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COVID-19 PANDEMIC AND CONTRACTUAL RELATIONSHIPS: FORCE MAJEURE AND IMPOSSIBILITY[a]

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Abstract

In every country touched by Covid-19, contractual performance is affected. Legislation enforcing lockdowns has made many contracts illegal to perform. Excessively unbalanced contracts become major issue due to health emergencies. In order to release the debtor, the force majeure must be unpredictable. However, the world has been warned of a looming epidemic and its consequences onto unprepared world. The paper examines if the Serbian Act on Obligations and its rules on impossibility protect the debtors in the circumstances of Covid-19, by comparing domestic solutions with European, transnational and Common law. Despite numerous provisions, traditional solutions were not adequate, so emergency regulations have been adopted, usually incompatible with the private law regime.

Key words: Force-majeure; Impossibility; Contract Frustration; Covid-19; obligation termination.

ПАНДЕМИЈА КОВИД-19 И УГОВОРНИ ОДНОСИ: ВИША СИЛА И НЕМОГУЋНОСТ

Апстракт

Ковид-19 пандемија утицала је на уговорне односе широм планете. Услед рестриктивних мера испуњење многих уговора постало је немогуће, а здравствени разлози пореметили су уговорну економију у корист једне или на штету обе стране. Да би ослободила дужника од обавезе, виша сила треба да је непредвидива. Напротив, свет је упозорен да је неспреман за претећу пандемију и њене последице. У раду се анализира да ли српски Закон о облигационим односима одредбама о немогућности испуњења штити уговараче у ковид-19 околностима, упоређујући домаћа решења са европским, међународним и Common Law изво-

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рима. Бројна традиционална решења нису адекватна, па су их заменили интервентни прописи, често неусклађени са режимом приватног права.

Кључне речи: виша сила; немогућност; престанак облигације; неиспуњење обавезе.

INTRODUCTION

The Covid-19 pandemic has been characterized as "a natural catastrophe in slow motion". In the aftermath of the governmental measures (e.g. suspension of business activities, mandatory quarantines, mobility restrictions), almost any contractual relationship has been seriously challenged, since the performance have turned out to be entirely or partially impossible. Across Europe, telework is mandatory. Companies must take the necessary measures to ensure social distance. Those unable to comply must close, rendering their contractual performance impossible.

Performance may become either physically or legally impossible; and the impossibility may be only temporary or permanent. Even if performance remains possible, one party may find it much more expensive or difficult, or may no longer have any interest for contract execution. Frequently, the contracting party simply can no longer afford to pay. The most vulnerable are affected the most, common consumer problems are debt and unsuccessful refunds for cancelled travel bookings and events. Difficulties encountered by suppliers and customers are outside the normally assumed risks. The impact of the pandemic is unprecedented. As a global crisis affects all society and economy, it goes far beyond what the traditional legal means were developed for.

The situation is classified as social force majeure, since individuals have been hit by unemployment or illness. The law needs to balance the impact on the whole economy, rather than just protect single entity, be it a business or an individual. A notion of "societal force majeure" recognize that businesses are also in severe and unexpected difficulties (Alderman et al., 2020: 440).

FORCE MAJEURE

France

The notion of force majeure derives from the Code Civil of 1804 (CC), which included it as an excuse to contractual liability. Before the reform in 2016, art. 1148 stated that force majeure exonerates a party from paying damages: There is no occasion for any damages where a debtor was prevented (…) because of force majeure or an accidental event. This was similar to Serbian Act on Obligations (ZOO) art. 263, "Release of Debtor from Liability":

> A debtor shall be released from liability for damage upon proving his inability to perform the obligation, or that his delay in performing was due to circumstances taking place after contract conclusion, which he was unable to prevent, eliminate or avoid.

Provision in art. 263 belongs to ZOO section on contractual liability, and it does not relieve the debtor from primary obligation, just exonerates them from damages. We can associate the absence of debtor's fault in art. 263 with externality of force majeure.

The drafters of the CC did not provide any force majeure definitions. In 2016, legislature finally ended this uncertainty with the new Art. 1218: In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the contract conclusion and whose effects could not be avoided by appropriate measures, prevents the debtor to perform their obligation. If the prevention is temporary, performance is suspended unless the delay justifies contract termination. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged under the conditions provided by art. 1351 and 1351-1 (impossibility). Three elements are traditionally required: externality, unforeseeability and irresistibility (Fauvarque-Cosson, 2019: 24). Please notice that force majeure results in impossibility.

