Considerations related to the exemption from liability in case of occurrence of a force majeure event or of unforeseeable circumstances

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Abstract: - The liability of the debtor for the damages caused by the unfulfilled obligation is exempted when the prejudice is determined by the force majeure or the unforeseeable circumstances.

Key-Words: - Liability, force majeure, unforeseeable circumstances, debtor, obligation.

1 Introduction
The force majeure and the unforeseeable circumstances are defined by article no. 1351 of the new Romanian Civil Code as follows:

Paragraph no. 1: If the law does not provide otherwise or the parties do not agree on the contrary, the liability is exempted when the prejudice is determined by the force majeure or the unforeseeable circumstances.

Paragraph no. 2: The force majeure is any external event, unpredictable, absolutely invincible and inevitable.

Paragraph no. 3: The unforeseeable circumstances is represented by the event that cannot be foreseen or prevent by the person that would be held liable if the event did not occur.

Paragraph no. 4: If, in compliance with the law, the debtor is exempted from its contracting liability for any exempted in the event of force majeure.

In the previous Romanian Civil Code, in force until 01.10.2011, these two denominations were used together as synonyms; however, we can find that the current Civil Code defines them separately in article 1351 paragraphs 2 and 3. Related to this different approach of the two notions, the issue raised in that to know that if the two denominations take into account a single exonerating cause of civil liability or each of them are related to a different notion, with its own significance and content. It is natural that, while the law-maker regulated separately these two notions, they are different and they must be analyzed separately.

The legislature has classified in a different way the force majeure and the unforeseeable circumstances as causes of liability exemption.

2 Problem Formulation

2.1 Expressing the law issue

According to article 1351 paragraphs 1 and 4, although both the force majeure and the unforeseeable circumstances are causes of liability exemption, the two legal notions are different and have their own effects.

2.2 The difference between the force majeure and the unforeseeable circumstances

Bearing in mind that, in accordance with the provisions of article 1351 paragraph 2 of Civil Code, “the force majeure is any external event, unpredictable, absolutely invincible and inevitable”, the occurrence of a force majeure event excludes in full liability, if this was the exclusive cause of the damage.

The unforeseeable circumstances are defined, in accordance with paragraph 3 of the same article,
as an event that cannot be foreseen or prevent by the person that would be held liable if the event did not occur. That means that in this case the civil contracting liability can be excluded.

Unlike the unforeseeable circumstances, the force majeure has always an external character and it is an unpredictable, absolutely invincible and inevitable event.

The causes of force majeure are the natural incontrollable and unpredictable events (earthquake, eruption of volcanoes, storm, tsunami, flood, fire, typhoon, bird flu, any other catastrophe, war, terrorist attack, coup d'état, etc.)

In order to be retained as a cause of force majeure, it is not enough for the event to be external as compared to the will of the parties and unpredictable, but it should be nevertheless impossible to be prevented and overcome by the parties. Force majeure requires an objective impossibility character. This provision impossibility of an event can be appreciated by reference to the prudent person depositing all the care for his work. [1]

We should bear in mind that in case of the notion related to the unforeseeable circumstances, it is not the external feature of the event that occurs. It comprises natural phenomena, if they do not have an extraordinary feature, absolutely unpredictable, invincible and inevitable, therefore they cannot be considered within the scope of the force majeure; the events and internal phenomena, meaning that those events that are originated or are produced in the scope of activity of the person held liable; the anonymous causes and non-culpable facts.

Therefore, in order for the liability exemption to occur, all the circumstances that prevent the performance of the contract must be independent of the parties will and to be incontrollable. It is difficult to consider generally if a certain event is or not a force majeure event and if it exempts or not the debtor in case the undertook obligations are not fulfilled.

In the judicial practice, the events of force majeure were considered to be natural catastrophes (earthquakes, droughts, storms, floods, wars, spontaneous strikes, embargo etc.). Such events cannot be considered absolutely as force majeure, however, they must be taken into consideration on each case, assessing if they fulfill or not the conditions of such event which can exonerate the debtor from its liability. [2]

For example, it was considered that the flood or the earthquake cannot be considered a case of force majeure in those territories or geographical areas where such catastrophes are a normal and habitual situation. In this regard, the legal practice indicated that the frequent landslides, torrential rains, frost are not unforeseeable events, as they cannot be considered as cases of force majeure. [3]

Related to the cause of the force majeure agreed by contract, the parties can agree by a deed that certain event to be assimilated to the force majeure.

