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FIDIC FORCE MAJEURE CLAUSE FROM THE VIEWPOINT OF SERBIAN LAW

The purpose of this paper is to present force majeure as stipulated in FIDIC forms, which are nowadays frequently in use when negotiating the conclusion of construction contracts concerning major projects. An important remark is that these forms have been greatly influenced by common law systems where operation of force majeure is dependent on the contractual definition and wording of the clause. On the other hand, the Serbian Law on Obligations contains its own understanding of force majeure-related concept, which might be amended in accordance with the principle of party autonomy. The paper further aims to elaborate on this interplay between these FIDIC forms and Serbian law. The conclusion is that the FIDIC force majeure clause represents an important contribution to the domestic regime, which does not expressly address scenarios with temporary impediments, which is necessary for successful completion of construction works.

Key words: *FIDIC General Conditions. – Force majeure. – Impossibility to perform. – Serbian Law on Obligations. – Temporary impossibility*.

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1. INTRODUCTION: A CONCEPTUAL ALIGNMENT

The maxim states that a contract is concluded when the parties have reached an agreement regarding the main elements of their transaction. Under the Serbian Law on Obligations – LOO,[1] in terms of a construction contract, it is sufficient for the parties to agree on the subject and on the price of construction works in order for construction contract to be concluded (Biro 1980, 104).[2] Nevertheless, every real-life situation entails a variety of risks that can affect performance of a previously validly concluded construction contract, and the parties are always advised to anticipate as many of those as they can, and to include them in the contracts. Construction projects seem particularly sensitive and uncertain when it comes to these risks, as they are usually directly exposed to forces of nature, such as earthquakes, floods, storms, etc. (which is understood as something that is beyond the parties' control even in a colloquial discussion), while their duration does not contribute to the mitigation of such risks (Nikčević 2021, 519). Also, large infrastructure projects are inextricably intertwined with the public law requirements of the place of construction (e.g. construction permits, safety measures, etc.), which makes them particularly susceptible of the risk of change in pertinent legislation. A reasonable question that arises here is – if the occurrence of an event that hinders performance of the contract cannot be attributed to either of the parties, which party should bear the consequences?[3]

In that sense, when negotiating a construction contract, especially a complex one, in practice party autonomy reigns supreme. Namely, the parties usually go beyond the point where they reach an agreement regarding main elements of their cooperation and go into more detail. There is a plethora of other terms typically considered by contractors and employers that are crucial for the successful, i.e. economical and timely completion of the project. For example, in practice the parties almost without an exemption include a version of a contractual penalty clause, providing that the contractor is required to pay a specific sum in the event that it exceeds the deadline.

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[1] Zakon o obligacionim odnosima [Law on Obligations], *Official Gazette of the SFRY* No. 29/78, 39/85, 45/89 – Decision of the Constitutional Court and 57/89, *Official Gazette of the FRY* No. 31/93, *Official Gazette of SCG*, No. 1/2003 – Constitutional Chart, and *Official Gazette of the RS* No. 18/2020). See Art. 630 para. 1.

[2] Additionally, Art. 630 para. 2 LOO provides that construction contracts must be concluded in writing.

[3] This paper does not discuss the institute of hardship, i.e. change of circumstances, despite its kinship to the concept of force majeure. Usually, hardship deals with the possibility to adapt the contract, which requires further discussion.

Of course, the fact that the parties did not agree on some terms does not mean that they are left without legal protection regarding a particular issue and that there are no rules outside parties' contract that might apply. It is always possible to rely on the default rules of the otherwise applicable law, i.e. if they contain any rules relevant to the situation at hand. When dealing with an international contract, however, things become even more complicated. Different legal systems contain not only different rules, but different conceptual understandings of legal phenomena in some cases, which may lead parties that were initially interested in conducting a construction project to get cold feet just because of different legal backgrounds and understandings of certain contractual concepts. Simply put, an English employer and a French contractor are bound to disagree on some terms of their transaction, because they might not be comfortable with the terms that the other party suggested, as they might be unknown in their legal systems, making it difficult for their canny local lawyers to properly advise them.

Equipping parties with adequate remedies in case of impediments that are outside parties' control might be particularly challenging when drafting a contract. These impediments represent the cornerstone of the legal notion of force majeure, but they are not treated equally in all legal systems (Jaeger 2010, 100). For instance, in French law, which introduced this doctrine (hence, the French term), force majeure encompasses the full package consisting of the cause, its impact on the party's performance, and the legal consequence pertinent to that impact. Specifically, if an event that is beyond the parties' control made it impossible for a party to perform its obligation, the French position would be that the contract is terminated by operation of law or suspended if the impossibility is temporary (Malaurie, Aynès 2018, 546–550). Contrastingly, if the performance of the obligation is still possible, according to position contained earlier in French law, the debtor would not be provided with an escape route (Karanikić Mirić 2020a, 309). This scepticism of the French 'all or nothing' position, as some authors call it (Živković 2012, 242), has recently been changed with the 2016 reform of *Code Civile*. Now it is possible to adapt even a private law contract in the event of changed conditions, due to unforeseeable circumstances (Malaurie, Aynès 2018, 409–411). On the other hand, in common law systems, the consequences of unexpected impediments are still largely dependent on specific contractual provisions and 'force majeure clauses' despite the doctrine of contract frustration having existed for nearly two centuries (Beatson, Burrows, Cartwright 2010, 474). Courts therein traditionally apply the rules outside the parties' contract restrictively due to a deeply rooted belief of the sanctity of contracts in common law systems (Circo 2020, 63–65). Nevertheless, this doctrine is conceptually different from the French understanding of force majeure as it releases the party of its obligation, regardless of whether its performance became impossible or more onerous (Murdoch, Hughes 2008, 344–345). The necessary condition, however, is that the purpose of the contract has become frustrated.

One of the ways to bridge these differences is via instruments of uniform law that were tailored to facilitate international contracting by professionals from different legal cultures and who get together to discuss various methods for serving the interest of all parties. These instruments usually contain a version of the force majeure concept, but they strive to offer a unique mechanism that is not connected to the understanding from any specific legal system. For example, Article 79 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) deals with the release from liability and adopts a compromised solution which is 'somewhere between' different legal concepts with the similar effect (Milutinović 2005, 443; Brand 2004, 393). This Article even avoids using the term force majeure precisely in order to eliminate any possible confusion or bias towards national doctrines (Milutinović 2005, 444–445; Sekolec 2004, 2–3). Even the instruments that use this term are often followed by disclaimers explaining that force majeure does not have the same meaning as the French doctrine. For instance, Article 7.1.7 Principles of International Commercial Contracts (PICC)[4] is named "force majeure", but its leading commentary explains that force majeure is accepted as a general principle of contract law and that Article 7.1.7 is to be interpreted autonomously, while the drafters kept the French term because of the widespread use of force majeure clauses and practitioners' familiarity with these clauses (Pichonnaz 2015, 866–867).[5]

The previous discussion shows that there can hardly be a single uniform understanding of force majeure concept across different jurisdictions, while the term itself is capable of stirring up discussion even in a room fool of well-versed international lawyers as it can have different meanings.

This paper will analyse and strive to determine the meaning of the force majeure clause contained in another uniform law instrument designed particularly for construction projects – the FIDIC Conditions of Contract for

[4] This is a soft law instrument developed by the International Institute for the Unification of Private Law (*Institut international pour l'unification du droit privé* – UNIDROIT).

