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On the Problems of Amending the Terms of the Contract on the Provision of Tourism Services during the COVID-19 Pandemic

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Abstract:

The article is devoted to the content of legal instruments in terms of tourism business, namely the problem of amending the terms of the contract for tourism services. Attention has been drawn to the existence of the relationship between the activities of the tourism business and the existing legal framework, as well as the key provisions of the legal plane that regulates the rules, conditions, and level of responsibility in the provision of tourist services have been highlighted. The consequences of the negative impact on the activities of modern representatives of the tourism industry have been determined, and the need to revise the policy of providing tourist services in a pandemic caused by COVID-19 has been substantiated. Authors' proposals for improving the legislative regulation of the tourism business in the context of the coronavirus have been provided, and a legal act that can positively influence the solution of existing problems has been proposed. The authors' vision of the content of the package of measures that can positively influence not only the development of the tourism industry in general but primarily to help to identify those legal segments that need improvement in the future.

Keywords: tourism; contract; tourism industry; legal act; legislative act; amendment of contract terms.

JEL Classification: M14; L83; L84; K49.

Introduction

The tourism sector around the world is suffering from measures to counter the COVID-19 pandemic. At the same time, the current situation should be considered not only as a problem but also as an opportunity to bring the tourism sector in Ukraine to a qualitatively new level. The tourism sector occupies one of the leading positions in the legal and economic sectors of the country's development. It is justified by the fact that the tourism industry plays a dual role of effect in the development of society. On the one hand, it is very important in the structure of sources that fill the budgets of different levels; on the other hand, the development of individuals in society without an effective recreation program does not benefit both at the social and industrial levels. At the same time, the representatives of the industry in question significantly influence the formation of each personality in society, the level of formation of their originative, creative, and spiritual values.

1. Literature Review

The first international convention, that aimed to establish the basic principles of activity and set out the essence of the legal relationship arising between the tourist and the tour operator, was the "International Convention on Travel Contracts" adopted in Brussels (Belgium) on April 23, 1970. This Convention defines two types of contracts - a tourist with a tour organizer (tour operator) and a tourist with a mediator (travel agent). Under the first contract, the organizer undertakes to provide the tourist with the full range of services ordered and paid for by the tourist. For the first time, a provision was established in Part 2, Clause 12 of the Convention in question, according to which the tour operator is liable to the tourist for the actions of third parties to whom they have entrusted the provision of services. Under the tourist's contract with the travel agent, the travel agent only acts as a mediator between the tourist and the tour organizer. The mediator is liable only with the powers granted by the agency agreement and is not responsible for non-performance or improper performance of the contract. When concluding a contract with a tourist, the mediator must indicate that they are acting as a mediator, and in case that this was not specified, they are liable to the tourist in case of improper provision of services as a tour organizer (Kostiukevych *et al.* 2020).

Relations in the field of tourism services are insufficiently studied in the Ukrainian legal literature. Scientific publications set out the general characteristics of this contract which is included in the types of service contracts. More than twenty years have passed since the adoption of the Law of Ukraine "On Tourism", but so far no scientific and practical commentary on this act has been made.

A comprehensive study of the legal nature of the contract for the provision of tourism services was not conducted. Scholars paid attention to the study of only certain issues in the field of tourism relations, in particular, dissertations by O.Y. Seryogina "Legal regulation of international touristic relations" (2002), M.M. Hudyma "Protection of consumer rights under the contract on the provision of tourist services" (2012), and M.M. Hudyma "The subject of the contract on the provision of tourist services" (2013).

2. Methodology

A civil law contract as an expression of the initiative and activity of the parties is to some extent a means of realizing the judicial personality of participants of civil legal relations. Determining the fate of the contract is manifested both at the stage of establishment and in the process of development of civil relations. Contractual relations of subjects of civil law are based on legal equality, free will, property independence of their participants, exclude subordination of power of one party to another, and provide a wide opportunity to determine the content of the contract, choose the best option for exercising subjective rights and responsibilities. Thus, the definition of terms of the contract should be voluntary, and the will of the parties should be expressed in the contract consciously and freely, based solely on the agreement of the parties and without any exterior pressure. Based on the abovementioned facts, one of the most important principles of private law regulation – the principle of freedom of contract, which is a general principle of civil law and is enshrined in Art. 627 of the Civil Code of Ukraine, is formed. The right to terminate and amend can be considered as an integral part of the freedom of contract, because it includes not only the choice of the counterparty, type of contract, method, and form of conclusion, defining the terms of the contract, but also changing the whole or its individual provisions; by proper performance, termination or unilateral withdrawal from the contract wholly or partially on the grounds provided for in the contract or in law. Thus, this principle underlies all the rules on contracts, including rules relating to the stopping, termination, and modification of the contract for the provision of tourist services.

