in execution costs or that decreases the value of the obligation in an amount equivalent to 50% or more, can be considered a change in circumstances that leads to a significant imbalance in contractual obligations. However, this 50% threshold is criticized in the literature as arbitrary and too low, so the "50% or more" rule did not find its place in the comments of the UNIDROIT Principles. In 2004 commentary of the Principles, it is stated that: "It depends on the circumstances of each particular whether there have been significant (fundamental) changes in the contractual equilibrium". Although this position does not fully satisfy the requirement of legal certainty, it has remained unchanged since then. Official commentators of the UNIDROIT Principles did not find an alternative solution that would help the courts and arbiters in their decisions. (Girsberger & Zapolskis, 2012)

Regarding the legal effects of hardship, the Principles foresee two stages of the proceedings. The first stage is negotiations between the contracting parties. The aim of these negotiations is to eliminate the imbalance in the contractual relationship, either through the change of the contract or its termination. The

disadvantaged party has only the power to demand negotiations, but there is no obligation for the other party to accede to those negotiations. If the negotiations "within a reasonable time" do not yield satisfactory results, it is envisaged that both parties can initiate court proceedings. This begins with the second phase of the proceedings, the stage of the court proceedings. The UNIDROIT Principles give the courts very wide discretionary powers. The court can terminate or modify the contract if it finds that the specified conditions have been fulfilled. In the case of termination of the contract, the court determines the terms and conditions of the termination, and if the court decides to change the contract, it determines the ways in which the distorted balance will be established. Whether the termination or the change is going to take place is completely up to the courts, the Principles don't favour one option over another.

3.2.2. Force Majeure in UNIDROIT Principles of International Commercial Contracts

The provisions on force majeure are located within the chapter of the Principles that deals with the non-fulfilment of the contractual obligation, while hardship provisions are located within the chapter on performance of the contractual obligation. The logic behind this lies in the fact that if the performance is impossible, then the contract won't be executed, therefore the question whether the party is exempted from the result of non-execution or if there is a place for compensation of damages will be decided based oн the provisions of non-performance. And if the performance has become onerous, the consequences will be reflected as some kind of performance. (Perillo, 1998)

Unlike CISG, UNIDROIT Principles use the term force majeure (the term comes from the French language). Article 7.1.7. refers to force majeure. This article accepts the general notion of force majeure as an excuse for non-fulfilment of an obligation. Article 7.1.7. Paragraph 1, further explains: Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

The arbitration decision of the Centro de Arbitraje de Mexico from November 30th, 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 the 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 requirements prescribed in Article 7.1.7, Paragraph 3.

As already mentioned, Paragraph 3 requires that a party invoking force majeure must inform the other party of an impediment, preventing it from executing the contractual obligation. If the notice was not given within a reasonable time after the disadvantaged party knew or had to know about the impediment, they are responsible for the compensation of damages resulting therefrom.

Article 7.1.7, although similar to Article 79 of the CISG, extends the significance of force majeure as a waiver of non-performance of the contract and provides that, in case of force majeure, the other party cannot seek enforcement, compensation of damages or any other claims connected to the contractual obligation affected by force majeure.

Article 7.1.7 also refers to the duration of an impediment that prevents performance. In the event that the impediment is only temporary, the affected party will be exempted only during the period of the impediment, or within a reasonable period of time, as long as the impediment has an effect on the performance. (Katsivela, 2007)

3.3. Principles of European Contract Law

Principles of European Contract Law (PECL) represent a set of model rules drawn up by leading contract law experts in Europe. The aim of the principle is to establish the basics of contract law, more precisely the common law framework for obligations for all EU Member States. They are based on the concept of a uniform European contract law, taking into account the specificities of the European market.

PECL were adopted by the Commission for European Contract Law, headed by Ole Lando, a lawyer and professor from Denmark, and are often referred to as Lando Rules. The Commission consisted of 22 members from all member states of the European Union. The first part of the Principles was published in 1995, then the second part in 1999, and finally the third part in 2002. Although foreseen as the general rules of contract law in the European Union, they are not mandatory and have the character of a recommendation (soft law). If the contracting parties decide to apply the PECL principles, the rules of domestic law do not apply to their contract.