However, we have to specify that including in the contracting liability case, proofing a case of force majeure does not result in the liability exemption under the following circumstances:

- the debtor was put in delay to execute the obligations taken (therefore it did not fulfilled its contracting obligations in due time), and the event of force majeure occurred after that moment, therefore the debtor will have the obligation to assume its liability as, if it would have executed its obligations in due time, the cause of force majeure would have occurred after the performance; [4]
- when by a contractual convention/clause, the debtor expressly assumed its liability.

The conclusion that can be drawn related to the difference between the force majeure and the unforeseeable circumstances must take into account the provisions of article no. 1352 Civil Code, according to which “The fact of the victim in itself and the fact of the third party exempts the liability even if they do not have the characteristics of the force majeure, only those of the unforeseeable circumstances, however only in the case that, according to the law and agreement of the parties, the liability is exempted”. The conclusion is that the force majeure always and entirely excludes the liability, but not any unforeseeable circumstances due to the exemption of liability.

2.3 Case under discussion

The plaintiff trading company SC B called into justice the trading company SC A bearing in mind that on 20.06.2012, the plaintiff SC B as the Purchaser and the defendant SC A as the Seller signed the purchase agreement for Romanian black oil sunflower seeds, in bulk for the 2012 crop, amounted 300 metric tons for the price of $500 per metric ton, following the delivery to be made during the interval 10.08.2012-30.09.2012. According to the contract, the Seller undertook the obligation to
deliver the respective quantity of products, and no provision was made for the Purchaser to make any advance payments.

By the writ of summons submitted to the Buzau Court of Law, the plaintiff company B requested the obligation of the defendant company A to pay the amount of $44,100 as damages representing the amount of the damaged occurred for SC B following the failure of performing the contractual obligations by SC A, by its own fault.

On 30.07.2012, SC A submitted a notification by fax informing SC B that an event occurred, classified as force majeure and which made the selling company impossible to deliver the products on the term established. In this case, due to the aggressive and extended drought, the oilseed sunflower production was 99% affected, which lead to the impossibility to deliver the products. SC A also submitted a deed called “force majeure certificate”, issued by the Giurgiu County Chamber of Commerce, Industry and Agriculture, where SC A is headquartered, which certifies that in July 2012, an aggressive and extended drought occurred, affecting the crops of the territory of Giurgiu County.

In reasoning its writ of summons, the plaintiff mentioned the fact that as sunflower oil producer, it had to observe a number of sunflower oil delivery orders, indicating that it had to find other suppliers of sunflower seeds to cover the lack of the 300 metric tons which were not delivered by company A.

In order to avoid the occurrence of further damage, SC B concluded the purchase agreement dated 19.09.2012 with SC X for the quantity of 2000 metric tons of oil sunflower seeds against the price of $665/metric ton.

The plaintiff considered that the difference between the price paid by the third party company and the price agreed is the damage occurred by the fact of the defendant company, consisting in failure to fulfill the product delivery obligation.

3 Problem Solution

In our opinion, the action of the plaintiff is not grounded and it has to be rejected because of the following reasons:

3.1. Specifications related to the classification of the incident contract in question, called “purchase agreement”

As a matter of fact we are talking about a sale-purchase agreement subjected to a sale of future merchandise in accordance with article no. 1658 paragraph 1 of Civil Code – sale of a future crop – meaning merchandise from a limited category (crop of year 2012, not 2011 or 2010, included in the own production made by SC A).

We support this affirmations as when the contract was signed – June 2012– the oil sunflower seeds crop afferent for year 2012 was in progress, therefore the contracted merchandise at the time did not actually exist, following to grow into the future, when it reached its maturity and being harvested.

