

НАЦІОНАЛЬНИЙ УНІВЕРСИТЕТ
«ОДЕСЬКА ЮРИДИЧНА АКАДЕМІЯ»

**ВІД РИМСЬКОГО ПРАВА
ДО ІНТЕГРАЦІЙНОГО ПРАВА ЄВРОПИ:
ЄВРООРІЄНТОВАНА ШКОЛА
ПОРІВНЯЛЬНОЇ ЦИВІЛІСТИКИ
НА ТЛІ ГІБРИДНОЇ ВІЙНИ**

Колективна монографія

*За редакцією
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Одеса
Фенікс
2025

УДК 323.22/.28:355.01] (477):342.7
В 42

*Рекомендовано рішенням вченої ради Національного університету
«Одеська юридична академія» 24 вересня 2025 року (протокол № 2)*

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В 42 **Від римського права до інтеграційного права Європи: євроорієнтована школа порівняльної цивілістики на тлі гібридної війни : кол. монографія / за заг. ред. проф.: Є. Харитонова, О. Харитонової, І. Давидової. – Одеса : Фенікс, 2025. – 660 с.**
ISBN 978-617-8763-01-5

Колективна монографія є комплексним дослідженням еволюції приватного права – від римської традиції до сучасних європейських моделей у контексті гібридної війни проти України.

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УДК 323.22/.28:355.01] (477):342.7

ISBN 978-617-8763-01-5

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Розділ 13. Дорожнє будівництво під час війни: поняття, значення та правові засади (Юлія Кривенко, Сергій Колесниченко)	358
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ГАЛУЗЕВІ ТРАНСФОРМАЦІЇ ПРИВАТНОГО ПРАВА

Розділ 14. Адаптація законодавства України до права ЄС в сфері регулювання сімейних відносин в умовах гібридної війни (Оксана Сафончик)	383
Розділ 15. Цивільно-правові особливості банківських договорів у країнах континентальної правової сім'ї (Роксолана Московчук)	415
Розділ 16. Вплив римського приватного права на формування непоіменованих контрактів (Вікторія Павлова)	447
Розділ 17. Особливості виконання договору про управління спадщиною в умовах воєнного стану (Сергій Узунов)	457
Розділ 18. Особливості договору про надання послуг з охорони майна в умовах воєнного стану (Денис Карташев)	479
Розділ 19. Особливості процедури банкрутства в Україні та ЄС: порівняльно-правовий аспект (Олена Копитова)	513
Розділ 20. Termination of the Obligations Due to Impossibility of its Performance: Force Majeure Clause V. Hardship Clause (Clausula Rebus Sic Stantibus) (Гончаренко Владислава)	547

ЦИФРОВІЗАЦІЯ ТА НОВІ ТЕХНОЛОГІЇ

Розділ 21. Роль цифрових технологій у забезпеченні доступу до цивільного правосуддя: компаративістський погляд (Крістіна Дрогозюк)	566
Розділ 22. Приватно-правові засади цифрової економіки: європейський досвід та український контекст (Оксана Калітенко)	595
Розділ 23. Від цивілістичних шкіл до єдиної цивілістичної традиції: спадкоємність, інтеграція, перспективи (замість післямови) (Євген Харитонов)	633
СПИСОК ОСНОВНИХ ПРАЦЬ ПРЕДСТАВНИКІВ ШКОЛИ.	637

Розділ 20

TERMINATION OF THE OBLIGATIONS DUE TO IMPOSSIBILITY OF ITS PERFORMANCE: FORCE MAJEURE CLAUSE V. HARDSHIP CLAUSE (CLAUSULA REBUS SIC STANTIBUS)

DOI

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Introduction

The stability of contractual legal relations and strict application of the principle of *pacta sunt servanda* are necessary conditions for the development of a sustainable legal system. An essential change in circumstances that the parties relied on when concluding a contract assumes particular risk significance during the contract's performance, which can lead to an imbalance of the parties' obligations under the contract.