3.3.1. Change of Circumstances in the Principles of European Contract Law

The final texts of PECL and UNIDROIT principles, although there are differences between them, accept the same concept and the same basic rules on changed

circumstances. There are differences in the organisation of the rules, as well as in terminology used. As already mentioned, UNIDROIT principles use Anglo-Saxon term "hardship", while PECL uses the term "a change of circumstances". Both texts are based on the principle of *pacta sunt servanda*, therefore the reliance on a change of circumstances is provided as an exception to the rule. (Petrić, 2008)

According to Article 6: 111 of the PECL, the contracting party is obliged to fulfil its obligation, although the fulfilment has become difficult, either because the cost of fulfilling the obligation has increased or because the value received by the contracting party is reduced. However, if performance has become excessively onerous, the contracting party may refer to changed circumstances. Unlike the UNIDROIT Principles, only the circumstances that occurred after the conclusion of the contract can be considered as a change of circumstances.

In line with the discussion about changed circumstances so far, one of the requirements set out by PECL is unpredictability of the event that renders performance extremely onerous. In other words, the affected party could not have reasonably considered the events at the time of the signing of the contract. 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, (c)) Meaning, that in some areas of business, 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 was assumed by the contracting party, pursuant to the signed contract.

Like the UNIDROIT Principles, PECL envisages two phases of the process. The first phase consists of the parties' negotiations, in order to eliminate the disruption in their contractual relation, either by changing the contract or termination of the contract. However, it is envisaged that both parties are obliged to enter into negotiations, unlike UNIDROIT principles that do not anticipate such an obligation.

The second phase is the stage of the court proceedings. Both parties may initiate court proceedings if negotiations do not yield satisfactory results within a reasonable time. PECL, also, gives the courts wide power, i.e. the court may decide, if it finds that the above conditions have been fulfilled, either to terminate or to amend the contract. The court terminates the contract under the conditions and effect it designates, or modifies it in a way that equitably distributes losses and gains between the parties arising from a change of circumstances. The PECL principles explicitly stipulate that the court may, in any event, award damages incurred as a result of one of the contracting parties not entering into negotiations or breaking them, contrary to the principle of conscientiousness and honesty. The court has full discretionary right to choose between a termination or modification of the contract. (Petrić, 2008)

Although, PECL delegates a lot of deciding power to the courts, when deciding whether to choose between the modification and termination, courts should, also, base their opinion on the principle *favor contractus*. They should first try to amend the contract fairly and in regard to the current factual situation and only as a last resort use the termination of the contract as a possible solution. In that way, PECL should have been more clear and decisive in order to provide more tangible guidance to the courts and arbitrations.

3.3.2. Force Majeure in the Principles of European Contract Law

PECL doesn't use the term force majeure, or any other established term for this institute. The provisions on force majeure are contained in Chapter 8, which refers to non-performance and remedies in general. Article 8:108 refers to an excuse due to an impediment that prevents performance, and for which the party could not be responsible and that couldn't have foresee or prevent the impediment. The same requirements are set out in PECL like in UNIDROIT, the impediment must be out of control of the party and the disadvantaged party could not foresee the event at the time of the conclusion of the contract or avoid or overcome that impediment and its consequences.

As with UNIDROIT principles, if an impediment is temporary, the disadvantaged party can be excused for non-performance only during the existence of an obstacle. But PECL principles emphasize an important distinction, if the time of the performance is a key part of the contract; the delay may have the character of non-performance and will be treated as such.

Paragraph 3, of the same article, establishes the duty of notification. The injured party has to notify the other side about the impediment and its effects that make the performance impossible. The injured party is obliged to do so in a reasonable amount of time, after the party found out about the impediment or was expected to have known about the impediment. This paragraph also establishes the right of the other party to seek any damages that have arisen as a consequence of failure to notify.

Under the PECL Principles, the consequence of invoking the force majeure clause is the complete release of the injured party from liability in the case of non-performance. In other words, that means that the other contracting party is excluded from requesting any type of performance and their ability to seek damages, unless the parties have agreed otherwise. Only in an event of partial non-performance, the other party may request partial performance, where possible, or choose to terminate the contract. For example, party A is renting a warehouse from party B. The warehouse gets partially damaged by a fire, which is a temporary and partial impediment preventing full performance, in this case, availability of the entire warehouse for storage. Party B can invoke force majeure and terminate the contract if the usage of the entire warehouse is necessary according to the contract

and thus be released from liability of non-performance. Party B has to inform party A of the new situation. Upon receiving the notification party, A can, however, decide that it can still use a part of the warehouse for storage, since the damage was only partial, and the storage is still usable. In that case, the parties can agree to change the contract to accommodate the new situation, e.g. reduce the price of the rent relatively to the usable space of the warehouse. Party B is still released from liability for not being able to provide usage for the rest of the warehouse. (Flambouras, 2002)

As we can see from the excerpt above, PECL Principles tried to approach force majeure from a wider angle, envisaging rules for non-performance, but also temporary non-performance and partial non-performance. Since a wide arrange of situations can arise when dealing with force majeure, it is important to have a wide base of rules to fall back on, which minimizes the possibilities of dubious interpretation of regulations by courts and arbitrations.