Natural disasters do not automatically qualify as force majeure under French law. Even though the courts are very restrictive, the Covid-19 pandemic is considered as force majeure (Berger and Behn, 2020: 95). Temporary impediment occurs in many cases regarding the pandemic, e.g. if the production can be resumed after the lockdown. In case of a permanent impediment, both parties are unbound from their obligations. Under the pre-2016 law, permanent impediment does not terminate the contract *ipso iure*, but the court judgement was required. These days, the contract is terminated by *ipso lege*, as in PECL and the UNIDROIT Principles (Fauvarque-Cosson, 2019: 25).

Serbia

The Serbian literature typically deals with force majeure as a reason for excluding liability in the tort law. Art. 177 ZOO, "Exemption from Liability", reads:

> (1) An owner (of dangerous object) shall be exempt from liability after proving that injury or loss took place due to a cause (…), whose effect could not have been foreseen, avoided or eliminated.

A force majeure is a natural event that causes damage. It ecomaps three main characteristics: 1. Event is extraordinary or unpredictable, exceptional or highly unusual, even for a very careful person. Certain natural phenomena (earthquakes and floods) can be predicted, but cannot be

controlled. 2. Event is inevitable or unavoidable, "stronger than human". Phenomena inevitable in one society can be remediable in another, and vice versa. 3. Event is external, not associated in any way with tortfeasor's activity. Natural catastrophes, such as earthquakes, storms, floods, avalanches and landslides, as well as unexpected actions by third parties (sabotage or assassination) represent the force majeure (Radišić, 2004: 231).

In a special part of ZOO dedicated to named contracts, there are certain provisions regarding Vis Major. Article 598, "Loss of Object due to an Act of God", reads:

> (1) The lease shall be terminated should the object leased is lost accidentally by an Act of God. Article 663, "Carriage Charge in Case of Interruption of Transport", provides*:* (3) A carrier shall not be entitled to carriage charge if the shipment is lost in course of transport due to an Act of God. Article 833, "Shipping", delivers: (5) Should a forwarding agent depart from instructions received, he shall also be liable for damage caused by Act of God, unless successful in proving that the damage would have occurred even if he had followed instructions.

General part of ZOO, dedicated to contracts in general, does not mention neither "Act of God" nor "Vis major" under those names. The Covid-19 pandemic is a natural event with all hallmarks of an external, unpredictable and unavoidable event, so it represents Vis Major. Even if no governmental restrictive measures were introduced, it is still a Vis Major (Pušac, 2020,: 145).

Force Majeure in a contractual clause

The force majeure renders the performance not just excessively onerous as in hardship, but impossible. The Covid-19 pandemic appears as a classical force majeure. Factual effects may involve illness or quarantine or even death of personnel, facility closures, or interruption of supply chains. Legal effects relate to lockdowns, curfews, travel restrictions and other measures (Berger and Behn, 2020: 91).

On 30 January 2020, the WHO declared Public Health Emergency of International Concern. Neither this declaration, nor force majeure certificates issued by public authorities (Pušac, 2020: 145), may not prejudge a court's factual evaluation of the Covid-19 situation in a given case (Berger and Behn, 2020: 92). It is important to prevent misuse of the force majeure defense, a tactic called "price majeure", i.e. attempts to renegotiate an unfavorable contractual bargain without an actual force majeure scenario (Berger and Behn, 2020: 93).

Because there are no codified legal rules on force majeure in the Common Law, and since the impossibility doctrine is very narrowly interpreted, contracting parties routinely include a standard Force Majeure clause:

> "If either party shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay".

This clause addresses the requirement of externality and includes a specific list of events. It includes a catch-all provision ("other similar causes") at the end (Schwartz, 2020: 55). Please notice that consequence of force majeure is temporal or permanent suspension of affected obligation.

In the Covid-19 scenario, there are two options for a party seeking to be excused: The "governmental laws" or the "Act of God" provision. Many treat the Covid-19 pandemic in the same manner as other natural disasters, like hurricanes, earthquakes or avalanches. Some commentators suggest that the pandemic does not qualify as an Act of God because its severity depends on human action. Others argue the opposite – an earthquake is still an Act of God, whether or not the factory has been earthquake-proof. A hurricane is an Act of God, even if it is partially a consequence of human-caused climate change. Pandemic is still an Act of God, despite it was spread by human behavior (e.g. travel) (Schwartz, 2020: 58).