Under such circumstances, there is no doubt that the object of the contract was a future good. Although the parties classified the contract as a sale-purchase agreement, in fact its legal classification is production agreement, as SC A was not an intermediary which only sells the respective products, but a producer.

3.2. Inapplicability of the principle *genera non pereunt* and the incidence for the case of article no. 1658 paragraph 2 of Civil Code

The plaintiff claimed that for the cause in question the principle *genera non pereunt* can be applied, according to which if the products subjected to the agreement ceased to exist, but they are products of type, *res genera*, meaning they can be replaced and the debtor has the obligation to fulfill its liability, by replacing and delivering of certain products of the same type. [5]

This principle was to be implemented absolutely as compared to the provisions of the previous Civil Code, however the Romanian lawmaker introduced an application of this principle by the new Civil Code, which provides in article no. 1658 paragraph 2 that “when the product or, as the case may be, the limited type is not achieved, the contract shall bear no effects.”

Bearing in mind that the new Civil Code refers to the notion of limited type products, however without specifying any definition or characterization of such products, we consider that a short definition of the two notions is needed: goods of a certain type and goods of limited type.

The goods of a certain type or series products belong to a certain category (e.g. grain, alcohol, clothing) without any individualization of any kind within the batch they are part of, being considered interchangeable/exchangeable, so that in
case of sale of goods of a certain type, the seller has the possibility to deliver the purchaser any of them, which is considered a valid fulfillment of contracting obligation. Therefore, this is how we explain the fact that the cessation of good of certain type cannot occur, having a case of *genera non pereunt*. According to some authors, even if the certain type goods cannot dissipate, the limited type goods can. [6],[7]

However, if when the sale-purchase agreement is concluded for good of a certain type, *genus limitatum*, they are individualized, meaning from generic/determinable (e.g. grain), the goods become individualized (e.g. wheat, corn, sunflower in a certain batch/a determined crop) then they are classified as sale of limited type goods, meaning the sale of goods of certain type, but limited to those in a well determined place and which are part of a certain batch, in the case being the oil sunflower seeds form the crop produced by SC A.

In case of goods of a certain type, as a matter of fact, the principle *genera non pereunt* is incident; however, this principle cannot be applied to the goods in a limited type. For example, if 200 tons of corn is sold, without indicating their provenience, and the corn the seller considered meant to fulfill the obligation ceased to exist, it is still a debtor, as it can at any time procure other corn instead from another place.

We are facing a whole different situation when we are talking about the sale of a limited type product.

Therefore, if the seller, for example, sells 200 tons of corn from a crop in a certain year, and the corn crop is lost due to a case of force majeure, the seller cannot be held liable related to the delivery, as we are not talking about selling 200 tons of corn generally, but 200 tons of corn limited as type, in the case being the oil sunflower seeds in the crop of year 2012 of producer SC A.

We are facing the incidence of provisions of article no. 1658 paragraph 2 second thesis of Civil Code, as the good of a limited certain type contracted was not achieved due to a force majeure cause, respectively the draught, thus occurring the liability exemption of the seller, which cannot be held liable for the failure to achieve the goods, because the contract has no legal effects.

### 3.3. The existence of the force majeure and failure to fulfill the contracting obligations

SC A requested the court to acknowledge that it was facing an event of force majeure which resulted in the impossibility to observe its liability.

Draught is considered as a real cause of force majeure, as in this regard, the Giurgiu County Chamber of Commerce, Industry and Agriculture issued a certificate. Therefore, draught classified as force majeure cause leads to the exemption of liability in case the parties failed to fulfill their obligations.

Against the claims of the plaintiff, meaning that this certificate of force majeure is not considered a true evidence, we indicate that such certificate is issued only based on documents that are issued by the qualified bodies related to the existence and effects of the event invoked, its localization, moment of occurrence and termination.

It is well-known that in 2012 in Romania the lack of precipitations and naturally of river coursers had serious effects for the whole economy of the country, thousands of hectares of agricultural land being affected by the serious draught, the corps of inland producer being, in most of their part, seriously affected.

This situation of force majeure was acknowledged nationally by Govern Decisions by which in agriculture a state of natural disasters were established, determined by the draught all the counties of the country were facing in 2012.

