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Who has the power to solve a breach of commercial contract – European Union, Ukraine or Russia?

With the increasing of globalization, more and more contracts are concluded between companies from different countries. So, in this situation, and increases the number of breaches of contracts. This trend was the reason for writing this article, which aims to find out whose powers allow settling disputes related to the breaches of contracts, and the extent to which such disputes can be resolved. In preparation was analyzed the experience of Ukraine, Russia and the European Union, in particular the United Kingdom (common law) and France (Civil law). It was found that an important role is played by the parties to the dispute, but it also depends on the phase of the process. Also, important external key figures are a judge or arbitrator. The powers of each of the parties depend on local laws, as well as the accepted agreement. Therefore, breach of the contract is one of the major challenges that may face the contracting parties. To further investigate the interesting question of which party receives benefits based on the law of any country included in the study.

Key words: breach of contract, judge, arbitrator, international commercial contract, power.

The problem and its importance. For the moment, the active international cooperation in different spheres deals with many problems. The questions which are linked with international law need some special attention. Any country is interested to guarantee the qualified juridical support of commercial contracts at the international level. That's why it is very important to know how the procedure of commercial contract breach must be put in practice and who has a power to take such a decision.

Analysis of the research into the problem. The problems of the commercial law at the international level have already become the objects of scientific investigation. Among the most important works we should note Russian scientist V. Orlow [4], Ukrainian investigators N. Mykolska, A. Makhinova [3], S. Bigun [1], and French lawyer C. Debourg [2] and others who had considered some aspects of international commercial cooperation connected with commercial contract.

The material of our research is limited to contracts for good and services we won't take into account: commercial premises rent contract, working contract, and contracts in Intellectual Property field. We will focus on international contracts because it is more international law study.

The objective of this article is point on that the knowing in advance who has the power to solve breach of contract is very important for firms, especially when they negotiate their contracts, because that helps them to prevent and to limit risks. Also they can change their usual contractual terms in order to create solutions when problems occur in the future. Knowing it also, allow firm to know what to expect when finding prospect in new countries or when a firm wants to expand in a new country.

We will analyze it at international level to be able to give guidelines to international firms and to firms who wants to enter in new markets. We will focus on who has the power to solve a breach of contract.

Breach of contract was defined by Sir Guenter Treitel as «a breach of contract is committed when a party, without lawful excuse fails or refuses to perform what is due from him under the contract, performs defectively or incapacitates himself from performing» [8]. For Europe Union, we will consider only France and United Kingdom in order to have one civil law country and one common law country. We will consider Russia because Russia is European Union biggest neighbor and Ukraine because it is «a priority partner country».

The power to solve a breach of contract belongs either *to the parties to the contract* **(I)** or *to external body Judge or arbiters* **(II)**.

I Parties themselves have the power to solve breach of contract. Regarding the power of the parties to solve a breach of contract the question to solve are «When» the parties can act **(A)** and «How» they can act **(B)**.

A) the moment the parties can solve breach of contract. This power is given to them at two moments: while they are still in the contract negotiation process, because they can add to the contract mechanism either to prevent breach of contract or to solve them in advance. The second moment this power is given to the

parties is when the breach of contract occurs. They can do it either just in case while negotiating the contract or take action when the breach of contract occurs:

1) The parties elaborate solutions in case of future breach of contract while negotiating the contract. The difference will come from law systems and not from geographic or membership of European Union or Commonwealth of Independent States. During negotiation the parties can add to the contract the contractual clause which will be used in the event of a breach of contract. It is not possible to make a list because thanks to the principle of contractual freedom: the co-contractors will decide what they will add to the contract and there are no lists available in one of the four countries of our study.

We will give explanations on the two ones with the most consequences: the choice of law and the choice of jurisdiction. The choice of law: the party can choose which law will rule the contracts; this choice is very important because, in case of breach of contracts, the consequence will be different. For contracts the basic rule is the freedom of choice of the law which will regulate the contract. This is stipulated by the Rome European regulation number 593/2008 which is used for the contract signed after December 19th 2009. In Ukraine there is a special law allowing that for international contracts: the «Law No. 2709-IV «On International Private Law».

The choice of the law by the party is not fully complete: the party cannot choose that there won't be any country's law that can be used for the contract. If the parties don't choose any country law which will rule their in their contract, a law will be chosen in case of litigation following some mechanism. The judge will decide which country law will be used following some criteria established in the national law.

