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Force majeure as grounds for exemption from contractual liability

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ABSTRACT

The article deals with the definition of force majeure, force majeure as a basis for exemption from legal liability. The degree of influence on the conditions and possibilities of fulfilling the obligations of the parties under various trade agreements as a result of the introduction of a force majeure situation throughout the country is also considered. In this regard, businesses are interested in possible options for exemption from liability for improper performance of duties caused by force majeure. Taking this into account, the article analyzes the fact that answers the question of recognizing force majeure as exemption from liability, about the circumstances that should be recognized as force majeure and the reasons that contribute to exemption from liability for improper performance of obligations. In certain cases, force majeure is prescribed in the contracts as a reason for exemption from contractual liability, but many business entities do not specifically list in the contracts the cases that will be recognized as force majeure. The article compares different types of contracts, which contain clauses on force majeure.

Keywords:

force majeure, force majeure, civil liability, contract

A complex problem in the field of contracts, especially in international sales contracts, often arises when an unexpected event prevents the performance of a contract. Traditionally, this problem arises "when unforeseen events following the date of the contract make performance either legally or physically impossible, or excessively difficult, impracticable, or costly, or destroy the known utility that the agreed performance had for either party¹." But under certain circumstances, non-performance of contractual obligations is justified by the laws of most countries. There are some common characteristics to be found in these laws in all national jurisdictions; these include: (1) the circumstance arises after the

conclusion of the contract; (2) for which neither party is responsible; and (3) is considered by law to be a valid reason for performance²." Force majeure, as a general rule, releases the parties from liability for breach of their obligations. That is, from the imposition of fines / penalties for improper performance of obligations. Force majeure is an important tool in the mechanism of civil liability, acts as a general rule as its extreme boundary. It is often clear from the text of the law itself that it is impossible to resolve issues of civil liability without first establishing what force majeure is. Contractual obligations must be duly performed and a unilateral waiver of obligations is not permitted. Civil law provides that in the event of

¹ Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 COLUM. L. REV. 287 (1958) [hereinafter Smit].

² Schmitthoff, Frustration of International Contracts of Sale in English and Comparative Law, in some problems of non-

performance and force-majeure on international contracts of sale 127, 128 (Int'l Ass'n of Legal Science, ed. 1961) [hereinafter Schmitthoff]

a violation, legal consequences must occur, including the imposition of liability measures.

In accordance with Article 333 of the Civil Code of the Republic of Uzbekistan, the debtor is liable for non-performance or improper performance of an obligation if there is fault, unless otherwise provided by law or contract. The debtor is declared innocent if he proves that he has taken all measures depending on him for the proper performance of the obligation. The absence of guilt is proved by the person who violated the obligation. Unless otherwise provided by law or an agreement, a person who has not fulfilled or improperly fulfilled an obligation in the course of business activities shall be liable, unless he proves that proper fulfillment was impossible due to force majeure, that is, extraordinary and unavoidable circumstances under the given conditions (force- major). Such circumstances do not include, in particular, breach of obligations on the part of the debtor's counterparties, lack of goods on the market necessary for execution, lack of the necessary funds from the debtor³.

Currently, almost all contracts contain a clause on force majeure circumstances. A force majeure clause is a circumstance on the basis of which the responsible party is released from liability for failure to fulfill contractual obligations⁴. The force majeure condition, according to international business practice, is usually included in an open list of events that can be recognized as force majeure circumstances. For contracts at the international and national level, different wording of force majeure conditions is needed⁵. Please note that force majeure only exempts from liability for violation of obligations (i.e. from the imposition of fines / penalties), but does not remove the need to fulfill the relevant contractual obligations themselves. For example, if the company failed to deliver the goods within the time specified in the contract, it may refer to force majeure as a basis for exemption from penalties for late delivery.

³ Национальная база данных законодательства, 30.03.2022 г., № 03/22/760/0249.

⁴ Ерахтина О.С. Договорные условия о форс-мажоре и затруднительных обстоятельствах в

However, force majeure does not release from the obligation to deliver as such. If, as a result of force majeure, a business entity finds itself in a situation where it is impossible to fulfill contractual obligations, special attention should be paid to the provisions of the contracts concluded by it. They, as a rule, determine the algorithm of actions of the parties in the event of force majeure circumstances, and failure to comply with such provisions may lead to the impossibility of referring to force majeure circumstances in the future.