In the conditions of war in Ukraine, the application of the mechanism of termination or change of contracts due to a significant change in circumstances becomes especially important. This is because it may not be possible to use the force majeure concept in territories where there are no direct military operations, but the fulfillment of obligations is impossible due to constant shelling and significant destructions.

Under the civil legislation of Ukraine, the performance of a contract is possible but significantly complicated in the event of a significant change in circumstances. A change in circumstances is significant if they have changed to such an extent that, if the parties could have foreseen it, they would not have concluded the contract or would have concluded it on different terms. A significant change in circumstances can be qualified as a type of impediment beyond the debtor's control.

Force majeure is used when an unforeseeable event that is out of one party's control makes it impossible to fulfill their contractual obligations, even if they took reasonable precautions.

Hardship, on the other hand, refers to situations where fulfilling the contract is still possible, but significant changes in circumstances have made it in an economic sense impractical.

The problem of the differences between such types of impediments beyond the debtor's control, such as force majeure and circumstances that have changed significantly (*clausula rebus sic stantibus*), has not yet found its reflection in civil literature under the legislation of Ukraine. There is also no unified approach in judicial practice to resolve disputes regarding the change or termination of a contract due to a significant change in circumstances, making the performance of the contract excessively burdensome.

Clauses regarding substantial changes in circumstances are usually not included in the content of a contract. Therefore, it is necessary to analyze theoretically the cases where the impossibility of performance arises due to force majeure, and when it arises due to a substantial change in circumstances as a basis for modifying or terminating the contract.

Most national laws and Codified Laws of Europe contain provisions on force majeure and/or hardship. The United Nations Convention on Contracts for the International Sale of Goods (CISG) contains only a force majeure clause, but, it does mention any rules on hardship¹. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of reference (DCFR)² contains provisions dealing with force majeure and hardship.

Force Majeure in UKR-CC, National Laws, CISG and DCFR

1. Force Majeure in UKR-CC

The rule of classical Roman jurists, mainly associated with formal stipulatory obligations aimed at transferring ownership of a thing,

¹ United nations convention on contracts for the international sale of goods (1980). URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

² Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of reference (DCFR). Full Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) / Ed. by Christian von Bar and Eric Clive. Vol. I VI. Munich, 2009. 4795 p. http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf

«impossibilium nulla obligatio est», has influenced on common views on the impact of the impossibility of performance. Impossibility of performance can be determined as the subjective or objective inability of the debtor to perform certain actions that constitute the content of the obligation. Impossibility of performance characterizes situations in which the performance of the debtor's obligations arising from the contract or law has become impossible for various reasons. Impossibility is an event that arises at the moment of performance of the obligation and is opposed to the principle of the inadmissibility of unilateral refusal of the obligation¹. The concept of impossibility of performance is collective because this impossibility is associated with different facts that impede the normal dynamics of the obligation.

Art. 526 UKR-CC² formulates general requirements for the performance of contractual obligations: the obligation must be performed properly in accordance with the conditions of the contract and the requirements of UKR-CC, other acts of civil legislation, and in the absence of such requirements and conditions – in accordance with the customs of business turnover or other commonly accepted requirements. The performance of the obligation consists of actions taken by the creditor and the debtor that constitute the content of their rights and obligations. The debtor must perform the obligation to the rightful creditor. Art. 527 (2) UKR-CC grants each party to the obligation the right to demand evidence that the obligation is being performed by the proper debtor or that the performance is being accepted by the rightful creditor or an authorized person. If a party does not exercise this right, it bears the risk of the consequences of not making such a demand.

In case it becomes impossible to perform an obligation due to circumstances for which neither party is responsible, the obligation is terminated (Art. 607 UKR-CC). From the content of Art. 607 UKR-CC, it follows that if the impossibility arises due to the fault of the debtor or the creditor, the obligation is not terminated. In the case of blameworthy impossibility of performance, the obligation is not terminated but only changes, as for the blameworthy party, the obligation to perform is

¹ Khalabudenko O. A. Property Rights. Book 2. Law of Obligations. Chişinău: International Independent University of Moldova, 2014. P. 422.

