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UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

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Chapter XXI. Exemption clauses

SUMMARY

During the course of construction, events may occur which impede the performance by a party of his contractual obligations. The present chapter concerns clauses under which a party who fails to perform a contractual obligation due to an impediment is exempted from certain legal consequences of the failure. It would be in the interest of the purchaser if the scope of the exemption clause were limited, both as to the events which constitute exempting impediments and the legal consequences of exempting impediments. The parties may wish to enable both parties to invoke an exemption clause (paragraphs 1 to 4).

[...]

The parties might also limit the scope of the exemption clause by adopting a restricted definition of exempting impediments. One approach may be to provide only a general definition of exempting impediments (paragraphs 10 to 12).

[...]

A. General remarks

1. During the course of construction, events may occur which impede the performance by a party of his contractual obligations. These impediments may be of a physical nature, such as a natural disaster, or they may be of a legal nature, such as a change in the law in the purchaser's country after the contract is entered into preventing the use of certain equipment specified in the contract. The impediments may prevent performance by a party permanently or only temporarily. Under the law applicable to the contract, a permanent impediment may result in the termination of the contract.
C. Definition of exempting impediments

1. General definition of exempting impediments

10. A general definition of exempting impediments would enable the parties to ensure that all events having the characteristics set forth in the definition will be considered as exempting impediments. This approach would avoid the need to compile a list of exempting impediments, and would avoid the risk of excluding from the list events which the parties would have considered as exempting impediments. On the other hand, it could be difficult in some cases to determine whether or not a particular event was covered by the general definition. The parties may wish to consider including the following elements in a general definition.

11. As a first element, the parties may wish to stipulate that performance of a contractual obligation must be prevented by a physical or legal impediment (see paragraph 1, above), and not, for instance, only made inconvenient or more expensive. The parties may wish to provide that if an impediment prevents a party from performing his obligation during only a temporary period of time, he is exempt in respect of a failure to perform only during that period.

12. As an additional element, the parties may wish to provide that the impediment must be beyond the control of the party failing to perform and that he could not reasonably be expected to have taken the impediment into account at the time the contract was entered into or to have avoided or overcome the impediment or its consequences.

Chapter XXII. Hardship Clauses

SUMMARY

Hardship is a term that is used in the Guide to describe a change in economic, financial, legal, or technological factors which causes serious adverse economic consequences to a contracting party, thereby rendering more difficult the performance of his contractual obligations. A hardship clause usually defines hardship, and provides for renegotiation to adapt the contract to the now situation, created by the hardship (paragraph 1). Hardship clauses are to be distinguished from exemption clauses (paragraph 2).

A. General remarks

1. The term "hardship" as used in the Guide means a change in economic, financial, legal or technological factors that causes serious adverse economic consequences to a contracting party, thereby rendering more difficult the performance of his contractual obligations. A typical hardship clause has two main aspects. Firstly, it would define hardship and, secondly, it would provide for renegotiation to adapt the contract to the new situation created by the hardship. The legal effect of hardship clauses may vary under different legal systems. While they are recognized under some legal systems, they are unknown in others; in still other legal systems their validity has not been tested in legal proceedings.

2. Hardship clauses are to be distinguished from exemption clauses (see chapter XXI, "Exemption clauses"). A hardship clause as conceived in the Guide would apply when a change of circumstances makes the performance of a party's obligations more onerous, but does not prevent that performance. An exemption clause as conceived in this Guide would apply only when a change of circumstances prevents performance. Thus, a hardship clause may apply where, after the contract is entered into, administrative regulations relating to environmental protection applicable to the construction change so as to introduce more stringent requirements which greatly increase the cost of construction. An exemption clause may apply where the regulations change so as to prevent further construction. The legal consequences resulting from the application of each type of clause as conceived in the Guide would also differ. F A hardship clause would provide that, if hardship occurs, the contract is to be renegotiated (see previous paragraph). An exemption clause would provide that, if a failure to perform an obligation occurs as a result of exempting impediments, certain remedies, in particular the recovery of damages, are not available to the aggrieved party against the party who failed to perform.
Referring Principles:

- VI.3 - Force majeure
- VIII.1 - Definition