Some kind of contracts, are regulated another way: first of all, the selling contract which are regulated either by the Hayes convention of June the 15th 1955 or the Rome European regulation number 593/2008 which is stipulating the same for selling contracts. In that case the law that will be regulating the contract will be the law of the country where the seller has his «habitual residence». Therefore a seller, who knows the other party will never take the law of his country, can negotiate that the parties won't choose law for that selling contract and therefore in case of litigation he will be sure it will be his own law which will be used.

Second for international transportation contracts for goods 16 if no law have been chosen to regulate the contract, the Rome European regulation number 593/2008 which stipulates in his article 5.1 that the law which has to be chosen is the law of the delivery point. The party can only choose one law for the contract, this is the mandatory limit to «forum shopping» practice and to make judgment possible The only limit, it is possible to choose another law for the arbitration procedure itself. Similar mechanisms are also used for the choice of the jurisdiction.

The main difference is that some States limit them to different fields but contracts are not included for example French civil Code article 3 makes a list of the fields where the choice of jurisdiction is impossible and contracts are not in the list, therefore they are not included. For the choice of jurisdiction the power of the parties is wider as it can happen during contract negotiation and also while litigation starts.

Also a party does not have to make explicit choice, if a party does not contest in defense the choice made by the plaintiff that means that party agrees. The choice of jurisdiction is a very good advantage for international contracts because it allows the party to select the jurisdiction which offers the advantage they search, like the speed the decision are taken, the language used by the judges. This is the fruit of negotiation or an agreement between the parties, therefore the parties must think if it is a good solution for them because it will be the one selected to solve a breach of contract.

In Russia several possibilities can be used to increase the strength of one party For example: the Civil Code offers «several methods of compelling the performance of an obligation» [...] one method is generally known as security devices» (article 389 of the Russian civil Code) [5].

These differences have to be carefully checked and known by the parties in order to avoid being in the weak position in case of breach of contracts. All has to be thought before negotiation process start and the negotiation goal must be a situation which is enough good for a party to sign the contract with in mind the consequences they expect in case the other party make a breach of contract. Different options are possible for the parties while they are negotiating the contract, they have also power when the breach of contract occurs.

2) The parties use solutions in case of breach of contract after the issues occur. We will look at two ways which happen when contract outcome is not the expected one: Liquidated damages and unilateral breach. While the first one can be considered as automatic sanction for a breach of the contract which has been planned by the parties in the contract, the second is a breach of contract made by one of the party of the contract without the agreement of the other one.

Liquidated damages: a way to avoid any intervention from outside the parties is to use liquidated damages. The condition: it has to be added to the contract by the parties during the negotiation part. It has similar implication the Civil law countries we study in this article, but not in common law countries. Liquidated damages exist in France, Russia arid Ukraine. They are in the Civil codes of these three countries. For France it is articles 1226-1233. In Russia it is article 329 and in Ukraine article 549. But in Ukraine regarding business contract it is the Commercial Code which has to be applied and the article 230 of the Commercial Code gives more possibility to claim liquidated damages. In Russia «liquidated damage is the most widely used security device listed in article 329». But contrary to common law, «Russian law combines the twins U.S concepts of liquidated damages and penalties into one omnibus security device called liquidated damages». Therefore if a Russian firm wants to set liquidated damages in a Common law contract with law of United Kingdom as law of the contract, the firm will be less protected than if it was the same notion in Russian law. Except on the amount of liquidated damages because Russian jurisdiction have decided they can decrease this amount if they feel it is too high thanks to article 333 of Russian Civil Code [5]. Some differences still exist, in the way judge is allowed to moderate this liquidated damage. This at first can be a surprise, because liquidated damage were created to allow the parties to create a rule with their contract and to solve the breach of contract with the liquidated damage.

A judge can still modulate the liquidated damage amount thanks to a principle of law: the justice must be checked by the State. In France also for commercial case, the interest which have to be paid in case of late performance are not liquidated damages and therefore cannot be decreased by a judge, who based their Decision on article 441-6 of the Commercial Code. If parties choose French law and French court to be the ones of the contract, they will choose a solution where judge powers are quite large and are also written in the Civil code, article 1152. The judge can increase and decrease the liquidated damage. The Code also set two limits, one for the judge who can only do this increase or decrease if the amount is really too high or too low, another one for the parties who cannot agree to prevent the judge to change the amount.