[5] In 2003 International Chamber of Commerce (ICC) published its pre-draft force majeure clause for those parties interested in broadening force majeure excuses in their contracts, Pichonnaz 2015, 868–869. The clause is available at: *https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-clause-2003icc-hardship-clause-2003/* (last visited 19 August 2023).

Construction,[6] specifically, the paper presents and assesses the 1999 *Red Book*[7] version of the Force Majeure clause[8] through the lens of domestic law. Even though these forms are largely influenced by common law, their Force Majeure clause strives to reconcile both civil and common law understanding of the concept and keeps the well-known term (Bunni 2005, 535; Klee 2015, 38–39). Interestingly, the newer edition of these forms from 2017, as well as some forms that were developed after 1999,[9] abandoned the term 'force majeure' to avoid confusion or conflict with similar provisions of governing law and switched their wording to 'exceptional risks' or 'exceptional events' (Klee 2015, 38–39).

In any case, these standard forms are frequently used for local projects, especially for state-organised ones where transnational financial institutions appear in the role of lenders (Klee 2015, 90–92), and a detailed assessment of the Force Majeure clause might be beneficial. Apart from that, the recent COVID-19 pandemic and start of the Russo-Ukrainian conflict, which are nowadays often used in commercial practice as reasons for delayed fulfilment of contractual obligations or even impossibility to perform, which only enhances the need to verify the clause's compatibility with Serbian law.

However, notwithstanding the FIDIC forms' widespread use in practice, Serbian legal literature is still rather scarce and counts only a few published papers and defended thesis on FIDIC-related problems in general. Despite

6 These forms were developed under the auspices of International Federation of Consulting Engineers (*Fédération Internationale des Ingénieurs-Conseils* – FIDIC). They represent a number of different contract forms containing bespoke terms, with special attention to large-scale construction projects. As of 1999, the FIDIC forms differ in the risk allocation and scope of the parties' obligations (Baker *et al.* 2009, 19). At the time, the FIDIC published the so-called 'Rainbow Suite' consisting of different forms, i.e. books, each called a different colour. Since then, the FIDIC published new edition of these books in 2017, to reflect even more fair division of responsibility (Chern 2020, 175–176). This paper focuses on 1999 version of the *Red Book* for the sake of convenience, as this is the most frequently used form (Klee 2015, 271). Nevertheless, the FIDIC Conditions of Contract for Plant and Design-Build, i.e. the *Yellow Book*, and Conditions of Contract for EPC/Turnkey Projects. i.e. the *Silver Book*, which are almost as popular as the *Red Book*, contain identical force majeure clauses.

7 The Red Book is also known as 'Conditions of Contract for Construction'.

8 Hereinafter the paper will use capital letters when referring to the FIDIC forms clause to avoid any possible confusion.

9 The term was changed already in the 2008 FIDIC Conditions of Contract for Design, Build and Operate Projects, i.e. the *Gold Book*, where the clause is called Exceptional Risks, while the FIDIC's 2017 editions uses the term Exceptional Events.

that, a doctrinal assessment is necessary for proper understanding of the forms and their compatibility with the domestic law, which is why this paper will address this topic.

2. FIDIC'S 'BETTER SAFE THAN SORRY' APPROACH

As noted by legal scholars, the FIDIC *Red Book* is heavily influenced by common law (Bunni 2005, 54), and as such, it contains a detailed force majeure clause. Clause 19 in the 1999 Conditions of Contract for Construction – Force Majeure strives to offer an all-encompassing and fair risk allocation, while providing the definition and, more importantly, the consequences in case a severe obstacle amounting to force majeure affects the contract. Generally, in the absence of an explicit force majeure clause, the parties to a contract governed by Serbian law rely on a provision from the LOO's general part, which merely states that force majeure-like impediments release the debtor from liability, which is not specific to construction work.[10] This does not always seem appropriate especially when dealing with long-term construction projects which might easily go downstream for reasons outside the parties' control and which require careful anticipation of the consequences of such an impediment. For this reason, the FIDIC forms' bespoke and rather detailed Force Majeure clause seems not only desirable, but necessary when Serbian law is applicable.[11] This part will deal with the FIDIC forms' Force Majeure and underlining mechanisms of the FIDIC's 'better safe than sorry' approach to force majeure impediments from various aspects.

2.1. Defining Force Majeure Under FIDIC

As a creature of contract, the FIDIC's force majeure clause is mostly dependent on its wording. All well-drafted force majeure clauses attempt to provide parties with all aspects concerning the notion – from definition of force majeure to its consequences. In other words, the operation of the force majeure clause depends on the definition of this phenomenon (Baker *et al.*

10 Section 3 of this paper (especially heading 3.2) analyses this interplay more closely.

11 The same goes for laws of other former Yugoslav republics where contract law is also based on LOO, and which deal with force majeure in the same manner.

2009, 498). The FIDIC forms' clause offers such a definition, and the manner in which it is drafted suggests that it strives to bring these standardised contracts closer to the civil law systems.

Specifically, Sub-Clause 19.1 para 1 describes the specific qualities that an event or a circumstance must have in order to fall within the FIDIC notion of force majeure. It states that 'Force Majeure' means an *exceptional* event or circumstance: (a) which is *beyond a party's control*, (b) which such a party *could not reasonably have provided against* before entering into the contract, (c) which, having arisen, such a party *could not reasonably have avoided or overcome*, and (d) which is *not substantially attributable* to the other party.[12]

This broad definition of force majeure largely resembles the understanding of force majeure within major civil law systems, which usually describe in general terms what qualities circumstances must have in order to excuse the party (Conrad 2023, 239–240; Hök, Stieglmeier 2023, 281; Moss, Schneider, Fiechter 2023, 561). As noted, the focus of the FIDIC forms is on what happens rather than on the type of event (Chern 2020, 143). Civil law jurisdictions are nowadays familiar with all the qualities laid down by the FIDIC, or at

[12] The FIDIC forms are all about risk allocation. The FIDIC's Force Majeure clause might be seen as such a provision dealing with risk allocation, but as Bunni (2005, 535) notes its purpose goes beyond. There are other provisions in the FIDIC's 1999 *Red Book* dealing with circumstances that are indeed external to the parties' control and which determine the consequences of those circumstances even when they are not that exceptional. The general risk allocation clause is Clause 17 – Risk and Responsibility, where the division of risks between the parties is laid out in some detail, as noted in Robinson (2011, 85). Other clauses are also worth mentioning as they deal with impediments outside the parties' control. For instance, Sub-Clause 13.7 provides the consequences of legal risks, i.e. the change in the laws of the country, Sub-Clause 4.12 addresses the allocation of risks concerning unforeseeable physical conditions, and Sub-Clause 8.4 deals with the extension of time for completion, especially in cases concerning exceptionally adverse climate conditions and unforeseeable shortages in the availability of personnel or goods caused by epidemics or governmental actions. For more about risk allocation see Klee (2015, 294–298). What is common for all these provisions is that they grant an extension of time and/or the payment of costs to the contractor who suffered the delay and/or incurred cost, or if that is going to be the likely outcome in the event of certain specific impediments. None of these state that the party should be prevented from fulfilling the obligation. Therefore, it seems that the FIDIC forms strive to protect the contractor whose performance has become merely more difficult and ensure that it will finish the works without suffering negative consequences due to those impediments. Of course, all the circumstances that are mentioned in these clauses could still potentially qualify as an exceptional event in terms of Clause 19 if they fulfil the requirements listed therein. Their special position within the FIDIC was never meant to prevent contractors from relying on Force Majeure, but merely to provide them with a more accessible solution as the threshold for proving these situations is clearly lower than the one required for Clause 19.