3.4. Draft Common Frame of Reference

Draft Common Frame Of Reference (DCFR) is an academic document written by legal scholars. The DCFR contains principles, definitions and model rule that constitute soft law; they do not have legally binding strength. DCFR contains general rules of contract law that express the essential values and ideas on which the EU contract law should be based on. The definitions proposed in the Draft create a unique and accepted European private law terminology that should be used equally, instead of defining the same terms in different ways in different EU legal acts.

Model rules are essentially performing the function of general legal norms on the EU supranational level, although, without legal sanction, which makes them EU soft law, such as the Principles of European Contract Law. They primarily serve as a guideline for legislators, with the goal of uniformity of both rules and terminology used in national legislature.

3.4.1. Change of circumstances in Draft Common Frame of Reference

The Draft Common Frame of Reference regulates the impact of changed circumstances in Article III.-1: 110, as an exception to the general rule, *pacta sunt servanda*. This article refers not only to contractual obligations, but also to obligations arising from unilateral contracts. Extending the reach of hardship to unilateral contracts is not common in national or international legal instruments. Taking into account that a large number of unilateral contracts is based on a promise made by a benefactor, one cannot deny the need to protect the debtor, who could face serious and unforeseen circumstances after the promise has been made. (Uribe, 2011)

Official DCFR commentators point out that the obligations arising under the law exclude the possibility of referring to changed circumstances. (Von Bar, et al. 2009)

In order for a contracting party to be released from liability for non-performance under the DCFR rules, the performance must become, not only, exceptionally onerous, but also that insisting on performance would be obviously unfair to the debtor. With this provision, the DCFR introduces a subjective measurement when it uses the terms "obviously unfair". What could be considered obviously unfair would have to be decided by the courts for each individual situation and with regards to the debtor's situation. That is why the DCFR doesn't require the contracting parties to renegotiate the terms of the contract, which is given only as an option. DCFR puts the deciding power in the hands of the courts by giving them an option to either change or terminate the contract, without prioritizing one of the two options.

For better understanding of the DCFR rules on a change of circumstances, we can turn to the official DCFR commentary. The commentary says that the change of circumstances must be 'very exceptional', of a nature that 'parties to a contract could not reasonably have foreseen when they made the contract', so that performance becomes 'excessively and disproportionately onerous' and leads to a 'major imbalance' between the parties' respective obligations. (Von Bar, et al. 2009. p. 711) Some examples are given, such as, if the imbalance is 'the result of the expected counter-performance becoming valueless; for example, if a drastic and unforeseeable collapse in an index of prices means that the debtor will be expected to do a demanding and extensive work for practically nothing' (Von Bar, et al. 2009. p. 712)

3.4.2. Force Majeure in Draft Common Frame of Reference

The DCFR doesn't use the term 'force majeure' or any other synonym established in trade law. In the Art. III. – 3:104 the DCFR talks about an "Excuse due to an impediment" in the Chapter 3 'Remedies for non-performance', where it is stipulated that 'A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences'.

In Paragraph 2 of the same article it is specified that 'Where the obligation arose out of a contract or other judicial act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.'

From the mentioned excerpts, we can conclude that the DCFR accepts the classical conception, as we had a chance to see in the UNIDROIT and PECL principles. There is no divergence there, except in the terminology used.

When it comes to terminology, one quirk of the DCFR is that instead of the terms 'termination of the contract' it uses the term 'obligation is extinguished'. As clarified in the Official commentary: when an obligation is extinguished, of course that means that the contract is terminated and that both parties are released from liability.

Apart from the debtor's duty to notify, the DCFR envisages a set of restitutionary rules if the obligation is extinguished completely, pointing to the Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations. (See III– 3:510)

3.5. Common European Sales Law

As part of the contract law harmonising effort, on October 11th, 2011 the EU Commission published a draft regulation on a Common European Sales Law (CESL) which is proposed to operate as an optional supplement to national law for the sale of goods and related services, and the provision of digital content. The regulation contains, as an annex, a 186 article autonomous code which is intended to operate simultaneously with current national laws. The Commission based the need for this document on the fact that the differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross-border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.