In United Kingdom, they might exist in the contract but they won't be enforced. Because common law system forces the parties to prove the link between the damage and the breach of contract before giving them damages. On the contrary, Civil law system uses this proof as a condition before giving damage when there is no contract a that is to say tort. In this case, we noticed the choice of one civil law country gives many advantages in case of breach of contract, because, the solution is automatic, fast, and efficient. France offers more protection to the other party because it allows judge to check if the damages are not either too high or too low. Therefore choosing civil law should be done if the risk are too high, especially during a financial crisis, in order to protect own interests.

If the party own interests are not to get amount of money to compensate the breach of contract but to leave the contract, they would better opt in for exactly opposite choice in the country's law for their contract, because it would help them in case of unilateral breach. We will one more time distinguish between the three civil law countries of our study and the common law country.

In Russia: the unilateral breach must be intentional for the liability to be searched and «the Civil Code expressly provides that a contract (contractual provision) excluding the liability for a future intentional breach is null and void (Article 401.4) ».

In Ukraine, to summarize the explanation provided by N. Mykolska and A. Makhinova, there are two kinds of unilateral breach of contract possible [3]. The first kind is with the judge agreement in case of significant breach (from other part) or significant changes of circumstances. The second kind, if it is allowed by the law or the contract.

In France, unilateral breach is not possible, except for one kind of contract: the long term contracts and only for future. French states law tried to find the balance between legal certainty and agreement unlimited in time. This was also needed to match the duration of a firm.

Regarding the solution chosen by common law with the example of United Kingdom: unilateral breach of contracts are possible and they can even be used in case the other party says it won't comply with contract requirement. In that case the innocent party has the right to claim for damage as it is an anticipatory breach from the other party.

In Russia, the party who is victim of the breach of contract can refuse to perform his obligation. To explain that point, V. Orlov uses the expression «is admissible», which means it is a possibility offered but it is not mandatory [3]. The parties can act at two different moments to prepare or to solve breach of contractual. Their actions have specific ways and face limits:

B) The way the power of parties can be used. To show the way the power of parties can be used we will see the nature of the request the innocent party can make and then we will see that the power of that party is limited:

1) the nature of the request the innocent party can ask. The nature of the request is directly linked with innocent party's power because what she can ask is what she has chances to get. Regarding damages: French, English, Ukrainian and Russian judges can allow damages in case of breach of contract. «Specific performance and mandatory injunction are exceptional in England, This is in contrast with France». In Ukraine it is possible to find very detailed specific performance. In Russia as Ch. Osakwe explains it: «specific performance will be only awarded if payment of damages would be an inadequate remedy». Even the innocent party can act at different moment, its powers are not unlimited [5, p.].

2) the limit of the power of the party victim of the breach. The limit of the power has the link with the choice a party can make or does not make. We will analyze it from a negative point of view to see the different consequences and the risks.

Not making a choice can have opposite consequences on the power of the parties. Not making a choice on the right time, will have dramatic consequences for the victim of the breach because some right won't be available for that party. This can happen by not making the right choice during the negotiation part of the contract. Like we will see, arbitration is possible in France, United Kingdom and Ukraine only if there was an arbitration clause / convention between the two parties. This can also happen after the breach of contract occurred, when the party takes too much time to act: «innocent party will lose his right to bring a claim for breach of contract if he delays for a certain length of time». Also in United Kingdom there is the Limitation Act 1980 which «provides statutory limitation periods».

Not making a choice, can be accepting the party other choice during litigation especially about jurisdiction choice, if the other party does not contest the jurisdiction chosen, it means they accept it.

Not every choice can be made. Sometimes alternative choices are offered to the party therefore when they choose one, they cannot choose the other. These choices are valid in all the four countries of our study. The French research center of Paris Sorbonne University has created a list which divides the sanctions for breach of contract in three categories. The Sanctions which aim to keep the contract, the sanctions which aim to make the contract disappear and the sanctions which aim to compensate this list was established in linked with European Union that means two of the countries of our study: France and United Kingdom. But we think it can be extended to Russia and Ukraine because the same kinds of sanctions exist.