least with variations thereof.[13] Therefore, it can be said the FIDIC forms offer a traditional definition of force majeure events/circumstances that can be found within the civil law family. Nevertheless, an emphasis on the exceptionality of an event (or a circumstance) hints that the FIDIC drafters wanted to make sure that only truly most adverse causes are included in this clause. Moreover, some authors with common law background emphasise the specificities of the FIDIC clause, and pinpoint that unforeseeability – the usual prerequisite for existence of force majeure – is not explicitly mentioned by the FIDIC. In their opinion, this further means that the FIDIC forms do not know of this requirement (Corbett & Co 2016, 2).[14] Foreseeability might have been left out as a relic of the past,[15] but that is not necessarily correct. Clause 19 requires that a party could not have reasonably provided against an event or a circumstance prior to entering into the contract. This wording can be understood to encompass unforeseeability, as it may be argued that if a party could have reasonably provided against something, then it would have been foreseeable in the first place.

At this point, a useful reference can be made to the notion of force majeure contained in different instruments of uniform law. The FIDIC commentaries explicitly recognise that this clause largely resembles the one contained in Article 7.1.7. of the PICC (Seppälä 2023, 1065).[16] The PICC condition that a party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract is similar to the FIDIC forms' wording. In fact, the PICC leading commentary uses the term 'foreseeable' when referring to this condition. Simply put, a party cannot rely on the impediment if that impediment, or rather its consequences on the contract, were foreseeable by the obligor of the given obligation (Pichonnaz 2015, 876–878). The same goes for Article 79(1) CISG, which contains the almost identical wording as this paragraph of Article 7.1.7 PICC,

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[13] When discussing general principles of contract law, Brunner (2009, 75) notes that force majeure provisions of different instruments of uniform law, i.e. the PICC, CISG, Principles of European Contract Law (PECL), and International Chamber of Commerce (ICC) Force Majeure Clause 2003, are 'substantially the same'.

[14] Conversely, Klee (2015, 370) claims that, under the FIDIC forms, force majeure must therefore be an exceptional event, whether foreseeable or not.

[15] The idea that nowadays hardly anything is unforeseeable, given the rapid technological development, is not a new one and was recognised in Yugoslav contract theory. See Krulj 1980, 351.

[16] Art. 7.1.7. para. 1 PICC states that 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.

even though it does not use the term 'force majeure'. Authors commenting on this provision also argue that the impediment must be unforeseeable to excuse the party from performance (Milutinović 2005, 449).

Furthermore, Sub-Clause 19.1 para. 2 should also be taken into account in defining force majeure under the FIDIC. This paragraph states that Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied: (i) war, hostilities (whether war is declared or not), invasion, act of foreign enemies, (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, (iii) riot, commotion, disorder, strike or lockout by persons other than the contractor's personnel and other employees of the contractor and subcontractors, (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the contractor's use of such munitions, explosives, radiation or radio-activity, and (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity. As the wording suggests, this paragraph lists the events and circumstances which *may* constitute Force Majeure under the FIDIC.[17] The list goes beyond events that usually represent 'Acts of God', that have their roots in natural causes and include human-made events such as war (Chern 2020, 144).[18] However, unlike earlier versions of the FIDIC forms, this paragraph provides that events and circumstances listed therein represent 'Force Majure' *only* if they qualify as exceptional event or circumstance in accordance with the criteria from previous paragraph (Burr 2016, 109–111).

On the other hand, Force Majeure is not limited to the events and circumstances listed in this paragraph. If an event or circumstance meets all the previously mentioned requirements, it constitutes Force Majeure. As stated above, the drafters did not want to exclude liability just because a certain type of event or circumstance occurred. The purpose of these examples is indicative, i.e. they help the parties to detect force majeure easier and to identify the range an event or circumstance should fall into in

[17] Interestingly, some authors criticised the wording of item (iv) because the items described therein do not constitute an event nor circumstance, but merely a potential cause of events or circumstances that might later be considered force majeure. See Corbett & Co 2016, 7.

[18] This list has slightly been amended in the 2017 version of the *Red Book*. The new Clause 18 separates events from item (iii), i.e. riot, commotion, disorder and strike and lockout in two separate items, while it adds tsunami to the natural catastrophes. Seppälä (2023, 1065–1066) even suggests further expansion of the clause, which would include additional illustrative events, e.g. threat of war and epidemics.

order to truly be considered exceptional (Seppälä 2023, 1064). Therefore, no matter how exceptional an event or circumstance may be, it does not have to amount to force majeure in two different situations. For instance, the COVID-19 pandemic may qualify as an exceptional event, but not in every case. It can be said that the contractor who concluded a contract in late January 2020 probably could reasonably have provided against the pandemic, while the one who entered a contract in April 2019 could not have. As it can be seen, Sub-Clause 19.1 takes into account the disturbance that the event created and how fair would it be to let the consequences fall onto the debtor of the obligation; it does not merely focus on the type of the event or circumstance. In any case, the purpose of this definition is to ensure that Force Majeure is determined on a case-by-case basis.

Furthermore, the Force Majeure clause ensures the contractor does not claim relief available to its subcontractors based on a broader definition or different understanding of force majeure (under the subcontract or by virtue of law applicable to the subcontract), even if its subcontractors are entitled to such relief. In that regard, Sub-Clause 19.5 provides that if any subcontractor is entitled, under any contract or agreement relating to the works, to relief from force majeure *on terms additional to or broader* than those specified in the Force Majeure clause, such additional or broader force majeure events or circumstances shall not excuse the contractor's non-performance or entitle it to relief provided under the Force Majeure clause.

2.2. Consequences of the FIDIC Force Majeure

The purpose of including a force majeure clause in a FIDIC contract in fact lies in the mechanisms provided in Force Majeure Sub-Clauses 19.4, 19.6 and 19.7, since they provide the consequences and the options at the parties' disposal when dealing with a Force Majeure.

It should be noted that these three provisions deal with different scenarios and accordingly offer different defences to the affected party. In fact, these 'scenarios' might be considered as three different classes of inability to perform the obligation. In other words, the more severe the impact of Force Majeure on the party's performance, the more drastic the tool it has at its disposal. The FIDIC Force Majeure is specific in the sense that it deals with contractual liability for late performance and with impossibility in one clause, which is not always the case in civil law jurisdictions (including Serbian contract law). The way the FIDIC Force Majeure is drafted helps the parties to eliminate any doubt as to the concrete consequences of force majeure, which might arise when the rules are scattered through different provisions of the contract or a statute.

The effects of the three mentioned classes will be presented and analysed in the following subsections. However, before turning to these effects, the previously discussed condition – that the event or circumstance amounts to Force Majeure only if the party cannot prevent or overcome it – should be discussed. In light of that, the abovementioned consequences are subject to two important duties of the party whose performance has been affected: the duty to notify the other party of Force Majeure, and the duty to minimise the delay.