² The Verkhovna Rada of Ukraine (2003). Zivil'nyj kodeks Ukrainy. [Civil Code of Ukraine: Code of Ukraine]. URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>

transformed into an obligation to compensate the losses incurred by the counterparty, pay penalties, etc.¹

The conditions for termination of an obligation in case of impossibility of performance are: 1) the existence of an objective circumstance, i.e. factual (physical) or legal impossibility to perform the obligation; 2) such circumstance arose after the conclusion of the obligation; 3) the impossibility to perform must arise during the existence of the obligation; 4) there is a causal connection between the objective circumstance(s) and the factual impossibility to perform the obligation; 5) there is no fault of the parties to the obligation (except in cases where liability is provided for by law or by contract).

It is important to distinguish between the impossibility of performance as a ground for terminating an obligation and force majeure. Force majeure is just a type of impossibility of performance and may in some cases result in termination of the contract. Therefore, it should be noted that the occurrence of force majeure circumstances does not always terminate the obligation, but only releases the obligor from liability for its non-performance.

The release of the debtor from liability in case of impossibility of performance is possible in the following cases: the circumstance is force majeure; there is no causal link between the actions of the debtor and the circumstances that have arisen; the circumstance that caused the impossibility of performance was beyond the control of the debtor.

Force majeure and impossibility of performance are related to each other as cause and effect and are mutually inclusive, since impossibility of performance can occur even outside the scope of force majeure. Absolute (physical) impossibility of actual performance of the obligation is an impossibility, the cause of which is the action of force majeure. In this case, any conditions that leave the possibility of performance of the obligation must be excluded. Impossibility serves as a basis for exemption from liability only if the impossibility is a consequence of the action of force majeure.

The concept of «force majeure» (*vis major*, force majeure, act of God) has existed for thousands of years and refers to a superior force, a «divine

¹ Prodaievych I. S. Termination of an Obligation Due to Impossibility of Performance: author's abstract of a PhD (Candidate of Legal Sciences) dissertation: 12.00.03. Odesa National Law Academy. Odesa, 2009. P. 12.

providence,» or an event that exceeds the power of human forces that can be opposed to it, and therefore releases one from liability.

The concept of «force majeure» is not defined in the UKR-CC, and instead, the term «uncontrollable force» is used. According to Art. 263 (1) UKR-CC, an uncontrollable force is defined as an extraordinary or unavoidable event under certain circumstances. Similarly, Art. 218 of the Commercial Code of Ukraine states that participants in commercial relations are responsible for non-performance or improper performance of a commercial obligation or violation of the rules of commercial activity unless they prove that all measures within their power were taken to prevent a commercial violation. Therefore, Art. 218 of the Commercial Code of Ukraine simply repeats the civil law definition of uncontrollable force and lists circumstances that do not fall under this category, which completely coincide with the circumstances specified in Art. 617 (1) UKR-CC regarding the case. It should also be noted that the approach of the legislator to defining the sole basis for relieving a participant in commercial relations of liability for a breach of obligation only in the case of impossibility of performance is inappropriate. Moreover, Art. 218 of the Commercial Code of Ukraine does not indicate whether the cause of impossibility of performance is solely due to an uncontrollable force or other reasons that depend on the will of the debtor. Therefore, due to the legislative imperfection of Art. 218 of the Commercial Code of Ukraine, it is advisable to apply the general norm of Art. 617 (1) UKR-CC to commercial disputes.