3.5.1. Hardship and Force Majeure in Common European Sales Law

CESL contains separate clauses on force majeure and hardship. The Articles 88 and 89 of the CESL closely follow the solutions laid out in the DCFR.

Article 88 provides for the exemption from any liability for non-performance of any contracting party unable to perform as the result of an impediment beyond its control or ability to overcome (although the other party may then terminate for fundamental non-performance). Article 89 adds provision for hardship cases, under the heading 'Change of Circumstances'. While in general increased onerosity has no effect upon the obligation to perform, the parties have a duty to negotiate the adaptation or termination of the contract if it is the result of an 'exceptional' change of circumstances occurring after the contract has been concluded. The change must be of a nature or scale that the party relying on it neither could have reasonably taken into account at the time of contracting, nor could be reasonably assumed as the risk of its occurrence. If the parties fail to reach agreement on what is to be done, then either party (or, presumably, both) may request a court to adapt the contract, in order to bring it into accordance with what the parties would

reasonably have agreed at the time of contracting if they had taken the change of circumstances into account, or to terminate the contract at a date and on terms to be decided by the judge. (MacQueen, 2012)

When it comes to hardship, the main difference between CESL and DCFR is that CESl establishes a duty to negotiate for both parties, before they can turn to the courts for the solution. Such an approach was rejected in the DCFR as 'undesirably complicated and heavy'. (Von Bar, et al. 2009) However, the text does not include what the consequences might be for refusing to renegotiate.

Given the limited negotiating space the contracting parties could have in modern globalised fast paced trade, imposing a duty to renegotiate could prove problematic and unsustainable in practice. Especially problematic is the renegotiation power of small and medium-sized enterprises when dealing with multinational corporations. Since this document is directed towards SMEs, a solution laid out in the DCFR establishes only that the debtor makes a good faith attempt to negotiate a solution as a precondition to going to court.

4. Conclusion

Creating a harmonised and reliable legal system is of upmost importance for facilitation of international trade. Equity, security and uniformity should be the cornerstones of that system. A system of clear supranational rules is meant to bridge the gap between differences in national legislation. Although attempts have been made to unify the commercial endeavours under one legal framework, all of the attempts fall short in one way or another. For international organisations, it has proven to be a task much more difficult than expected. Some divides in national legislation are enormous to easily be undone, on the other hand, differing opinion among legal scholars lead to unclear and contradictory provisions.

When it comes to force majeure and hardship, the divides in national legislation become obvious. In creating the single market, the EU has to bridge these gaps, in order to successfully unify the market. Inconsistent solutions and the use of general terms in sources of uniform law give too much power to courts and arbitrations, but also create a potential problem in decision-making. Given the infinite number of possible situations arising from long term contracts, vague and general terms presented in the sources of uniform law could lead to different decisions in same situations, which is not an option if equity and uniformity want to be achieved. Since both jurisprudence and case law are divided on this issue, there is no clear consensus on the effects on hardship and force majeure on commercial contracts and liability for non-performance. The biggest problem for courts and arbitrators can be drawing a hard line between hardship and force majeure situations, as well as determining the threshold of disturbance of contractual equilibrium where regular and expected risks occur and hardship starts.

For contracting parties, it might be best to incorporate hardship and force majeure clauses in their contracts, especially long term contracts. Thus pre-empting more possible negative effects that time and unforeseen circumstances could have on the contract. Some ideas of how these clauses might look could be found in model clause published by various international organisations, such as the International Chamber of Commerce (See ICC Publication No. 650). By adapting their contracts to these unforeseen situations, the contracting parties are contributing to the development of *lex mercatoria*, which relies on fair and equitable relations between contracting parties, without limiting the freedom of contract.

References

Belgium 19 June 2009 Court of Cassation [Supreme Court] (Scafom International BV v. Lorraine Tubes S.A.S.)

Flambouras, D. (2002). Comparative Remarks on CISG Article 79 & PECL Articles 6: 111, 8: 108. Guide to Article.

Girsberger, D., & Zapolskis, P. (2012). Fundamental Alteration Of The Contractual Equilibrium Under Hardship Exemption. Jurisprudencija, 19(1).