Some force majeure clauses specifically list "diseases", "plagues", "epidemics" and "health emergencies". The recently revised ICC Force Majeure Model Clause of March 2020 lists plagues and epidemics. Those are uncontrollable and unforeseeable, provided that the party is able to prove that the effects could not have been avoided (Berger and Behn, 2020: 114). Application of Vis majeure clause will therefore depend on the selection of events listed as triggers, the consequences addressed by them (inability to perform, reduction in supplies), and whether what has actually happened is covered (Beale and Twigg-Flesner, 2020: 1197).

An interesting point is the "futility of enumeration." Prior to terrorist acts of September 11, 2001, Force Majeure clause that included the term "terrorism" was a rare occurrence. Since then, clauses including "terrorism" or "terrorist," become much more common. The clever solution may be to delete the Force Majeure clause entirely and rely solely on the Impossibility doctrine. Enumeration is pointless. Countless other disasters might come, from super-volcanoes to meteors. If you try to list all of these, a Force Majeure clause will be interpreted narrowly. If you add "meteor collision," but a comet ends up hitting the earth, a court would likely hold that not to be covered. However, if you exclude the Force Majeure clause entirely, the court would treat a comet the same as a meteor (Schwartz, 2020: 60).

Belgium

In Belgian commercial practice, force majeure exempts the debtor when new circumstances with the following characteristics arise: aggravated party is unaccountable; circumstances are unforeseeable and unavoidable; irresistibly results in an impossibility (Philippe, 2020: 1280). Please notice that force majeure is tied to impossibility. This is not the case in the Serbian law, where it is noted that sometimes force majeure can make performance more difficult, but not impossible. Vice versa, impossibility may have the cause other than force majeure (Jankovec, 1993: 55).

Force majeure must be an external, disruptive event, not attributable to the party that invokes it. This applies to the virus that comes from abroad and spreads impressively. The notion of unforeseeability is relative; the pandemic was envisaged in the 2013 German parliament report; in 2015, Bill Gates warned the public that the world was not prepared for the next pandemic. This leads us to the question of whether that means that the coronavirus pandemic was predictable. We refer to the prudent and diligent man placed under the same circumstances. The Covid-19 pandemic and its effects were not foreseeable. Based on the publicly accessible info, the existence of the virus was known as early as January 15 2020, but it is important to distinguish the impossibility to predict this sort of event, and the foreseeability of its effects. If the event was foreseeable, but its effects were not, the debtor will still be able to excuse himself. On 15 January, none could have foreseen that Covid-19 would spread on all continents: seller commits on February 2020 to deliver a product on April 2020; he knows of the coronavirus and its effects in China at this time, but he does not know that his Belgian factory will be closed on March 2020 under the Belgian ministerial decree; therefore, he can argue that restrictions were unpredictable when he committed (Philippe, 2020: 1281).

Force majeure results in the contract dissolution if it is final, and contract suspension if temporary. In a synallagmatic contract, the doctrine of risk applies. *Res perit creditori*: the thing perishes at the creditor's risk. Practically, if the seller is unable to deliver because of force majeure, he is released, while the buyer is also exempt from paying the price (Philippe, 2020: 1286).

Another question would be how to apply force majeure on a lease. Due to lockdown, his store has been closed so the tenant refuses to pay rent claiming force majeure; the landlord counters that the lack of liquidity is never a force majeure; Article 1722 of Belgian CC states that the lease is void in the event of a loss of the rented object so the impossibility of usage is equated with the loss; the landlord is not fulfilling his obligation to make rented property available for usage. Therefore, the tenant is entitled to suspend the payment of rents (Philippe, 2020: 1283). We already showed that Serbian law does contain similar provision in art. 598

ZOO. The solution from the Belgian author may be overextended, but it may be the only option for a tenant in Serbia.

Transnational Contract Law

The force majeure represents a truly transnational legal principle, a part of the "New Lex Mercatoria." It is reflected in Art. 79 CISG and Art. 7.1.7 UPICC. As digest of the decisive requirements, provisions overcome the differences contained in most domestic legal systems. Art. 7.1.7 UPICC provides:

> 1. party is excused if she proves that the non-performance was due to an impediment beyond control and that she could not reasonably be expected to have taken it into account at the time of the contract conclusion or to have avoided or overcome it or its consequences; 2. When the impediment is only temporary, the excuse shall have effect for such period.

The transnational force majeure doctrine does not appear to be grounded in impossibility, which of course is the sole justification for the original French doctrine (Berger and Behn, 2020: 109).