In Art. 14-1 (2) of the Law of Ukraine «On Chambers of Commerce in Ukraine» the terms «force majeure» and «uncontrollable force» are identified as identical. Specifically, force majeure circumstances (acts of God) are considered to be extraordinary and unavoidable circumstances that objectively make it impossible to fulfill obligations stipulated by a contract, agreement, or legal and regulatory acts, namely: the threat of war, armed conflict or a serious threat of such a conflict, including but not limited to hostile attacks, blockades, military embargoes, actions of a foreign enemy, general military mobilization, military actions, declared and undeclared war, actions of a public enemy, riots, acts of terrorism, sabotage, piracy, disorder, invasion, blockade, revolution, coup d'état, mass riots, the imposition of curfews, quarantine, expropriation, forced eviction, seizure of enterprises, requisition, public demonstration,

blockade, strike, accident, unlawful acts of third parties, fire, explosion, prolonged interruptions in transportation, regulated by the conditions of the relevant decisions and acts of state authorities, closure of sea straits, embargoes, export/import bans, etc., as well as those caused by exceptional weather conditions and natural disasters, namely: epidemics, severe storms, cyclones, hurricanes, tornadoes, squalls, floods, snow accumulation, icing, hail, freezing of the sea, straits, ports, passes, earthquakes, lightning, fire, drought, subsidence, landslides, and other natural disasters, etc.

In our opinion, it is worthwhile to positively evaluate the attempts of the Ukrainian legislator to establish at least an approximate list of life circumstances that can be recognized as force majeure (uncontrollable force) and circumstances that are not recognized as such. Generally, foreign legislation does not contain a similar force majeure list. However, according to case law on this issue, in French, German, and Anglo-American law, circumstances such as the non-issuance of export or import licenses, inflation, and other forms of currency depreciation, i.e. economic impossibility of performance, are never recognized as force majeure.

2. Force Majeure in National Laws

Regarding the impossibility of performing an obligation, the French and German legal doctrines have adopted one of the basic principles of the continental legal system, which was already known in Roman law: an obligation that cannot be performed is legally worthless (*impossibilium nulla est obligatio*). According to Art. 275 BGB, the impossible cannot be imposed on the debtor. In the civil law system, the grounds for release from liability are recognized as the economic impossibility of performing an obligation due to a sharp change in market conditions, price increases, devaluation, and other unforeseeable circumstances. In some types of contracts (air transport, storage, etc.), liability may arise even in the case of force majeure or *casus*.

In common law system, impossibility of performance may be caused by circumstances for which the debtor is not responsible and which arose after the obligation was created, including cases of economic impossibility of performance due to a sharp increase in the cost of performance as

a result of force majeure, death, or incapacity of the debtor¹. The legal systems of England and the United States are characterized by the principle of innocent (absolute) contractual liability of the debtor for breach of obligation, regardless of fault. In addition, force majeure and casus, in general, do not relieve the debtor of liability.

The responsibility for breach of contract in common law system is based on the principle of unconditional compensation, which is considered adequate to the actual performance of the obligation. For this reason, the purpose of establishing grounds for exemption from liability for non-performance (improper performance) of the contract is generally eliminated in legislation. Thus, there are no cases where the debtor is exempted from liability when performance is impossible. However, exceptions to the general rule have been formed by case law in the Anglo-American legal system, which allows for the release of the debtor from liability in cases such as accidental loss of an individually specified item – the subject of the contract, the death or illness of the debtor in an obligation related to his/her person, adoption of a normative legal act that has made performance impossible, a significant change in economic circumstances that makes performance disadvantageous for the debtor, the loss of the purpose of the contract (the doctrine of «frustration of purpose»), i.e. the loss of the purpose of the contract after its conclusion due to circumstances beyond the control of the parties, and impossibility of performance, i.e. the occurrence of circumstances the absence of which was envisaged as a condition for the conclusion of the contract. Among the above grounds for exemption from liability, the doctrine of «frustration of purpose» is the most significant, which releases the debtor from the performance of the contract due to subsequent impossibility of its performance caused by events beyond the control of the parties to the contract. This is a very broad concept that includes impossibility, extreme difficulty in performance, and the loss of purpose, even if it does not lead to physical impossibility of performance of the contract. In modern conditions, in most cases, the impossibility of performance of the contract is caused by acts of state authorities.