Thus, the following should be noted in the contract:

- Deadlines for notifying the other party of the occurrence of force majeure circumstances;
- Circumstances determined by the parties as force majeure;
- The form and means of communication by which the notice of force majeure must be sent to the other party;
- Documents that must be provided to the other party to confirm force majeure circumstances and the timing of their submission;
- Provisions on the right to unilaterally withdraw from the contract due to prolonged force majeure circumstances;
- Other conditions that the parties must comply with in case of force majeure.

If the contract does not contain provisions on force majeure, it is necessary to be guided by the general provisions of the Civil Code and other legislative acts that provide for the possibility of exemption from liability due to force majeure circumstances. If a party complies with all contractual provisions regarding the sequence of actions in the event of force majeure, this will help prevent liability (fines / penalties) for breach of contractual obligations.

The starting point for any force majeure clause is the definition of the force majeure event that will give rise to the clause. Some clauses use a very broad definition, referring to any "event or circumstance beyond the reasonable control" of a party seeking to rely on the clause. But this approach can lead to

предпринимательской практике // Законы России: опыт, анализ, практика. 2011. № 4. С. 65.

⁵ Узденова А.А. Оценка рисков в туристской индустрии // Научный альманах. 2015. № 9 (11). С. 318-321.

uncertainty. Another approach is to have an "exhaustive definition" that lists all categories of events that should be covered, such as war, natural disasters such as earthquakes or floods, terrorist attacks, etc. However, the parties will not be protected a force majeure clause if some completely unforeseen event occurs that the parties did not take into account when drafting the clause. For this reason, in most cases, the best approach is to have an exhaustive definition that lists the events that the parties think would be covered by a force majeure clause, but then includes a "cover all" clause to ensure that the definition do not preclude the application of the clause to other similar events. If such an approach is taken, the parties may also wish to expressly exclude certain events from the definition. In some cases, it may be appropriate to be even more precise and indicate that certain events will or will not be considered force majeure in relation to one of the parties to the contract, but not in relation to the other. The key point to remember is that while it would be unusual for a definition to require that the relevant event be unforeseen (given that force majeure events are often predictable but cannot be prevented), the event must be one that is located beyond the control of the other party. There is a model force majeure clause that has been developed by the International Chamber of Commerce⁶. This includes cases that contribute to the exemption from liability under contracts:

- natural disasters;
- explosions;
- fires;
- failure of machinery and equipment;
- strikes, etc.

There is also a clause that emphasizes what is not a force majeure: lack of permits, other documents - licenses, visas, residence permits⁷. Currently, in connection with the COVID-19 pandemic, many business entities are adding clauses to contracts providing for exemption from liability in connection with the pandemic. Typically, contracts include clauses providing for the termination of the contract if force majeure continues for more than 90 days.

⁶ Типовая оговорка о форс-мажоре. М.: Консалт- банкир, 1997.

If the parties to the contract cannot agree on exemption from liability due to force majeure, the parties may apply to the court. During the course of the proceedings, a party experiencing force majeure should be prepared to provide arguments on the following points:

- Unpredictability of circumstances. That is, the justification that at the time of the conclusion of the contract there were no force majeure circumstances, and the party could not have known about the possible occurrence of such circumstances;
- The inevitability and extraordinary nature of the circumstances. That is, the justification that the circumstances are exceptional and do not depend on the will of the parties;
- A causal relationship between the impossibility of fulfilling contractual obligations and force majeure circumstances. Here, the party has the right to present any evidence proving the actual impossibility of performing the contract.

In conclusion, it should be noted that force majeure circumstances are grounds for exemption from liability for breach of obligations. However, each case of impossibility of proper performance of duties must be analyzed separately to determine the specific circumstances and requirements of the relevant contract. Force majeure circumstances are the basis for exemption from liability if the legislative acts provide for this, and also if the contract specifically prescribes all possible circumstances that have the criteria of emergency and insuperability, as well as excluding the liability of the parties.

⁷ Булеков М. Непреодолимая сила: сферы применения // Хозяйство и право. 2015. № 3 (458). С. 114-128.