The first duty – the duty to notify the other party – stems from Sub-Clause 19.2 which states that if a party is or will be prevented from performing any of its obligations under the contract by Force Majeure, then it notifies the other party of the event or circumstances constituting the Force Majeure, specifying the obligations the performance of which is or will be prevented. The notice must be given within 14 days of the party becoming aware, or of when it should have become aware, of the relevant event or circumstance constituting Force Majeure. The clause does not further state what would be the effect of the failure to provide timely notice.[19] Some authors argue that an event that might otherwise constitute force majeure will not be Force Majeure unless the notice procedure is correctly followed (Corbett & Co 2016, 8) and this position seems correct, unless a pre-emptive provision of the law governing the contract automatically releases the parties from further performance in accordance with Sub-Clause 19.7.[20]

The second duty is laid down in Sub-Clause 19.3, which states that each party will at all times use all reasonable endeavours to minimise any delay in the performance of the contract as a result of Force Majeure. In addition, it required the party to give notice to the other party when it ceases to be affected by the Force Majeure. This clause is closely related to the well-known duty to minimise damages in case the contract realisation is jeopardised.

[19] The 2017 edition of the *Red Book* elaborates on the effect of timeliness of this notice. Namely, Sub-Clause 18.2 contained therein provides that if a party does not send the Force Majeure notice in time, i.e. within 14 days, but at a later time, then it shall be excused from performance of the prevented obligations as of the date on which this notice is received by the other party. Seppälä (2023, 1070) argues that denying relief based on the party's failure to provide a timely notice would be too harsh.

[20] However, even in this case, the party that fails to provide the other party with timely notification might be liable for damages.

Both these duties ensure that only the party who did not contribute to the adverse effect of Force Majeure and which managed the situation properly is excused and spared of negative consequences.

2.2.1. Excusing the Prevented Party from Performance

As mentioned, Sub-Clause 19.2 starts by instructing the party prevented from performing any of its obligations to provide the other party with a notice describing the impediment and its impact on its contractual obligations. If the party does so, it is excused performance of such obligations for as long as such Force Majeure prevents it from performing them. In other words, the party affected by the impediment is not be liable if the impediment amounts to Force Majeure.

Interestingly, Sub-Clause 19.2 excuses the party which is prevented from performing *any* of its obligations, but in its last paragraph it provides that notwithstanding any other provision of the Force Majeure clause, application of Force Majeure is excluded in the case of one of the parties being prevented from making payments to the other party under the contract, and therefore significantly limiting the scope of this clause. This means that the parties cannot rely on financial hurdles when they want to seek the Force Majeure related protection. However, the 'notwithstanding any other provision' part of the clause suggests that this rule does not pre-empt any other provision from Clause 19 that provides otherwise. This might be of further importance for the application of Sub-Clause 19.7, which will be discussed later in this paper.

When it comes to the obligations of the contractor, who is affected more often than the employer,[21] the wording of Sub-Clause 19.4 suggests that this provision should be read together with Sub-Clause 19.2 (Corbett & Co 2016, 8–9). Namely, Sub-Clause 19.4 stipulates that the contractor affected by Force Majeure is entitled to the extension of time and payment of eventual costs (but note that reimbursement of costs is not available in all cases).[22] However, the rights from this Sub-Clause are subject to initiating the FIDIC

[21] It is important to note that Sub-Clause 19.2 para. 3 provides that notwithstanding any other provision of that clause, Force Majeure does not apply to the obligations of either party to make payments to the other party under the contract.

[22] The last paragraph of Sub-Clause 19.4 provides that after receiving the notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 dealing with determinations, to agree or determine these matters.

claim procedure from Sub-Clause 20.1,[23] but some authors suggest that the contractor will have met these obligations by giving the notice referred to in Sub-Clause 19.2 (Corbett & Co 2016, 8–9).

The first remark is that the FIDIC forms merely require that a party has been prevented from performing its obligations by virtue of force majeure. This ensures that the affected party is excused even in cases where performance did not become impossible (after all, the consequences of impossibility are addressed in a separate provision which will be discussed later). However, it does not further specify what 'prevented' means in terms of the FIDIC forms. Some authors argue that events or circumstances that merely make it more difficult for the party to perform its obligations, do not constitute Force Majeure under the FIDIC forms, as Clause 19 does not represent a general risk allocation provision (Corbett & Co 2016, 8). Considering the general purpose of force majeure clauses, this interpretation seems correct. The idea is not to make an excuse for a party that is perfectly capable of performing its obligation, but to protect the future of the contract by facilitating the performance to the affected party which would otherwise suffer adverse consequences.

Subclause 19.2 might also be helpful in determining what is meant under the wording 'prevented'. As mentioned, this provision provides that the party, having given notice, is excused performance of such obligations *for so long as* such Force Majeure prevents it from performing them. 'For so long as' clarifies that the agency of force majeure event/circumstance should be temporary. Thus, this Sub-Clause refers primarily to cases of temporary impossibility where a party objectively cannot do anything in order to perform its obligation, but that impossibility is not permanent. After all, the FIDIC forms contain special provisions for some cases where the performance has become merely more difficult.[24] This means that the FIDIC forms deal with 'lighter' obstacles separately and that the Force Majeure clause is reserved for more detrimental outcomes.

In any case, the purpose of these two Sub-Clauses is to discourage the creditor from terminating the contract straight away (but it does not prevent it), which is considered unjust in cases where the contractor is temporarily

[23] This procedure has been deemed controversial in civil law systems and has initiated much discussion about its validity. Namely, this provision provides that the party will be precluded from submitting its claim after expiry of a specific time limit, the legal nature of which and its consequences may be irreconcilable with the mandatory provisions of the LOO. For different approaches see Nikčević 2021 and Babić, Pelicarić 2019.

[24] They are briefly presented in subsection 3.3. of this paper.

prevented from performance (Jankovec 1993, 77). The idea is to suspend the contractor's obligations by excusing it from the performance and granting it some extra time. This provision might especially be useful where applicable law does not explicitly provide for suspension of performance where temporary impossibility occurs, which is the case with Serbia's LOO, as discussed later in this paper.

But the FIDIC goes beyond suspending the performance, it also entitles the contractor to payment of costs in some cases of Force Majeure. As explained in Sub-Clause 19.4 item (b), the party can ask for payment of costs in cases of human-induced force majeure, but not where it is the result of natural catastrophe. Even in those cases the contractor is restricted by an additional requirement – the event or circumstance preventing it from performing the obligation must occur in the country where the work is taking place, except in the case of war, hostilities, invasion, or act of foreign enemies. The latter ones always justify the request for payment of costs.

2.2.2. Optional Termination

As previously mentioned, the parties usually do not want to terminate the contract where performance of some obligation has merely been prevented. That position is reflected in FIDIC Sub-Clause 19.6, which justifies termination *only* in the case of the performance being suspended for a certain period.

According to the FIDIC forms, a party is allowed to terminate the contract only if 1) execution of *substantially all the works in progress is prevented* and 2) where that suspension in performance due to Force Majeure *lasts for a certain period or is repeated frequently*. In this case, it is more likely that the contract will become useless for one or both parties, which is why termination is justified. If only part of the works is affected, allowing termination would seem radical and would create uncertainty for both parties.