The parties cannot have all the power when a breach of contracts occurs, because self redress is forbidden. In France and United Kingdom self redress is banned because «it is banned in all Member States» in European Union. In Russia prohibition of private revenge started in Russian law from the XVth century. In Ukraine prohibition exists but some Professors find it has come back indirectly in case law. That is why the power is given to an external body a judge or an arbitrator.

II. The power given to external body: judge or arbitrator. We will study the actual system in the four different countries **(A)** and then the trends **(B)**.

A. the actual system. We won't study in detail the judge power and arbitration in the four countries of our studies but instead we will explain in general both co-exist and then introduce special situations which limit the power of the parties. While both are possible in most of the case, there are special situations both are possible. For France, the situation is simple either there is an arbitration clause between the two parties and it will be arbitration or without any clause it will be a judge who will settle the case. The clause can be within the contract or it might have been agreed separately. For United Kingdom, the Arbitration Act gives the definition and the rules for arbitration. For Ukraine, «the law of Foreign Economy Activity [...] allows the parties to a commercial dispute to select a forum for its resolution56» and this include arbitration special situations. For the Russian legal system only arbitration courts are possible for commercial law, but they are State ones and organized like normal courts. And on tops of the courts there is The Supreme Arbitration (Commercial) Court of the Russian Federation, one if its mission is to «One of the most important lines in the activity of the Supreme Arbitration Court of the Russian Federation is to ensure the uniform understanding and application by all arbitration courts of the legislation in the sphere of economic relations», which does not exist in other countries' arbitration. So Russia is the example of a hybrid system.

France and United Kingdom are European Union member states; therefore we have to explain the specific role of European Union judge regarding the matter. There are two ways the European Union judge can be involved. Either by preliminary ruling, like when the European Court of Justice decided that «anti suit injunctions for arbitration agreements are incompatible with the Brussels I Regulation so that they are no longer available so as to counter-attack a torpedo action brought before the courts of a Member State». Or by judging cases when they reach the European Union level, that is to say when all the domestic remedies have been exhausted.

The European Court of Justice has set some guidelines, for example about the choice of the judge when there is a contractual breach: it must be the judge of the location where the breach happened.

Regarding Arbitration at European Union level, it does not exist. There is no arbitration institution, and no equivalent to European Court of Justice in arbitration. International conventions apply to all the four countries but they are limited to specific fields. The Vienna convention is the most famous we will study, its field of application is selling contracts between professionals. In this field the solution are the same for France, Ukraine and Russia because they ratified it and it has entered in force. But The United Kingdom has not yet ratified the CISG. The parties must fulfill the condition set by the convention that is to say the mistake of the other party must be enough big, and then four remedies are possible, they have been summarized as: Exception of non-performance / Specific performance / Unilateral termination / Damages, price reduction, default interest.

B. the trends. In France: to make arbitration the easiest way including international arbitration the goal is to attract business making contract to choose France and French law.

This is made by French state at international level: France is the most progressive regarding enforcement of the arbitration agreements, because it is even more progressive than European convention on Commercial arbitration and then New York convention. The same evolution is seen at national level: for Arbitration there is an extension, since the decree January the 13th 2011. It extends the field arbitration can be used and also who can use it. The French courts follow the same trend by case law, for example they judged that arbitration agreement was not ruled by any state law but has only to follow international public policy. In France it is possible to create tailor made solution when choosing arbitration, for example it is possible to choose one State law for the contract and one State law for the Arbitration convention. These changes are made to increase the number of arbitration in France and to attract more arbitration from abroad by making rules more liberal and easy to use. This will certainly increase the number of arbitration in France; even it is too early to be able to notice it.

Ukraine has opposite trend compared to France, because according to PWC Ukraine, there are not enough skilled arbitrators. It can be inferred that by reporting this point in their report they indirectly don't recommend Ukrainian arbitration. Also not enough arbitrator would mean there are delays and this would be against one of the advantages of the arbitration which means faster solution and that is important for a breach of contract, when the parties are expecting the fast solution to know if they will continue to make contract with the same firm, they need to know the outcome of previous breach of contract.

The Discovery of new dangers in arbitration has to be in mind for the parties when they choose the arbitration way, especially when there will be a breach of contract. The multiplication of proceedings linked with the same case is a tendency in the arbitration. And the situation gets more complex when arbitration decision is canceled by national court and that leads to new arbitration decision with opposite result. C. Debourg introduces it and gives famous French case law examples of it [2, p. 1]. Therefore the situation is real and increasing with the argumentation of choice for arbitration.