Force Majeure Under French Law. According to Article 1218 of the French Civil Code, force majeure refers to an unforeseeable event that is

¹ Shymon S. I. Civil and Commercial Law of Foreign Countries: Study Guide (Course of Lectures). Kyiv: KNEU, 2004. P. 137.

beyond the control of the affected party and cannot be avoided by taking appropriate measures. In such cases, the affected party is not held liable for any breach of the contract. Therefore, force majeure releases a party from its contractual obligations.

Parties have the right to regulate force majeure clauses in a contract. They may modify the legal definition and consequences of force majeure through mutual agreement. In the absence of any such agreement, for an event to qualify as force majeure under French law three requirements must be met: 1) Exteriority (*extériorité*), *i.e.*, the event is beyond the affected party's control; 2) Unforeseeability (*imprévisibilité*), *i.e.*, the event could not reasonably have been foreseen at the time of the conclusion of the contract; 3) Irresistibility (*irrésistibilité*), *i.e.*, the effects of the event could not be avoided by appropriate measures.

Force majeure refers to unforeseeable and unavoidable events such as natural disasters, accidents, wars, and terrorism that affect a contractual relationship unexpectedly from the outside, and despite the parties' best efforts, cannot be avoided. However, if the parties should have anticipated the event, such as recurring floods in a region, and failed to take necessary precautions, the event may not be considered force majeure. To avoid disputes, force majeure clauses are often included in contracts to exempt both parties from liability or obligations when an extraordinary event occurs. A force majeure event temporarily suspends the primary obligations of both parties, and neither party is responsible for the adverse consequences of non-performance or delay. Therefore, liability is waived, and the other party cannot claim damages.

Force Majeure Under German Law. There is no specific legal provision in German law that allows the refusal, termination or adjustment of contractual relationships due to force majeure («*höhere Gewalt*»). Under German law, such events can be subject to statutory provisions on impossibility of performance (section 275 German Civil Code (BGB)), and provisions dealing with circumstances where the events in question interfere with the basis of the transaction (section 313 BGB).

However, force majeure clauses are often included in contracts and general terms and conditions, allowing for the right to refuse performance, dissolve or amend the contract. The consequences of force majeure are not regulated by law and are instead determined by the parties involved. These consequences can be stipulated in contracts and general terms and

conditions up to a certain limit. However, any provision that eliminates the requirement of fault, such as a clause providing for claims for damages in the event of force majeure, is generally ineffective in general terms and conditions. These clauses may permit suspension of contractual obligations without liability for non-performance while the force majeure event persists and some may even permit termination under certain circumstances such as a prolonged force majeure event.

Force Majeure Under English Law. Under English law, force majeure is not a distinct legal concept. Instead, the doctrine of frustration is applied to excuse contractual performance due to unexpected circumstances. However, parties can agree on a wider range of circumstances where failure to perform will be excused and the consequences of such failure in force majeure or hardship clauses. It is common for commercial contracts to include these clauses, but some contracts may not have them, leaving affected parties to potentially rely on the doctrine of frustration in situations such as the war in Ukraine.

Force Majeure Under US Law. According to the Uniform Commercial Code § 2-615, delays in delivery or non-delivery do not constitute a breach of contract if the underlying cause is an event whose non-occurrence was a basic assumption of the contract between supplier and customer. If such an unforeseen event occurs, the contract can neither be terminated nor adjusted; instead, the customer has (merely) no claims for damages against the supplier.

In order for a party to use a force majeure clause as a defense for non-performance or termination, they need to prove that the events cited in the clause are the actual reason for the failure to perform or terminate. This is more likely to be evident in contracts directly related to Ukraine, where the conflict could directly affect performance. However, the determination of causality will depend on the specific obligations and events in question. Whether sanctions resulting from the conflict in Ukraine can be considered a force majeure event will also depend on the language of the contract, but the same causal analysis will generally be applied.

3. Force Majeure in CISG

According to Art. 79(1) CISG, a party is not liable for failure to perform any of its obligations if it proves that the failure was due to

an impediment beyond the party's control and that such party 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. If a party is able to prove these requirements, it is relieved from its liability of performance and the other party cannot claim any further rights. A contracting party can invoke the clause where a party fails to perform its duties towards the other contracting party because of non-performance of a third party. As a legal consequence, the party who fails to perform and claims force majeure will be relieved from liability without having to face any claims of the forfeiting party and the other party is released from their obligations as well.