Specifically, Sub-Clause 19.6 reads that should the prevention last for a continuous period of 84 days or for multiple periods totalling more than 140 days, due to the same notified Force Majeure, then either party may give the other party a notice of termination of the contract. The termination takes effect seven days after the notice is given, and the contractor proceeds in accordance with Sub-Clause 16.3 dealing with cessation of work and removal of equipment. Therefore, the notice is a requirement in case of Force Majeure related termination, i.e. it is not automatic.

Of course, the employer is always allowed to terminate the contract for convenience,[25] but this special force majeure inspired ground for termination allows the contractor to terminate the contract under equal terms (which is not the case when terminating for convenience) and to ensure that the consequences of this termination are the same as those when the employer terminates for convenience, since in both cases the contractor is not to blame for termination.[26]

With this provision, the FIDIC acknowledges that when performance is suspended for a time period of a certain length, it brings the parties' relationship closer to that of permanent impossibility, which deserves special attention.

2.2.3. Discharging the Parties from Performance

The FIDIC standard forms also deal with the worst-case scenario for the parties' – the impossibility to perform the obligation. In this case the FIDIC provides what national legal systems usually do – it discharges the parties from further performance.

The application of Sub-Clause 19.7 is broader than the application of the previously discussed clauses as it states that the parties are discharged from further performance of their obligations in the case that *any* event or circumstance outside the control of the parties (including, but not limited to those that fall within the definition of Force Majeure from Sub-Clause 19.1) induces such an impossibility. The same effect is accorded to any event or

[25] This ground for termination is found in Clause 15.5 (Employer's Entitlement to Termination) of the 1999 *Red Book*. For specifics of the FIDIC standard forms' termination reasons and their comparison with the LOO regime in Bosnia and Herzegovina see Gagula, Meškić 2020.

[26] Sub-Clause 19.6 para. 2 provides that upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include: (a) the amounts payable for any work carried out for which a price is stated in the Contract; (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal; (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works; (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in its country (or to any other destination at no greater cost); and (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination. The same is provided in Clause 15.5.

circumstance outside of parties' control that makes performance unlawful, or which under the law applicable to the contract entitles the parties to be released from further performance of the contract.

The FIDIC forms, thus, distinguish between factual and legal impossibility, as they require that the event or the circumstance beyond the parties' control make performance *impossible or unlawful*. In civil legal systems such distinction is unnecessary because impossibility is a broader notion, encompassing both mentioned impossibilities. It may, however, be dubious in different legal systems whether the term impossibility encompasses only physical impossibility or commercial impossibility as well. For example, common law regimes place great emphasis on the actual wording of the clauses (Bunni 2005, 499–500), which might also explain why the FIDIC Force Majeure clause makes the abovementioned difference between impossibility and unlawfulness. In any case, paying close attention to the wording further means that if a clause does not state explicitly that impossibility is physical, a lawyer with a background in common law might argue that commercial or economical impossibilities are also covered by the contract (Corbett & Co 2016, 18). These commentators argue that since financial impossibility is not excluded from the clause, it falls within the scope of Sub-Clause 19.7 and that the contractor might be released from performance if "the costs of continuing the contract are so far above the price it has agreed to perform for that it is unable to raise enough finance to continue" (Corbett & Co 2016, 21). Conversely, lawyers with a background in civil law will resist the idea of economic impossibility and will stick to the dichotomy of legal and factual impossibility understood from an objective point of view (Jankovec 1993, 62–65). This means that the confusion as to the real meaning of this term is possible and the unravelling of this dilemma has important practical implications since the party wanting to rely on this provision will be discharged from performance. In that regard, it is worth mentioning that the newest FIDIC commentary lists only physical impossibilities when discussing impossibility to perform. Therein Seppälä mentions two examples from case law that explain what might constitute impossibility according to the FIDIC: first one being the situation where the construction site was washed away in a flood, rendering performance of the contract impossible, and the second one stating that there was impossibility when construction was prevented by a rebellious army (Seppälä 2023, 1084–1085). Some other authors even straightforwardly state that 'impossible or unlawful' in this Sub-Clause 'essentially covers legal and physical impossibility' (Baker *et al*. 2009, 503). Moreover, even the commentators who argue that the notion of impossibility goes beyond the physical impossibility admit that it might be argued that anything that can be changed by a variation order cannot be considered impossible (Corbett & Co 2016, 21). Newer versions of the clause dealing with consequences of impossibility, Sub-Clause 18.6 in the 2017 FIDIC edition, condition discharging the parties from further performance with previous attempts to modify the contract, if such modification is possible. Specifically, the Sub-Clause provides that the parties are discharged from performance upon one party's notice to the other only if the parties are unable to agree on an amendment to the contract that would permit the continued performance of the contract. This means that the parties should enable the contract to continue where that is *still possible* (Seppälä 2023, 1084). In the context of 1999 Sub-Clause 19.7, the previous provision may only be used to clarify that FIDIC forms do not intend to accept the notion of absolute impossibility, but rather a more flexible and practical understanding.

In any case, the previous discussion demonstrates that it is not quite clear what is meant by 'impossibility' under this clause, and it would be preferable if parties would further elaborate in their contract on it meaning, to avoid any doubts as the FIDIC attaches serious consequences to cases of impossibility.

Moreover, Sub-Clause 19.7 provides that the parties may be discharged from performance not only where the performance became impossible or unlawful, but also in cases where *applicable law releases the party from performance* due to certain events/circumstances beyond the parties' control. This addition shows that the FIDIC forms were never intended to limit the parties' options in cases where their contract is influenced by an external event, nor to impose a restrictive understanding of impossibility. The FIDIC merely ensure that impossibility discharges the parties from further performance, but also instructs them that it does not preclude them from relying on other available defences or doctrines releasing them from performance under the applicable law (Baker *et al.* 2009, 498, 503).

Finally, as in all other cases discussed in this section, the party seeking the release must notify the other party of the event or circumstance from this Sub-Clause. The discharge is of an immediate effect (Baker *et al*. 2009, 503).

3. INTERPLAY BETWEEN FIDIC AND LOO CONCEPTS OF FORCE MAJEURE

As mentioned, the FIDIC forms are rooted in common law, yet the endeavours to attract parties from different legal systems led to the need to adapt to different conceptual understandings. For instance, the FIDIC abandoned the common law concept of frustration of the contract and replaced it with a more civil law-like force majeure clause (Bunni 2005, 530). Nevertheless, lawyers with a non-common law background should nevertheless carefully assess the meaning of this clause and how it relates to the concepts laid down in their domestic legal systems, as their application may be pre-empted by the FIDIC forms, or the Force Majeure clause may be invalidated in whole or in part by operation of the otherwise applicable law.

For this reason, this section aims to present the interplay between Serbia's contract law and the FIDIC forms. Of course, all these conclusions operate on the presumption that Serbian law is applicable law under the contract.