Starting from March 12, 2020, quarantine – a set of temporary measures and restrictions imposed by the Government of Ukraine to eliminate epidemics – has been established in Ukraine (Articles 1, 29 of the Law of Ukraine "On Protection of the Population from Infectious Diseases") (Kostiukevych *et al.* 2020).

On March 16, the government issued a Resolution №215 (amendment to Resolution 11211) (Panasiuk, Akimova and Kuznietsova 2020) and effectively shut down businesses that work directly with the public (catering establishments, malls, fitness centers, etc.), significantly restricting the work of passenger carriers by rail, road transport, as well as closed the subways of Kyiv, Kharkiv, and Dnipro.

Even though the Resolution contains exceptions to the possibility of banks, insurance companies, grocery stores, fuel, communications, medical devices, but it should be recognized that the scale of such measures is an unprecedented halt to not only small but also medium-sized businesses. The crisis triggered by the coronavirus primarily hit travel companies and aviation. At the time of quarantine, all departures are suspended, while the demand for vouchers is approaching zero.

Against this restrictive background, the norm of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)” of March 17, 2020, № 530-IX (Akimova *et al.* 2020a), is not accidental. Amendments were made to Part 2 of Article 14-1 of the Law of Ukraine “On Chambers of Commerce and Industry in Ukraine” (Akimova *et al.* 2020b), according to which the quarantine established by the Cabinet of Ministers of Ukraine is a force majeure circumstance.

As a general rule, force majeure is a circumstance that “releases” a person from liability (Article 617 of the Civil Code of Ukraine). The relevant rule applies to both citizens and enterprises, both contractual and non-contractual obligations, in particular cases of damage (Part 3 of Article 1166, Part 5 of Article 1187 of the Civil Code, Part 2 of Article 1209 of Ukraine). But it is the business that has suddenly and “in all its glory” felt the effects of government decrees that is most interested in the terms of the release from liability.

In connection with the occurrence of force majeure, namely the decision of the National Council of National Security and Defense of Ukraine of March 13, 2020, on the situation around the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 and the Order of the President of Ukraine from March 13, 2020, №87/2020, according to which restrictions on crossing the state border of Ukraine are introduced, Ukraine closed air connections with all countries from March 17, 2020. Now, according to the prohibition of the Cabinet of Ministers to leave Ukraine, all tours that fall during the quarantine period (from March 17, 2020, to April 23, 2020) have been cancelled. Most of the agreements on the provision of tourist services were concluded for early booking promotions for the period from May to November 2020. But tourists who turn to tour operators and want to cancel the trip and get their money back, which should happen after April 24, will not be able to do so. Tour operators point out that force majeure does not apply to dates outside the official quarantine, and thus took advantage of the nuance of calculating penalties and changed the rules for calculating the amount of money when canceling a tour at the initiative of the tourist. Companies may not reimburse the tourist for an amount equal to the actual costs incurred (ACI), and such ACI may actually be from 90-100%. All these changes in contracts by tour operators were made unilaterally. It does not take into account that, as a result of the adoption of the resolution of March 11, 2020, №211 “On prevention of the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2” by the Cabinet of Ministers of Ukraine, force majeure occurred not only for tour operator but also for the tourist. The government's imposition of strict quarantine measures, such as a prohibition on travel agencies and public transport, makes it virtually impossible for tourists to properly fulfill their obligations under the terms of the travel service contract.

In civil science, the main attention is paid to the problems of concluding and terminating a contract, but the concepts, conditions, consequences, and general patterns of changing the terms of the contract remain unexplored or contain numerous gaps that have now become relevant. Thus, Art. 629 of the Civil Code of Ukraine proclaims the principle of contract obligation (*pacta sunt servanda*), that is, the civil legislation enshrines the principle of inviolability of the agreements reached by the parties to the transaction, and thus the relevant conditions enshrined in the contract. The firmness of contractual ties, their ability to maintain stability in conditions where economic conditions change, is recognized as one of the main factors in the dynamic development of market relations. The firmness of contractual relations determines the stability of civil turnover as a whole.