However, such release from liability applies only for the duration of such an obstacle. CISG also stipulates that notification of the other party of the occurrence of such obstacles is a mandatory condition for release from liability.

The content of Art. 79(1) CISG indicates that the concept of «force majeure» is not mentioned at all. It is believed that intentionally, this term is not used in international private law, and accordingly, the characteristics of extraordinariness and exceptionality, which allow the parties to the contract to independently determine the circumstances that release them from liability. However, in CISG the characteristics of unforeseeability (the person could not have reasonably expected the obstacle) and inevitability (the obstacle is beyond their control) are preserved.

Therefore, according to CISG for exemption from liability based on force majeure, the simultaneous presence of the following grounds is necessary:

- 1) non-performance must be caused by an obstacle beyond the control of the party claiming exemption from liability;
- 2) the party claiming exemption from liability could not have reasonably expected the occurrence of this obstacle at the time of the conclusion of the international sales contract;
- 3) the party claiming exemption from liability could not have reasonably expected to avoid this obstacle or its consequences;
- 4) the party claiming exemption from liability could not have reasonably expected to overcome this obstacle or its consequences.

It should be noted that in order to provide sufficient flexibility to CISG its developers used abstract categories, including the term «obstacle» instead of «force majeure» or «act of God,» and the expression «beyond the control» instead of the word «fault».

4. Force Majeure in DCFR

Art. III-1:102(3) DCFR reads: “Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.”

Furthermore, the law of defenses and excuses for breach of contract is by no means coherent, neither on most national levels nor on the European level, and that includes notions of force majeure and change of circumstances; of impossibility and frustration; of hardship and *imprévision*; of fault, *culpa* and *Verschulden*. Here, a general solution is established in Art. III-3:104 DCFR, containing a kind of *force majeure* clause, which was derived from Art. 79 CISG and Art. 8:108 PECL and has now been used by the European Commission in Art. 88 CESL.

Art. III-3:104 DCFR captures the modern understanding of contractual excuses. It describes the general rule for excuses: these are impediments to performance which are beyond the debtor’s control and could not be reasonably be expected to have been avoided or overcome. The criteria of this article may be interpreted as a redefinition of the general requirement of attribution of impediments. The article seems to focus particularly on impossibility, as it only provides specific rules for temporary and permanent impediments (art. III-3:104(3) and (4) DCFR).

Analysis. The civil law systems, as described earlier, mostly conform to the DCFR guidelines on excuses from performing. In Ukrainian, German and French law an impediment (a reason for non-performance) is considered valid only if and to the extent that the party affected by the impediment can prove that such impediment is beyond its reasonable control. The English common law approach may appear different at first glance, but it follows a similar structure. The default presumption under common law is that the party responsible for the impediment is liable (known as «strict liability»). However, there are exceptions to this, such as

cases of impossibility or illegality, and force majeure clauses can provide further exceptions. Thus, in practice, many reasons for non-performance do not result in liability, which is essentially the same outcome as in civil law systems.

Force Majeure, in general, is the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment can prove that such impediment is beyond its reasonable control and that it could not reasonably have been foreseen, avoided or overcome at the time of the conclusion of the contract.

Hardship in UKR-CC, National Legal Orders, CISG and DCFR

1. Hardship in UKR-CC

According to Art. 652 UKR-CC, a significant change in circumstances that the parties relied on when concluding the contract is a basis for its amendment or termination, unless otherwise provided by the contract or does not follow from the essence of the obligation. At the same time, a change in circumstances is considered significant if they have changed to such an extent that, if the parties could reasonably foresee it, the contract would not have been concluded at all or would have been concluded on significantly different terms.