3.1. Importance of Determining the Legal Nature of the LOO Provisions

When dealing with force majeure under the LOO, the starting point should be locating all relevant rules concerning their consequences. It quickly becomes clear that the LOO does not deal with force majeure (or *vis major* as it is usually referred to in local legal circles) within a single provision like the FIDIC forms do, nor does it use the said terms in describing this legal institute. Rather, the LOO contains different institutes dispersed in different provisions which deal with events of vis major in a different manner.[27]

Before analysing all these rules separately, one crucial remark to the nature of the LOO provisions should be made: they are dispositive in nature. This means that parties are free to stipulate their contractual relationship as they please and to derogate from default rules, which is today embodied in the principle of party autonomy across most legal systems. However, party autonomy as provided in the LOO is not without its limits. Article 10 LOO states that parties must stay within the limits of compulsory legislation, public policy, and good faith. This somewhat limited understanding of contractual freedom helps establish a dichotomy between mandatory and non-mandatory statutory provisions under Serbian contract law. In other words, some rules are compulsory and cannot be changed at the whim of the parties, while on the other hand, some rules are dispositive in nature and can be altered by the parties in their contract.

[27] There are general rules on contractual liability stipulating what is the impact of force majeure on the party's liability. In a different section, the LOO regulates situations where force majeure made it impossible for the party to fulfil its obligation. Lastly, the Law contains special rules when performance of the obligation has not become impossible, but more onerous, or the purpose of the contract was frustrated due to the operation of force majeure.

In any case, the entire LOO operates under the presumption that the parties can derogate from default rules as provided in Article 20 LOO (Hiber 2022, 455).[28] This broad and general limitation of the party autonomy requires determining compatibility of the agreed terms with this limitation in each specific case (Hiber 2022, 459). However, if a rule is compulsory, the LOO provision might (and it often does) expressly state that the parties may not derogate from it,[29] while in other cases, this will stem from the nature of the provision.[30] Hiber emphasises that specific limitations in the LOO are usually drafted in a manner that either prohibits or orders the parties not to derogate from them (Hiber 2022, 459–460). On the other hand, he argues that in light of the presumption that the parties are allowed to derogate from the LOO provisions, expressly stating in a non-mandatory provision that it will be applicable "unless provided otherwise in the contract" is redundant and creates unnecessary dilemma in practice as to whether the provisions not containing this or similar wording can be considered non-mandatory at all (Hiber 2022, 460).

However, this does not mean that dispositive rules do not have the same significance as the parties. They are still legally binding, and parties must abide by them if they did not choose to alter them. The only way to avoid the application of these rules is to derogate their application. Therefore, the meaning of 'non-mandatory' is that the parties did not use their right to modify their contract. This logic applies to all rules equally, including those related to the consequences of force majeure.

The discussion above may be useful when assessing the validity of a particular contractual term. It is even more important when dealing with bespoke forms that are influenced by different legal systems and thus require careful scrutiny, since what is valid under one country's law, does

[28] Parties may regulate their obligation relations in a way that is different than the one specified within the law, unless something else follows from a specific provision, or from its general meaning.

[29] For example, Art. 364 expressly states that parties cannot alter, i.e. establish a longer or shorter period of unenforceability due to the statute of limitations than the one set forth by statute, nor they can suspend unenforceability for a given period.

[30] A useful example is the analysis of effectiveness of waiver of claim clauses under domestic and akin legal systems in Živković (2020, 92). Waivers represent one method of deviating from default rules and the finding is that they may be ineffective and invalid not only where their ineffectiveness is expressly regulated by the statute, but also in other instances, as is the case with other contractual terms. Živković further proposes a useful two-step test for establishing so-called waivability of a claim which might be used in general when determining the nature of a provision. For more on this test see Živković 2020, 92–94.

not have to be valid under another's. The same applies to the FIDIC forms, regardless of how useful or practical their solutions might be. For instance, validity of provisions providing a special time bar for submitting the claim under the FIDIC claim procedure has been closely examined from the LOO perspective as the answer is not that straightforward (Nikčević 2021; Babić, Pelicarić 2019). Therefore, a proper understanding of the nature of the LOO provisions that correspond to concepts contained in the FIDIC forms is a necessary first step.

3.2. FIDIC's Attempt to Elaborate on the LOO's Provisions on Contractual Liability

Returning to the regime of force majeure under the domestic LCT regime, the general rule is found in Article 263 LCT which deals with contractual liability. According to this provision, the debtor is released from liability for loss provided that it proves its inability to perform the obligation, or that the delay in performing its obligation was due to circumstances that occurred after the conclusion of the contract and which it was unable to prevent, avoid or overcome – which is traditionally been understood as vis major in domestic legal literature (Jankovec 1993, 98; Karanikić Mirić 2019, 46).[31] The LOO is explicit as to the parties' ability to amend this rule. The parties are free to change the default standard and consequently extend or limit and exclude the liability in accordance with Articles 264 and 265 LOO. However, this freedom is not without its boundaries: in both extremes (extension and exclusion of liability), the parties are limited by certain standards and principles. Therefore, the parties wanting to exclude their liability cannot do so in the case of intention or gross negligence, nor can they extend the liability if that would be in contravention with the principle of good faith and integrity.[32]

[31] In *Skica*, an older draft document that influenced the LOO, created by Mihailo Konstantinović, Art. 208 merely states that the debtor will be released from liability in the case of vis major or another external cause for which it is not responsible, without going into further definition of what qualities or traits the cause should have. See Konstantinović 1996, 102.

[32] Article 264 para. 2 provides that the creditor cannot rely on the provision excluding liability contrary to the good faith principle, but it does not state that that clause is invalid. It is possible that the drafters did not intend to make these clauses invalid, but rather to give the court an option to avoid their application. In the latter case, the court must assess the 'fairness' of the application of such clause in every

It has already been discussed in legal doctrine that the force majeure clauses represent a typical form of excluding liability (Jankovec 1993, 367). Of course, a clause that is named 'force majeure' can also have the opposite effect and extend the liability of the party. For instance, Jankovec (1993, 367) explains that by operation of default rules the manufacturer would be liable if a fire occurs within its factory since that is not an external event, but that the parties are free to exclude its liability in such cases. The parties are equally free to provide that the debtor will be liable in cases where it is liberated by default rules – in this case by providing that all cases of fire will not represent a vis major and therefore will not be the reason for exclusion of liability (because, perhaps, the area is susceptible to fires and the parties wants the debtor to take that fact into account).

In any case, when it comes to the FIDIC forms' Force Majeure clause, one thing is clear – it replaces the definition of vis major from Article 263 LOO. However, the Clause 19 definition of force majeure does not seem drastically different from the one required by the LOO. Indeed, the FIDIC forms require that the exceptional event or circumstance could not have been reasonably provided against before concluding the Contract, and the domestic LOO does not. The LOO does not mention the foreseeability of a circumstance whatsoever. However, this still does not mean that a party will always be released from liability when they could have foreseen a circumstance.[33] Parties are still required to act in accordance with specific standards of care,[34] in addition to their general obligation to act in accordance with the principle of good faith.[35] Therefore, Article 263 LOO can be interpreted in a way that does not allow a party to rely on a circumstance that was foreseeable at the time of the conclusion of the contract.[36] If the party acts in accordance with the required standard of care, it may be able to anticipate the adverse event, prepare for its effects and take appropriate measures to prevent it from affecting the contractual obligation. Therefore, it can be argued that unforeseeability is implicitly required by the general principles of contract law.

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particular case. If this provision were to lead to an outcome that is unfair, the court will simply not apply the clause (but it will not declare it void and the creditor may rely on it in another case).