Katsivela, M. (2007). Contracts: Force Majeure Concept or Force Majeure Clauses. Unif. L. Rev. ns, 12, 101.

Lando, O., & Beale, H. G. (Eds.). (2000). Principles of European contract law: Parts I and II. Kluwer Law International.

Law on Obligations, Official Gazette of the SFRJ No. 29/78 of 26 May 1978; Amendments in Nos. 39/85 of 28 July 1985, 45/89 of 28 July 1989 (YCC) and 57/89 of 29 September 1989; Final amendments in the Official Gazette of the SRJ, No. 31/93 of 18 June 1993

MacQueen, H. L. (2012). Change of circumstances: CISG, CESL and a case from Scotland. Journal of International Trade Law and Policy, 11(3), 300-305.

Perillo, J. M. (1997). Force majeure and hardship under the UNIDROIT principles of international commercial contracts. Tul. J. Int'l & Comp. L., 5, 5.

Perović, J. (2012). Promenjene okolnosti u srpskom ugovornom pravu i izvorima uniformnog ugovornog prava. Anali Pravnog fakulteta u Beogradu, 60, 185-202

Petrić, S. "Uvod u načela europskog ugovornog prava (Landova načela)." Zbornik Pravnog fakulteta Sveučilišta u Rijeci 29.1 (2008): 335-370.

Schulze, R. (2012). Common European Sales Law (CESL). Beck.

Schwenzer, I. (2008). Force majeure and hardship in international sales contracts. Victoria U. Wellington L. Rev., 39, 709.

Stojanović, D., & Perović, S. (1980). Komentar Zakona o obligacionim odnosima. Kulturni centar–Gornji Milanovac, Pravni fakultet Kragujevac, 19(0).

Unidroit Principles (2016). International Institute for the Unification of Private Law

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)

Uribe, R. M. (2011). Change Of Circumstances In International Instruments Of Contract Law. The Approach Of The Cisg, Picc, Pecl And Dcfr. European Review of Private Law, 479, 8.

Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009). Principles, definitions and model rules of European private law: Draft Common Frame of Reference (DCFR). Walter de Gruyter.

PROMENJENE OKOLNOSTI I VIŠA SILA U SRPSKOM PRAVNOM SISTEMU I IZVORIMA MEĐUNARODNOG UNIFORMNOG PRAVA

Rezime: U današnje vreme, globalizacija je efekat koji najviše utiče na privredu. Globalizacija utiče i na trgovačke ugovore i odnose ugovornih strana. Usled ekonomije obima i brzine i količine zaključenih ugovora u međunarodnoj trgovini, učesnici tržišne utakmice moraju imati stabilan i pouzdan pravni okvir na koji se mogu osloniti. U globalizovanoj ekonomiji trgovci iz različitih zemalja sa sobom donose različite trgovačke običaje, kao i norme nacionalnih pravnih sistema koje su često dijametralno suprotne, dok ponekad, pravni instituti koji postoje u jednoj zemlji ne postoje u drugoj. Takav je i slučaj sa institutima više sile i promenjenih okolnosti. Usled velikih razlika u regulisanju ova dva pravna instituta u nacionalnim pravnim sistemima, nastali su pokušaji standardizacije i stvaranja jedinstvenog sistema oslobađanja od odgovornosti za neizvršenje ugovorne obaveze zbog više sile ili promenjenih okolnosti. Ovaj problem postaje još očigledniji kada su u pitanju dugoročni ugovori koji su podložni efektima nepredviđenih okolnosti. Cilj ovog rada je da istraži prirodu pomenutih pravnih instituta u nekim od najvažnijih izvora međunarodnog trgovačkog prava, sa posebnim osvrtom na regulativu Republike Srbije, kako bi se dodatno razumele sličnosti i razlike između nacionalnih pravnih sistema i izvora međunarodnog prava. Prvi deo rada se bavi pozitivno-pravnim sistemom Republike Srbije, koji se odnosi na višu silu i promenjene okolnosti. Drugi deo rada bavi se međunarodnim izvorima trgovačkog prava, kao što su: Konvencija UN o ugovorima o međunarodnoj prodaji robe iz 1980; UNIDROIT principi međunarodnih trgovačkih ugovora; Principi evropskog ugovornog prava; Nacrt zajedničkog pojmovnog okvira; i Zajedničko evropsko trgovačko pravo.

Ključne reči: viša sila, promenjene okolnosti, ugovori, uniformno pravo

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