Transnational force majeure is based on the following four cumulative requirements: Externality: the obligor has not assumed the risk for the external event; Unavoidability/Irresistibility: The event was beyond the obligor's sphere of control and was absolute; Unforeseeability: The event and its consequences, i.e. the adverse impact on the ability to perform, could not reasonably have been avoided, e.g. by alternative and commercially reasonable modes of performance or safety measures; Causation (*conditio sine qua non*): The obligor's non-performance was caused by the external event and not by the obligor's own fault, e.g. by self-inflicted production problems, defective goods or packaging etc. The Covid-19 pandemic meets all four requirements, at least for contracts concluded before February 2020 (Berger and Behn, 2020: 110).

Virologists have predicted for many years that a pandemic such as the SARS of 2002-2004 could break out again. But the Covid-19 scenario was not foreseeable per se, no one could predict when and where it would occur. In spite of the disastrous consequences of the fast-spreading infectious diseases, parties cannot be "on permanent alert." Covid-19 is an event so unlikely to occur that reasonable parties see no need to allocate the risk of its occurrence (Berger and Behn, 2020: 111).

The global consequences of the Covid-19 pandemic, which affected multiple business sectors, make it easier for the affected party to prove the unavoidability. Contractual performance is partially or totally, temporarily or permanently suspended. Contract termination is only an "ultima ratio" remedy (Berger and Behn, 2020: 113).

IMPOSSIBILITY

Differences in Civil and Common Law

Many jurisdictions recognize some form of an impossibility doctrine tracing its roots to well-known *impossibilium nulla obligatio est*. Impossibility means the obligation cannot be fulfilled as agreed and no increased efforts could change that (Karanikić-Mirić, 2020a: 50). Subsequent impossibility excuses performance if renders it impossible for the party (subjective) or for everyone else (objective) and cannot be attributed to obligor's fault, i.e. willful or negligent action or omission. Mere incidence of expense or delay or onerousness is not sufficient.

The impossibility doctrine is narrow and rarely applied, as it undermines contract as a legally enforceable promise, otherwise parties would lose faith that contracts really are binding. An ordinary change in difficulty due to increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, are not sufficient (Schwartz, 2020: 49-50).

Doctrines on impossibility are common throughout the world. However, there is some variation: for example, Germany incorporated both initial and subsequent impossibility into BGB; England only recognized initial impossibility firstly (until providing for subsequent impossibility later); France only incorporated subsequent impossibility (as the force majeure) (Berger and Behn, 2020: 98).

The English courts developed a doctrine of frustration, where the underlying basis or purpose of the contract is altered, destroyed or made useless. If an unforeseen event amounts to frustration, the parties are released. The common law frustration doctrine looks like an extremely narrow version of a civil law doctrine of changed circumstances. However, it is still far away from many civil law jurisdictions because "common purpose" of both parties needs to be frustrated (Berger and Behn, 2020: 102). In civil law jurisdictions, even one-sided excessive onerousness exposes contract to *clausula rebus sic stantibus*.

The US modified impossibility doctrines to provide defense in situations where performance remains technically possible, but would be excessively onerous. Common law did not recognize the Canon law doctrine of changed circumstances and never developed a hardship doctrine, so subsequent changes are handled under impossibility doctrine (Berger and Behn, 2020: 97). Practical impossibility is recognized in Serbian doctrine as well. Obligation is practically impossible if it is associated with such exceptional obstacles, difficulties and material expenses that it is, by common sense, considered objectively impossible. For example, the debtor could pull the sunken machine out of the seabed, but with colossal additional costs, which cannot be reasonably demanded (Karanikić-Mirić, 2020a: 45). The practical impossibility is a normative query: is it fair to

ask the debtor to ruin himself? The practical impossibility implies that it has become irrational and meaningless to ask for performance as originally agreed. Fulfillment requires excessive expenses or it is a risk for life or health (Karanikić-Mirić, 2020a: 46).

Contracts can be frustrated because of changes in the law, supervening illegality, war, cancellation of an expected event and abnormal delay. Covid-19 and consequent governmental actions are falling within these categories. Where timing is important, the unavailability of stocks or staff is a frustrating event. Similarly, governmental Covid-19 restrictions render the performance of certain obligations illegal (Berger and Behn, 2020: 103).

Serbian ZOO

The ZOO contains a provision on impossibility dedicated to synallagmatic contracts. Article 137, "Impossibility of performance not attributable to either party" reads:

> (1) Should performance of obligation by one party become impossible due to an event not attributable to either party, the other party's obligation shall be terminated too, while a party performing part of his obligation may request restitution (…). (2) Should partial impossibility of performance be due to events not attributable to either party, one party may repudiate the contract should incomplete performance fail to meet his needs; otherwise the contract shall remain valid, while the other party shall be entitled to proportionate reduction of his obligation.