33 Unlike the FIDIC forms' Force Majeure, the LOO is confined to the term circumstance without mentioning the event. However, this does not constitute a change or deviation since, as noted by some authors, the term circumstance is broader and might encompass the term event. See Krulj 1980, 648.

34 Art. 18 LOO.

35 Art. 12 LOO.

36 But there are opposing views. See Krulj 1980, 649; Jankovec 1993, 122–123.

Furthermore, it is notable that Article 263 LOO requires that the debtor could not have prevented the occurrence of the given circumstance, overcome its effects, or avoided negative the consequences it creates (Jankovec 1993, 116–120), while the FIDIC forms merely require that the party could not reasonably have avoided or overcome Force Majeure. Nevertheless, the purpose of both sets of rules is the same – the party must take reasonable measures to mitigate the influence and try to surmount it. Furthermore, the fact that the circumstances could not have been prevented means that they were beyond the party's control, which is the explicit FIDIC requirement as already discussed above.

Finally, the remaining condition – that Force Majeure must not be substantially attributable to the other party – is encompassed by the civil law understanding of vis major as something outside the sphere of the parties' agency in general (Konstantinović 1996, 102).

In any case, due to these reasons, I believe that the Force Majeure definition does not constitute a deviation from the domestic notion of vis major that would have a different outcome in practice. This position is further supported by the fact that the way that both the FIDIC Force Majeure and the LOO define force majeure implies that it should always be determined on a case-by-case basis, in accordance with all the particularities of the case.

Yet, the true improvement that the FIDIC forms' Force Majeure brings to the domestic LOO lies elsewhere. Its significance is demonstrated in the legal consequences that the clause attaches to the agency of these events.

3.3. Suspension as Primary Solution to Temporary Inability to Perform

The FIDIC Force Majeure provides that the party whose obligation (any obligation) is affected by force majeure shall be excused from performance of such an obligation, *for so long as such force majeure prevents the party from performing it*, provided that the party gives notice, describing in detail force majeure and its impact on specific contractual obligations. On the other hand, Article 263 LOO merely states that the party shall be released from liability for loss in case of vis major. This is a crucial difference between the two regimes and an important contribution of the FIDIC Forms.

The difference is that the L is phrased rather broadly, without considering certain specific situations that might be of practical relevance. It seems that this provision deals with situations where a vis major event occurs at the time when the deadline for performing the obligation lapses.[37] Article 263 LOO is also usually considered alongside provisions dealing with permanent impossibility, and not in other cases (Jankovec 1993, 75), but the major oversight of the LOO is that it does not prescribe what happens when impossibility occurs during the performance of the contract but stops before the lapse of deadline. Will the party be 'excused' if it did not fulfil its obligation in time but because of an adverse situation that lasted for only a while during the performance?

Attaching adequate legal consequences to temporary impossibility to perform might be crucial for construction contracts, which often suffer due to various external causes preventing contractors from performing the work. Merely stating that the contractor will be released from liability is not sufficient in cases where performance of the obligation has a more permanent character – which is precisely the case with construction contracts. Jankovec (1993, 72) criticised this approach and advocated the introduction of specific rules *de lege ferenda*, finding that cases of temporary impossibilities must be equipped with extending the time for performing the obligations, since the primary need should be to preserve the contract, not to terminate it, which would be the case with permanent impossibility. According to him, a time extension should be granted regardless of the debtor's responsibility for the impossibility, while liability for damages is a separate issue from the party ensuring successful implementation of the contract.

What the FIDIC forms provide is the suspension of the contract for the duration of the impediment and providing the contractor with additional time when it is the affected party suffering the delay.[38] The idea is to ensure that the contract stays in place and that the affected party does not suffer

37 It may be argued that this is Jankovec's position as well, but not stated as straightforwardly. He discusses that in case of a temporary impossibility, the creditor has Art. 126 para. 2 at its disposal, stating that the creditor may terminate the contract because the debtor did not fulfil its obligation in time but after giving the latter subsequent time for performance. For more details see Jankovec 1983, 74–76.

38 The FIDIC forms are not the only rules used in the construction industry that recognize the need to allow time extension in cases of external impediments. The construction business is largely dependent on practices in the industry, and it requires that contractual terms go hand in hand with these practices. Domestic practices were codified in 1970s in Special Usages on Construction (Posebne uzanse o građenju, *Official Gazette of the SFRY* No. 18/77) which expressly stipulated that the contractor is entitled to request an extension of the deadline in cases where it was prevented from performing the works due to changed circumstances (Usage 42). The legal nature of these usages is similar to that of the FIDIC forms, and if parties want them to be applied, they must include them in their contract, as stated in Art. 21 para. 2 of Serbian LOO.

any negative consequences in the event of Force Majeure. That is precisely what the LOO lacks (or at least does not offer as a straightforward solution). Clause 19 of the FIDIC does not refer to temporary impossibility explicitly, it only states that the party should be prevented from performance, but as already explained above, this term should be interpreted restrictively since the idea is to provide the party with adequate remedies only in truly exceptional cases, which undoubtedly includes situations of temporary impossibility.

Interestingly, the FIDIC Force Majeure clause goes even further when allowing the contractor to request payment of costs incurred due to a force majeure event in cases where that request would be appropriate (which is not a usual consequence, but having in mind the rationale of facilitating the performance of the contract, it represents a useful contribution of FIDIC forms.

3.4. Termination as Alternative Possibility

Another important contribution of the FIDIC forms concerns the specific grounds for terminating the contract due to reasons of force majeure; the FIDIC regime defines how long the parties are expected to tolerate suspension of performance.

Namely, when the inability to perform is temporary, it is not justified to terminate the contract right away. However, it would not be reasonable to expect from the parties to put up with the given inability for an indefinite period (even when it is certain that inability is temporary). For that reason, the FIDIC forms provide that both parties can terminate the contract after a certain period of time. After that time lapses, the FIDIC forms consider that the force majeure's impact on the contract had become more severe and that the parties deserve a remedy that is more rigorous – the right to terminate.

Still, the contract cannot be terminated in all cases where the contractor would be granted an extension of time and/or payment of costs, e.g. when delay/costs occurred because the contractor was prevented from performing *any* of its obligations. Unlike Sub-Clause 19.2, Sub-Clause 19.6 allows termination only where execution of *substantially all the works* in progress is prevented. This rule is in line with the rationale from Article 131 of the Serbian LOO which forbids termination in cases where a minor part of obligation has not been performed.

Since neither of the parties is responsible for force majeure, FIDIC allows both parties to terminate the contract in such cases, but the employer still must pay certain expenses incurred by the contractor, which are listed in Sub-Clause 19.6 para. 2.

On the other hand, the general rule of the LOO is that the creditor is allowed to terminate the contract when the debtor fails to fulfil its obligation by the date stipulated in the contract.[39] Where the deadline was an essential term of the contract, termination is automatic upon lapse of time for performance.[40] If the deadline is not an essential term, then the creditor must provide the other party with subsequent time to perform its obligation. If it fails to do so, the contract is terminated automatically. Of course, the employer is always allowed to terminate the contract where the contractor did not execute the work, but also, it could terminate for convenience in accordance with Article 629.[41]

The FIDIC forms, in fact, closely regulate the possibility of terminating the contract in case of temporary prevention where the time for performance still has not lapsed.