The language issue. It appears if the arbitration has to use the New York Convention on the Recognition and Enforcement of Foreign Awards. That convention was «adopted under the auspices of the United Nations», which means six official languages. A study made by Paulsson in 1998 discovered that French and English version don't match fully, while Russian version matches English version [6, p. 229]. Therefore, it can be sometimes tough for the party to select arbitration especially if they can access into their own language (English or Russian) while the arbitrator has another version but with different words while the three languages have similar values. Some authors go more far than this consideration like P. Glenn who thinks «choice of law is a costly and inefficient process. Particularly week in case of second-order conflict of conflict rules and in cases of tripartite relationship involving mixed proprietary and contractual features» [7]. We won't go so far because we think parties must think in advance to be ready in case a breach of contracts occurs.

To conclude, this study has shown the power belong to the parties at the contract, and they have to use them on the right time Then judge or arbitrator are given the power by contract or law to solve the problems. Regarding all these points, France, United Kingdom, Russia and Ukraine have created different solutions; most of them globally use similar mechanism. Knowing the difference and choosing as the law of the contract the law matching the interest of the party while negotiating the contract would give a definite advantage. That's why this study has shown some of the difference to give some clues in the choice.

Further research could be done by studying more countries within European Union like the former Soviet Republics which are now European Member States (Estonia, Latvia, Lithuania), and also country like Kazakhstan to see if the solutions are closer to the Russian ones. Studying Croatia would be also interesting because it has just joined the European Union by becoming its 28th member on July the 1st 2013 and it was part of another supranational entity: the Former Socialist Federal Republic of Yugoslavia.

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Яцишин М., Раффьє В. Кому належать повноваження вирішувати спори, пов'язані із порушенням комерційного контракту – Європейському Союзу, Україні чи Росії? З поширенням процесу глобалізації все більше контрактів укладається між компаніями з різних країн. Відповідно, у ситуації, що склалася, збільшується і кількість випадків порушення та розірвання контрактів. Така тенденція послужила причиною написання цієї статті, мета якої з'ясувати, чиї повноваження дозволяють вирішувати спори, пов'язані з розірванням подібних контрактів, і до якої міри такі суперечки можуть бути вирішені. У ході підготовки було проаналізовано досвід України, Росії та країн Європейського Союзу, зокрема Великобританії (загальне право) та Франції (романо-германська правова сім'я). Було встановлено, що важлива роль відведена сторонам спору, але вона залежить і від фази процесу. Також важливими зовнішніми ключовими фігурами є суддя чи арбітр. Повноваження кожної зі сторін залежать від місцевого законодавства, а також прийнятої угоди. Тому порушення і розірвання договору є однією з основних проблем, з якою можуть зіткнутися сторони договору. Для подальшого дослідження цікавим є питання про те, яка зі сторін отримує переваги, опираючись на законодавство тієї чи іншої країни, включеної в дане дослідження.

Ключові слова: порушення/розірвання контракту, суддя, арбітр, міжнародний комерційний контракт, повноваження.

Яцишин М., Раффье В. Кому принадлежат полномочия разрешать споры, связанные с нарушением коммерческого контракта – Европейскому Союзу, Украине или России? С распространением процесса глобализации всё больше контрактов заключается между компаниями из разных стран. Соответственно, в сложившейся ситуации увеличивается и количество случаев нарушения и расторжения контрактов. Такая тенденция послужила причиной написания этой статьи, цель которой выяснить, чьи полномочия позволяют разрешать споры, связанные с расторжением подобных контрактов, и до какой степени такие споры могут быть разрешены. В ходе подготовки был проанализирован опыт Украины, России и стран Европейского Союза, в частности Великобритании (общее право) и Франции (романо-германская правовая семья). Было установлено, что важная роль отведена сторонам спора, но она зависит и от фазы процесса. Также важными внешними ключевыми фигурами являются судья или арбитр. Полномочия каждой из сторон зависят от местного законодательства, а также принятого соглашения. Поэтому нарушение и расторжение договора является одной из основных проблем, с которой могут столкнуться стороны договора. Для дальнейшего исследования интересен вопрос о том, какая из сторон получает преимущества, опираясь на законодательство той или иной страны, включенной в данное исследование.

Ключевые слова: нарушение/расторжение контракта, судья, арбитр, международный коммерческий контракт, полномочия.