In case of total impossibility, contract is terminated *ipso lege*. (Karanikić-Mirić, 2020a: 31)

Subsection 2 of art. 137 is convenient for partial impossibility, it does not deal with permanent or temporal aspects. However, the logic is similar. In the case of a long-term contract (subscription-style contracts, gym membership, video streaming services) performance may be interrupted: a swimming pool is temporarily closed, a sport channel is unable to offer live events. If obligations are severable, then frustration applies to severable parts only. If the contract is frustrated partly, with some instalments already delivered, then the seller is entitled to receive payment for them. If the client paid for membership monthly, payment for each month and the access to gym facilities would be treated as severable. However, had the client paid for a whole year upfront, it might be more problematic to argue partial frustration. Proportionate part of the fee should be released (Beale and Twigg-Flesner, 2020: 1193).

In a special Decree, The Serbian Government implicitly took the position that the contractual obligations of travel organizers during the pandemic and state of emergency have not become impossible, but only

more difficult (Karanikić-Mirić, 2020b: 110). In reality, the situation was closer to temporary impossibility.

In addition to cited art. 137 dedicated to contracts, impossibility terminates obligations in general. Art. 354, "Termination of obligation due to impossibility of fulfilment" recites:(1) An obligation shall come to an end should its fulfilment is impossible due to circumstances for which the debtor is not to blame. 2) A debtor must prove the existence of the circumstances exempting him from liability. In both art. 137 and 354, the absence of fault is required for contractual obligation to cease without negative consequences for the debtor. As extraordinary and exogenous event, the impossibility will excuse the party and nonperformance will not count as a contractual breach.

Strict application of impossibility is justified because the law should not offer an escape route for what has turned out to be a bad bargain. Since the burden of proving the absence of fault lies on the debtor, the unpredictability of the pandemic goes to his advantage. Everything is foreseeable, at least with good imagination. Countless books and movies specifically depict alien invasions. However, if an invasion renders contractual performance impossible, it seems clear that the impossibility doctrine should apply. Conversely, if the parties enter into a contract after a hurricane has been spotted offshore, difficulties in performance due to that particular hurricane will not lead to a successful impossibility defense (Schwartz, 2020: 50).

Application to Covid-19

Doctrine of impossibility directly applies to contracts undermined by Covid-19. Pandemics have happened before (Spanish Flu of 1918), and scientists have repeatedly warned of recurrence. However, the same applies to hurricanes, avalanches or fires. The mere fact that natural disasters have happened in the past does not excludes the impossibility doctrine (Schwartz, 2020: 52).

If performance of the contract has become impossible due to Covid-19 (e.g. travel and work restrictions) the contract will be frustrated. If a government order prohibits the party from doing what they promised, this is "legal impossibility". A further category relates to physical impossibility, e.g. because of death or personal illness, lack of transport or other essential services. Sometimes legal and physical impossibility are mixed. If the babysitter failed to show up because pandemic made it physically dangerous for her to enter your house, the impossibility doctrine will excuse her. The outcome is even clearer if the government has issued an order for all to remain home (Schwartz, 2020: 53).

Not all of the Covid-19 measures will render performance permanently impossible. Many contracts can still be performed, or completed, only later. This requires asking whether the delay deprives the other party

of the substance of what they were contracting for. Similarly to consequences of force majeure in France or Belgium, Serbian literature classifies impossibility as temporal or permanent (Radišić, 2004: 177). It is worth to notice that ZOO does not acknowledge this important distinction (Jankovec, 1993: 75).

The Covid-19 pandemic significantly affects credit agreements. The ability of borrowers to keep up with regular instalments is compromised. Due to loss of income, consumers face serious financial difficulties resulting in the inability to repay the credit. Nevertheless, as generic obligation, monetary payment is treated as always possible (Pušac, 2020: 151). Illiquidity does not amount to frustration; instead, it is a risk that the debtor and creditor have to bear. Serbian law acknowledges the practical impossibility, although it cannot be reduced to the debtor's economic problems. The economic impossibility is not a valid defense. The obligation cannot be terminated just because it has become too difficult in the economic sense, even if it threatens the debtor's livelihood. Economic impossibility is not an objective impossibility, which ceases the obligation *ipso lege* (Karanikić-Mirić, 2020a: 48, 51).