The concept of amendment of obligatory legal relations traditionally consists of two components: the obligation can be changed in content (qualitative feature) and in subjective composition (quantitative feature). A change in the content of liability is usually a modification that “results not in a new obligation but only expands or narrows, that is, the content of the previous obligation is determined differently.”

The amendment of the contract is not aimed at the liquidation of the contract concluded by the parties but only at changing some of its terms by committing, as a rule, both parties to the relevant legal actions, which in fact by its nature is a transaction, as a transaction is an action of a person aimed at acquiring, amending, or terminating civil rights and obligations (Part 1 of Article 202 of the Civil Code of Ukraine). By its legal nature, the action of the parties to amend the contract is not only an agreement but also a contract, as it is an agreement of

the parties aimed at amending civil rights and obligations. Therefore, such actions are subject to the general rules on the procedure for concluding the contract, but taking into account the fact that the parties will not conclude the contract but amend its terms. Based on this, an amendment in the contract is a change in its terms while maintaining the model of the contract, that is, the signs of the original obligation remain unchanged.

As we can see, the legislator in Art. 651 of the Civil Code provides the same grounds for amendment and termination of the contract, so the amendment and termination of the contract should be understood as a normative and logical sequence of actions performed by the parties, in the manner and on the basis provided by the contract or legislation, in order to change or terminate the contract between them for the future.

Although the legislator combined the amendment and termination of the contract by allocating the same grounds, it should be noted that the legal consequences of amending and terminating the contract are different, and therefore, these are different legal phenomena. In particular, in case of an amendment in the contract, the content of the obligation based on the contract in question also is amended. In this case, the obligation is amended in the part in which the contract underlying it was amended and in the other part remains the same. Upon cancellation of the contract, it is terminated, including the termination of the obligation based on it. From this moment the parties lose the rights provided by the obligations and are released from the corresponding obligations (Iasechko *et al.* 2020a,b,c,d,e).

According to Part 1 of Art. 653 of the Civil Code of Ukraine, the subject, place, terms of performance are subject to change, however, the specified list is not exhaustive that gives the bases for a wide interpretation of norm, which has been used by tour operators in contracts on provision of tourist services at present. Civil law does not contain a direct indication as to which essential terms of the contract are permissible to be amended and which contractual terms are not subject to be amended under the influence of any circumstances.

The possibility of changing the contract as a voluntary action of the entitled party aims to amend the specific conditions of the contract for the future from the moment specified in the contract. An important element of changing the contract is the notification of the party about the desire to change the legal relationship, that is, it is an offer and acceptance.

The contract will be considered amended at the time of receipt by the person who sent the proposal to amend the contract (offer), consent to such an amendment (its acceptance).

The agreement on termination and amendment of the contract consists in direction of the offer (the proposal to conclude it) by one participant of the contract and its acceptance (acceptance of the proposal) by another participant (or participants) of the contract. At the first stage of concluding such an agreement, the person initiating the termination of the contract expresses their will, and this offer has a number of features: 1) it is impossible to conclude an agreement on termination of the contract by public offer because it is addressed to an indefinite number of persons; 2) the offer must be clear - that is, the acceptor must draw a clear conclusion from it about the termination of the contractual obligation; 3) the offer may either contain or lack the deadline for acceptance. In the second stage of concluding the agreement, the acceptor also expresses their will: either accepts the offer of the bidder or rejects it. In the latter case, the relationship between the offeror and the acceptor is terminated. Upon termination of the contract, the acceptance must be complete and unconditional (Akimov 2020; Linnik *et al.* 2020; Grazhevskaya and Mostepaniuk 2020; Anwar *et al.* 2020).

This requires the settlement of such a moment as the notification of the other party to amend the contract, the solution of which is to fix a certain period in which the parties can agree to amend the contract. Thus, Part 3 of Art. 188 of the Commercial Code of Ukraine provides that the party to the contract, which received a proposal to amend or terminate the contract, within twenty days after receipt of the proposal notifies the other party of the results of its consideration. However, the norms of civil law do not contain such a set deadline for response, which is to some extent a gap in the legislation, which has been used by some creditors when changing the terms of the contract.