Anyway, according to article no. 28 paragraph 2 letter i of Law no. 335/2007, the Chambers of Commerce and Industry approve the existence of force majeure and their effects on the performance of commercial obligations by the request of Romanian companies, based on documentation.

At the same time, on European level measures were taken, the European Commission giving compensations to Romania, as aid to cover the costs of the damages produced by the draught and woods fires from summer of year 2012.

We consider that for the case being the characteristic features of the force majeure are fulfilled:
- the event is not related to the action/lack of action of SC A;
- the severity of the draught was unforeseeable as SC A had no possibility to intervene to prevent or eliminate the hazard of its occurrence;
- the draught from summer of 2012 was absolutely invincible and inevitable, as it could not be avoided.

It is true that, in theory, there is the
possibility of irrigating the areas harvested with oil sunflowers, however, for the case being, the area where the harvested surface is located there are no irrigation works in place, which put the company A under the impossibility to irrigate the harvest. We considered that this issue, of the lack of existence, or, as the case being, the impossibility to using the irrigation systems is a national issue, which, in the years to follow, it must be remedied by the authorities, as it is very likely that such phenomena of excessive draught to produce further in Romania, knowing that this country has extreme seasons, very hot summers and very cold winters.

Although the plaintiff claims that SC A must be liable for the damage caused, we consider that the sanction of obligating the company SC A to pay compensation can occur only if the obligation was not fulfilled culpably, which is not the case for our situation.

In this regard the provisions of article no. 1350 of Civil Code are specified: “Any person must fulfill its contracting obligations. When, without any justification, it does not fulfill its obligations, it is liable for the damage caused to the other party and has the obligation to repair this damage, under the conditions of the law.”.

From the interpretation per a contrario of this law text, it results that the liability cannot be triggered in case that the non-compliance of the obligation has a justification.

The plaintiff claims that on 19.09.2012, following the non-fulfillment of the obligation by the defendant of the contracting obligations, it was put under the situation to purchase a quantity of 2000 metric tons of oil sunflower seeds against the price of $165/metric ton higher than the price agreed at first, to cover the quantity of 300 metric tons which were not delivered by our company. Although the defendant submitted for the case deeds indicating that it purchased oil sunflower seeds from other sellers, these contracts are concluded with producers being located in other counties of the country – for the case being Constanta County – not with producers from Giurgiu County, where the crops were almost totally compromised by the draught.

We consider that for the case being the proof of a cert damage cannot be bought, therefore, the conditions of triggering the contracting civil liability are not fulfilled.

Related to the conditions of existence of a damage, it also brings into discussions the condition that this damage has to be sure, meaning sure to exist and to have the possibility of assessment. For the case being, the damage invoked by the plaintiff is not sure, because we cannot affirm that the quantity taken from other producers was bought to replace he quantity that was not delivered. And this is concluded by taking into consideration the difference between the quantity of 300 metric tons. Therefore, this condition is not fulfilled.

Related to the fault of the party, although in terms of contracting liability it is presumed, for the case being the presumption of not confirmed, proving the contrary, namely there is no fault of the defendant in fulfilling its contractual obligations.

All such issues have been acknowledged by the court of law, which rejected the action submitted by SC B, reasoning that in the case being, the force majeure case occurred which exonerated the company from its liability. [8]

4 Conclusion

Depending on the situation, some facts can be established as having the effect of exemption from contracting liability. As an example, these facts consist in the circumstances that are not entirely unpredictable, nor totally invincible, but can be real obstacles to fulfill the obligations arising from the contract.

Such a view demands tolerance for the classic point of view regarding force majeure. This theory is explained by the fact that in the new circumstances it becomes impossible to fulfill the contractual obligations on reasonable and normal terms. [9]

As a conclusion, we consider that the contracting parties must protect themselves by including into their contracts certain provisions that should include the details related to the cases of force majeure and the steps to be taken into account of the parties under such circumstances (immediate notification, adopting certain emergency measures to limit the losses, calling the authorities to confirm the case of force majeure, etc.).

References:


[3] Court of Highest Instance, Civil Division,