Nevertheless, the circumstances are different this time, the systemic solution in the form of "emergency legislation" circumvented major public revolt and probably rebellion. The European Law Institute (ELI) published a summary of legal issues in relation to Covid-19. Principle 12 is about the moratorium on regular payments, particularly on taxes, rents, and loans. Final maturity date is extended for the duration of the moratorium and neither the calculation of the amount due, nor of other taxes or instalments subsequently due, are in any way increased. Statutory period of limitations should likewise be suspended. Furthermore, by acknowledging solidarity, States should favor partial or full release of certain types of matured debts (European Law Institute, 2021: 11). Moratoria on consumer credit and rent obligations have been introduced across Europe. The moratorium varies typically between three and six months. However, there remains uncertainty what happens when it ends (Alderman *et al.*, 2020: 439). National Bank of Serbia introduced moratorium on loan and leasing repayments (Decision on temporary measures for banks to mitigate the consequences of the covid-19 pandemic in order to preserve the stability of the financial system, Official Gazette of RS, 103/2020).

More difficult cases develop where Covid-19 renders performance much more difficult or expensive, but not factually or legally impossible. For instance, a supplier promises to deliver merchandise, but their factory in New York is shut down by government order. At first, it seems that performance has become legally impossible. But, same merchandise can be produced in a factory in Japan, with doubled cost. In that case, the courts would not relieve the supplier. At some point, however, the added expense could rise to a level where performance is effectively impossible.

In one well-known case, the court granted relief after performance cost turned out to be ten times what was anticipated. But the question of what would happen if it were five times as expensive arises (Schwartz, 2020: 53). In continental law, subsequent misbalance of contract economy (violation of the principle of equal value of contractual benefits) is a signal for the application of doctrine of changed circumstances. However, it is difficult to draw a precise line between onerousness and impossibility.

Refunds and Vouchers

A very disruptive element of the pandemic is the cancellation or substantial delay of prepaid events and services, due to the restrictions imposed. Weddings, sports events, cruises, air-travel, concerts and similar events are moment-sensitive. Businesses often lack resources to issue immediate refunds. Regarding economic impossibility of fulfillment, German courts had previously accepted defense of "existential devastation", the looming economic ruin of a debtor forced to perform an agreed obligation. But the concept was soon abandoned (Jankovec, 1981: 242). It led to the contract termination by force of law, which was not the goal of the contracting parties (Karanikić-Mirić, 2020a: 47).

There are three alternative approaches. First, consumers may be entitled to a full refund, or a voucher for future use. A second approach is to oblige consumers to accept vouchers. The third approach require consumers to accept vouchers equal to the value of their original ticket, unless the consumer can show that they are in financial difficulties, e.g., unemployed or unable to use the service later. Otherwise, the consumer must pay the cancellation fees (Alderman *et al.*, 2020: 444-446). The choice of solution depends on whether the regulator is more in favor of the businesses or the consumers.

The Decree on the offer of a replacement travel is an emergency regulation by which the Serbian government protected the economic interests of tourist travel organizers during the pandemic. The Government left the passengers with two options: to accept replacement travel or to terminate the contract. However, the passenger who opts for termination cannot demand a refund, contrary to the rules of contract and consumer law. Instead, he is obliged to grant the organizer an interest-free loan. Although this prevents a large number of simultaneous refunds, the government has failed to incorporate any safeguards for the passengers (Karanikić-Mirić, 2020b: 115). States should ensure that the consequences of the disruption of contractual relationships, such as the cancellation of travel arrangements, should not be at the sole risk of one party, in particular of a consumer or SME (European Law Institute, 2021: 11).

A more difficult situation arises when the event is not directly affected by the pandemic, but rather by the consumer's concerns and fears. Restrictions are over but the consumer may still feel unsafe. The remedy

should be a refund or travel voucher, at the option of the provider (Alderman *et al.*, 2020: 446). Beyond the framework of consumer protection, in a traditional private law regime, arbitrary cancellation of travel for fear of Covid-19 would be considered as a self-imposed (subjective) impossibility, which is not a valid reason for the exemption from the contractual obligation. In other words, the tourist would have to pay.

CONCLUSION

Let us again consider the hypothetical tenant whose restaurant has been closed rendering him unable to pay rents for months during lockdown. We have to revert to asking which ZOO provisions exist to protect the tenant, but also what the dispute with the landlord would look like. The problem is that there probably would be no agreement at the end of that harsh dispute. According to one opinion, art. 137-1 (impossibility in synallagmatic contracts) is discarded because it refers to permanent impossibility (Pušac, 2020: 51). Article 137-2 speaks of partial impossibility, but does not mention temporary impossibility. Article 263 releases the tenant from the secondary obligation – damages, but is silent on the primary obligation – payment of rent. The tenant cannot use art. 354 (termination of obligation in general) since the rent payment is a generic obligation, resistant to impossibility (art. 355). Moreover, economic impossibility is not accepted.