Conclusion

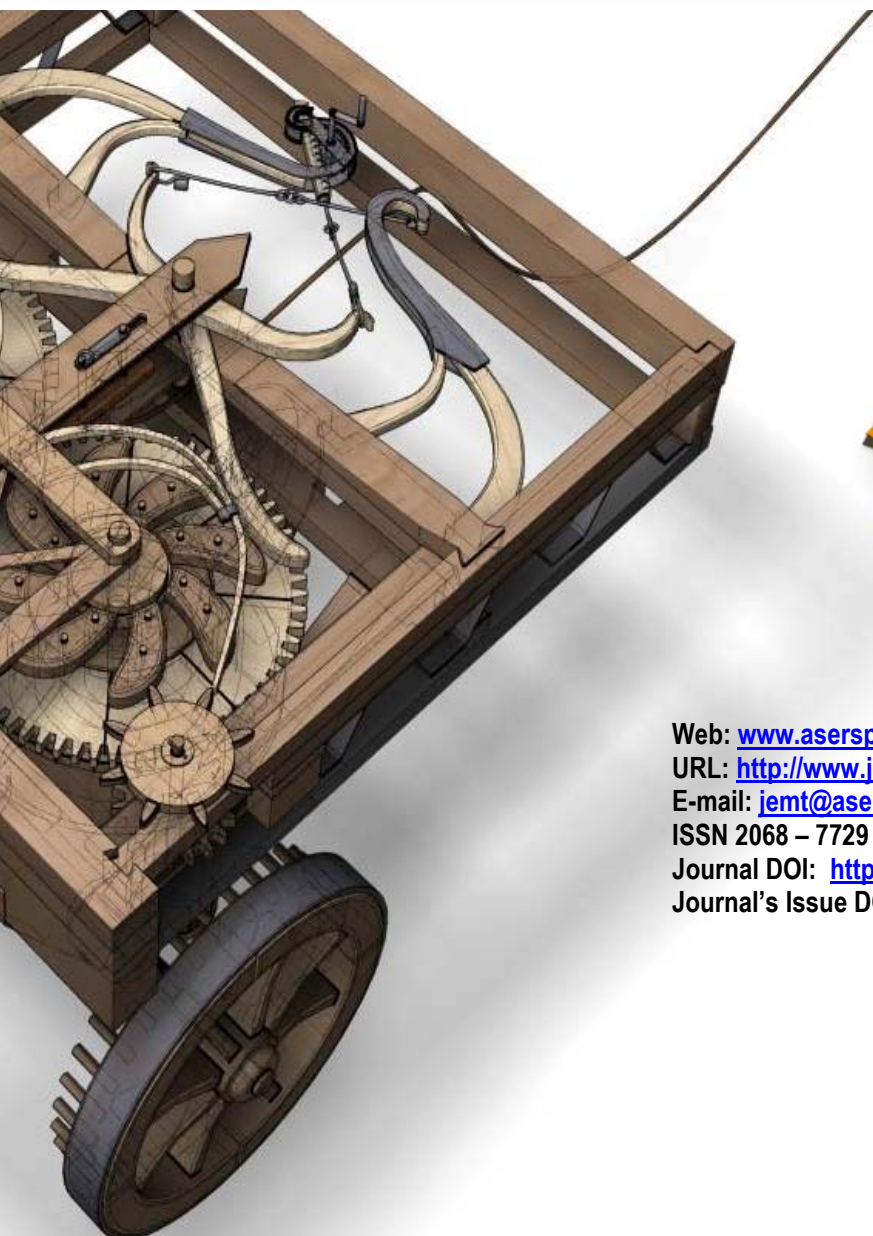
Due to the gaps in legislation and the ongoing situation in the world, after the end of quarantine, a whole layer of court cases will appear in judicial practice where tourists will demand a refund of funds paid under the contract for the provision of tourist services. The amendment and termination of the contract for the provision of tourist services must be made in writing. A party who has declared an amendment, termination of the contract for the provision of tourist services, or unilateral refusal to perform the contract wholly or partially may not withdraw this refusal from the moment it was notified to the other party if it does not follow otherwise from the law, other legal acts, contract or customs of business turnover. However, the amount of refunds can be reduced by the amount of actual costs incurred, while the main inconvenience for consumers is that the calculation of the amount of ACI is

carried out individually after the cancellation of the tour. When cancelling the trip, the tourist does not know the amount of possible compensation from the tour operator.

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