Notwithstanding previous reasons for termination, the FIDIC also allows termination for convenience and, just like domestic law, it gives this possibility only to the employer. As this is exclusively the employer's privilege, and if it terminates for convenience, it will have to pay for the same expenses as in the case of termination due to Force Majeure.

3.5. Impossibility to Perform: FIDIC vs. LOO

Under Serbian law, impossibility to perform is one of the ways of cessation of all obligations in general, not only contractual ones. In the LOO, the consequences of impossibility to perform are contained in Article 354

[39] Art. 125 para. 1 LOO.

[40] Art. 126 LOO.

[41] In the event that the employer decides to terminate for convenience, Art. 629 LOO provides that it is supposed to pay to the contractor the stipulated fee, reduced by the amount of costs not incurred by the contractor, which would otherwise have been incurred if the contract remained in effect, along with the earnings received by the contractor elsewhere, or which it intentionally passed up.

LOO. According to this provision, in the event that the impossibility occurred for reasons for which the debtor is not responsible,[42] the obligation ceases to exist in any case.[43]

However, where impossibility affects the performance of an obligation stemming from a reciprocal contract (which construction contracts undoubted are) the contract in whole is affected.[44] In fact, Article 137 para. 1 LOO states that the obligation of the other party's obligation ceases as well, provided that neither of the parties are responsible for the impossibility.

The rationale for the position that the impossible obligation ceases to exist leads to the conclusion that it is mandatory and cannot be amended. When performance of an obligation becomes impossible, there is no logical reason to maintain that party's obligation in force, as it simply cannot be performed. Therefore, it appears that including provisions providing for a different legal destiny of the obligation in the event of a subsequent impossibility to perform is not permitted. When it comes to FIDIC Sub-Clause 19.7, which stipulates that the parties are discharged from their obligations in the event that their performance becomes illegal or impossible, or when parties are released from performance by operation of the governing law, its existence in the contract might seem may appear futile as it does not add to the LOO's position but only confirms its position.

However, the Serbian law does not merely state that the contract ceases to exist, it also explains what the other consequences of subsequent impossibility are. Namely, the subsequent impossibility does not render the contract invalid. Legal theory states that the contract is either automatically terminated (Karanikić Mirić 2020b, 31), or that it continues to exist as a legal fact despite the fact that obligations contained therein ceased to exist (Jankovec 1982, 79).

42 Jankovec (1982, 75) claims that the obligation should cease to exist even when one of the parties is responsible for it.

43 Legal doctrine and case law have addressed on various occasions what kind of impossibility, and it is presently accepted that impossibility should be subsequent, total, and permanent, while it can be both legal and factual in nature. For more details see Krulj 1980, 356–357; Jankovec 1993, 51–81; Karanikić Mirić 2020b, 43–49. Apart from that, an obligation must be individual and not generic since performance of the latter remains possible.

44 The LOO uses the term 'bilateral contracts' in the heading of Section 5. This section actually deals with contracts where the purpose lies in reciprocity, i.e. in the exchange of mutual obligations. As stated in Radišić (2008, 125), one party undertakes to perform its obligation only because the other party promises to perform its obligation.

Regardless of which position one might deem justified, this divergence may be used to explain why the LOO provides specific rules dealing with consequences of impossibility to perform. The first one can be found in Article 137 LOO which stipulates that if the performance of the obligation of the other party from the reciprocal contract is still possible and if it fulfils that obligation in part, then it is entitled to restitution. On the other hand, Article 356 LOO stipulates that the debtor whose obligation ceased to exist is still required to transfer to the creditor any right it would have against a third person responsible for such impossibility. Read together, these two rules imply that restitution is not possible in all cases. In the scenario from Article 356, the creditor receives something in return which further means it should not be put in a better position than the debtor and hence should not be entitled to full restitution in that case.

Moreover, legal doctrine emphasises that the LOO rule providing restitution in case of termination is not adapted to the specifics of construction contracts where restitution is simply not possible (Vukmir 2009, 503). Precisely for that reason authors argue that termination of contracts with long-term obligations termination takes effect *ex nunc* (from that moment on), while everything that has already been done remains valid because it cannot be simply erased (Milošević 1980, 345–346; Radišić 2008, 168; Jankovec 1982, 166). This position suggests that neither situation should justify enrichment at the expense of the other party and the same applied to the impossibility to perform.

Finally, if we take Jankovec's (1982, 79–80) position that the rule providing that the other party's obligation ceases due to its debtor's impossibility to perform is dispositive in nature, then the parties may freely allocate the risk of such an impossibility and it does not matter whether the contract is terminated or not.

Returning to the FIDIC Force Majeure clause, items (a) and (b) of Sub-Clause 19.7 explain that the release from performance does not affect the rights of either party regarding any previous breach of the contract and provides that the contractor is entitled to payment of the same costs and sums as in case where the contract is terminated due to reasons of Force Majeure. By doing this, the FIDIC forms go beyond the position that the contractor should be paid for any work carried out and shifts some other costs to the employer.[45]

[45] I was referring to the costs provided in items (b) to (e) of Sub-Clause 19.6 para. 2.

4. CONCLUSION

This paper attempted to demonstrate that despite different conceptual understandings of force majeure under the FIDIC forms (in particular, the 1999 version of the *Red Book*) and the LOO, the FIDIC Force Majeure is convenient when concluding construction contracts for complex projects. Its validity from the perspective of domestic law does not seem disputed and its common law origins should not create any greater confusion when contracting under these forms.

Namely, it has been shown that the notion of force majeure under the FIDIC showcases endeavours to make these forms closer to civil law systems as its broad definition, providing qualities of force majeure rather than listing specific impediments, resembles the understanding of continental legal systems, including the one contained in Serbian law.

Moreover, the way that the FIDIC Force Majeure deals with consequences seems rather simple as it focuses on the real impact of the force majeure impediment and makes the difference according to its severity when attaching legal consequences. First, the FIDIC forms merely state that a party shall be excused when it is prevented from performing any of its obligations by reasons of force majeure (i.e. Force Majeure, as previously defined). For contractors this is of particular importance as they are entitled to a time extension when in delay, and to payments if they incur certain specific costs. Second, if the inability to perform substantially all works lasts for a certain time or reappears for the same reason, both parties are allowed to terminate the contract. And finally, if the performance of parties' contractual obligations becomes impossible or unlawful, or if the parties are released from further performance by virtue of governing law, the FIDIC forms discharge the parties from further performance.

However, the FIDIC forms, as a means of allocating certain risks, do not always require impediment to constitute Force Majeure in order to provide the contractor with a time extension and payment of costs. There are other terms dispersed across the forms that grant the contractor that right.

Finally, through the lenses of the LOO, the FIDIC forms' Force Majeure brings many contributions. Namely, by excusing the party and providing contractors a time extension, it solves the question of what happens with temporary inabilities to perform the contract, which represents a gap in the domestic regime. Accordingly, it can be deduced that under FIDIC forms, termination represents an alternative means in case of agency of force majeure, which should be used only when justified, which has been argued as necessary in domestic literature. Moreover, it seems that the FIDIC

Force Majeure-induced impossibility to perform does not diverge from the LOO's position significantly, providing that the contractors are entitled to certain costs it incurred in relation to the works, in addition to the usual reimbursement for the works already performed, as dictated by the rules on unjust enrichment.

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