There is no ZOO provision about force majeure excusing the primary obligation. There is no provision for temporary impossibility, nor impossibility of successive performances, and the hypothetical tenant's obligation is of those categories. Application of contractual force majeure clause is unlikely because it is a rarity in local practice, and the contracts themselves are often verbal.

Referring the tenant to the rules on changed circumstances (Jankovec, 1981: 242) is not expedient because those imply the court intervention, which is slow due to the individual assessment. Quantity of claims would overwhelm the courts. Furthermore, the debtors are already in default, so they cannot invoke the changed circumstances. Conversely, rules on impossibility apply *ipso lege*.

Despite numerous ZOO provisions, and as many academic concepts about impossibility, it is curious that none of them is of much use to our hypothetical tenant. Solutions from ZOO have failed when they are needed the most. What should an impossibility look like if the global catastrophic consequences of Covid-19 are not enough to constitute one, is the question here. That is why the public authorities pass intervention regulations in order to save the debtors from economic ruin, but also themselves from looming rebellion. Traditional solutions are inadequate

to deal with the Covid-19 circumstances since rules on force majeure or impossibility set a high threshold for invoking them.

Possible solution 1: rent for each month under lockdown is considered separately and terminated as an installment; the over-all obligation to pay the rent continues and the contract lives on (Art. 137-2 analogy). Solution 2 relies on a wider interpretation of art. 598 ZOO (Loss of rented object due to an Act of God). The landlord's obligation has become impossible, because he cannot provide *ususfructus* to the tenant. As a counter-performance, the payment of rent ceases.

The analysis unlocked some theoretical dilemmas. Acceptance of practical impossibility means that the notion of objective impossibility is significantly narrowed in favor of the subjective impossibility. An excessively difficult problem for one legal entity can be a simple obstacle for another.

Rejection of economic impossibility ignores economic reasons due to which the debtor cannot fulfill his obligation. The position of all legal entities is equalized, although their economic strength is different. This overlooks the fact that with enough money - many problems become workable. Performance which is impossible for the poor, is possible for the rich. Moreover, almost any obligation can be condensed to a cash equivalent. It follows that any impossibility can be understood as economic impossibility, and thus not recognized.

REFERENCES

Alderman, R., De Franceschi, A., Giancaspro, M., Howells, G., Lei, C., Lete, J., Micklitz, H. W., Miscenic, E., Naude, T., Pichonnaz, P., Poillot, E., Ramsay, I., Terryn, E., Twigg-Flesner, C., & Wilhelmsson, T. (2020). Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic. *Journal of Consumer Policy*, *43*(3), 437–450. https://doi.org/10.1007/s10603-020-09463-z

Beale, H., & Twigg-Flesner, C. (2020). COVID-19 and Frustration in English law. In *Sergio Garcia Long, Derecho de los Desastres: Covid-19 (Pontificia Universidad Católica del Perú, 2020)*. 1185-1201. https://doi.org/10.2139/ssrn.3698693

Berger, K. P., & Behn, D. (2020). Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study. *McGill J. Disp. Resol.*, *6*(4), 79–129.

European Law Institute. (2021). *ELI Principles for the COVID-19 Crisis Consolidated Version of the 2020 ELI Principles for the COVID-19 Crisis and the 2021 Supplement*. Wien.

Fauvarque-Cosson, B. (2019). Does review on the ground of imprévision breach the principle of the binding force of contracts? *Revija Kopaoničke škole Prirodnog Prava*, *1*(1), 11–35. https://doi.org/10.5937/rkspp1901011f

Jankovec, I. (1981). О појму немогућности испуњења уговорне обавезе (The Concept of Impossibility of Fulfilment of Contractual Commitments). *Anali Pravnog Fakulteta u Beogradu*, *3–4*, 231–243.

Jankovec, I. (1993). *Ugovorna odgovornost* (Contractual liability). Beograd. Poslovna

politika.
Karanikić-Mirić, M. (2020a). Отежано испуњење уговорне обавезе (The subsequent difficulty of performance in contract law). *Pravo i Privreda*, *58*(4), 25–54. https://doi.org/10.5937/pip2004025k
Karanikić-Mirić, M. (2020b). Ugovori o turističkom putovanju u uslovima pandemije covid-19: uredba o ponudi zamenskog putovanja (Travel Contracts During the Covid-19 Pandemic: The Decree on the Offer of a Replacement Travel). In *Perspektive implementacije evropskih standarda u pravni sistem Srbije, knjiga X (Perspectives of Implementation of European Standards in the Serbian Legal System, Volume 10)*, Pravni fakultet Univerziteta u Beogradu, Beograd.
Philippe, D. (2020). Coronavirus: Force majeure? Hardship? Deferral of obligations? Some practical elements. Advice for the analysis and redaction of clauses. In *Sergio Garcia Long, Derecho de los Desastres: Covid-19 (Pontificia Universidad Católica del Perú, 2020)*. 1277-1295.
Pušac, J. (2020). Status zakupca poslovnog prostora u vreme epidemije virusa COVID-19. *Godišnjak Fakulteta Pravnih Nauka*, *92*, 140–153. https://doi.org/10.7251/GFP2010140P
Radišić, J. (2004). *Obligaciono pravo* (Law of Obligations). Nomos.
Schwartz, A. A. (2020). Contracts and COVID-19. *Stan. L. Rev. Online*, *73*, 48.
Zakon o obligacionim odnosima (Act on Obligations), Sl. list SFRJ. br. 29/78, 39/85, 45/89 - odluka USJ i 57/89. Sl. list SRJ. br. 31/93, "Sl. list SCG". br. 1/2003 - Ustavna povelja. Sl. glasnik RS. br. 18/2020)
Odluka o privremenim merama za banke radi ublažavanja posledica pandemije covid-19 u cilju očuvanja stabilnosti finansijskog sistema (Decision on temporary measures for banks to mitigate the consequences of the covid-19 pandemic in order to preserve the stability of the financial system), Sl. glasnik RS. br. 103/2020)

ПАНДЕМИЈА КОВИД-19 И УГОВОРНИ ОДНОСИ: ВИША СИЛА И НЕМОГУЋНОСТ

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Резиме

Хипотетички закупац је спречен да плаћа закупнину јер је његов ресторан затворен због рестриктивних мера. Које одредбе ЗОО му иду у прилог? Према једном мишљењу, чл. 137 ст. 1 (немогућност у узајамним уговорима) отпада јер се односи на трајну немогућност. Члан 137 ст. 2 говори о делимичној немогућности, али не помиње привремену немогућност. Члан 263 ослобађа закупца од споредне обавезе – накнаде штете, али ћути о примарној обавези – плаћању закупнине. Закупцу не иде у прилог ни чл. 354 (престанак облигације) будући да је плаћање закупнине генеричка обавеза, отпорна на немогућност (чл. 355). Штавише, економска немогућност није прихваћена.

Не постоји одредба ЗОО о вишој сили која би угасила примарну обавезу. Не постоје одредбе о привременој немогућности, као ни о немогућим сукцесивним престацијама, а обавеза хипотетичког закупца спада у ове категорије. Примена

уговорне клаузуле о вишој сили је мало вероватна јер је њено уговарање раритет у локалној пракси, а сами уговори су често усмени.

Упућивање закупца на правила о промењеним околностима (Јанковец, 1981: 242) није сврсисходно јер подразумева интервенцију суда, дуготрајну због индивидуалне процене сваког случаја. Тужбе би преплавиле судове. Поред тога, дужници су већ у доцњи, па је касно за позивање на промењене околности. Насупрот томе, правила о немогућности важе *ipso lege*.

Бројне одредбе ЗОО о немогућности и теорије у литератури нису од велике користи хипотетичком закупцу. Решења из ЗОО су заказала када су најпотребнија. Каква би то немогућност требало да буде ако катастрофалне последице глобалне пандемије нису довољне? Зато органи власти доносе интервентне прописе како би спасили дужнике од економске пропасти, али и себе од претеће побуне. Традиционална решења су неадекватна за суочавање са последицама пандемије, зато што су услови за позивање на вишу силу и немогућност превише строги.

Потенцијално решење бр. 1: током рестрикција, закупнина за сваки месец је засебна обавеза која се гаси; уговор остаје на снази (аналогија са чл. 137 ст. 2). Решење бр. 2 ослања се на шире тумачење чл. 598 (Пропаст закупљене ствари услед више силе). Обавеза закуподавца постала је немогућа, јер не може да пружи *ususfructus* закупцу. Као противчинидба, гаси се и обавеза исплате закупнине.