The concept of «significant change in circumstances» is difficult to define. Thus, in the Decision of the Supreme Court of Ukraine dated February 20, 2012, it is indicated which circumstances cannot be considered significant for amending or terminating the contract by a court decision. In this case, the plaintiff asked the court to amend the financial lease agreement and recognize his payment of lease payments at the exchange rate of the hryvnia to the US dollar at the time of conclusion of the contract as lawful, since a significant fall in the hryvnia exchange rate is a significant change in circumstances. However, the court concluded that «the occurrence of the global financial crisis is not a significant change in the circumstances on which the parties to the contract relied when concluding it, since the economic crisis has a general nature and concerns

both contractual parties, therefore, it cannot be a basis for amending or terminating the contract in court.»¹

The contract may be terminated or amended if the parties could not reasonably foresee the corresponding risks at the time of its conclusion or if the risk assumed by the debtor proved to be extremely burdensome and in any case significantly impairs the property interests of one of the parties.

Therefore, in the presence of a significant change in circumstances, the responsibility of the parties is preserved. This means that the party whose right has been violated has the right to demand compensation for damages. Therefore, in the event of the termination of a contract due to significantly changed circumstances, the parties may not only demand a fair distribution of actual damages but also of lost profits.

2. Hardship in National Legal Orders

Imprévision Under French Law. French law is reluctant to change the terms of a contract, even when circumstances have changed. The principle of performing obligations takes precedence over ex post modify claims (Art. 1134 of the French Civil Code), with a few exceptions. For example, public contracts can be modified or terminated by a court. A contract can be modified if an unforeseeable circumstance prevents the fulfillment of an obligation. For instance, after the First and Second World Wars, the French Parliament allowed courts to suspend contracts that were entered into before the start of either of these wars.

Under the doctrine of *imprévision*, if the circumstances have changed in a way that would make it very difficult for one party to fulfill the terms of the contract, then that party may be entitled to some form of relief.

Prior to the 2016 reform of French contract law, that is based on the *pacta sunt servanda* principle, courts in France refused to apply the *théorie de l'imprévision* to commercial contracts unless the parties had agreed to it. However, since October 1, 2016, Art. 1195 of the French Civil Code allows a party to request a renegotiation of the contract if a change of circumstances that was unforeseeable at the time of the contract's conclusion makes performance excessively onerous for that

¹ Decision of the Supreme Court of Ukraine of 20 February 2012. URL: <http://www.scourt.gov.ua>

party. The affected party must continue to perform its obligations during the renegotiation period. If renegotiation fails, the parties may agree to terminate the contract or turn to a court or arbitral tribunal to adapt the contract. If there is no agreement within a reasonable time, the court or tribunal may amend or terminate the contract, determining the date and conditions of termination.

The clause explicitly excludes a party that has assumed the relevant risk, so it is recommended that parties include specific wording stating that the risk of hardship is assumed.

Under French law, the doctrine of *imprévision* can only be invoked for contracts concluded after October 1, 2016, unless the parties have agreed otherwise. However, if a party is unable to fulfill its obligations due to unforeseeable and exceptional circumstances, such as an epidemic, it may rely on the principle of good faith or the exception *d'inexécution*. This mechanism allows a party to refuse or suspend performance if the other party fails to perform its obligations or is unlikely to do so within a reasonable time, provided that the non-performance is sufficiently serious. These provisions are set out in articles 1219 and 1220 of the French Civil Code.

Hardship in German Law. In the original *Bürgerliches Gesetzbuch* (BGB) the main category of excuses was impossibility, which was quickly found to be too limited for a fair distribution of contractual risks. According to § 275(1) BGB the right to performance is excluded if this is impossible for the debtor or anyone else.

Since the reform of German contract law in 2002, the BGB offers rules for excuses besides impossibility. The debtor have to pay damages for breach of obligation. This does not apply if the debtor is not responsible for the breach of duty (§280(1) BGB, § 286(4) BGB)).

The creditor may withdraw from the contract if he has set the obligor a reasonable deadline for performance or supplementary performance without success, even if the debtor is not responsible (§ 323 BGB). The liability for damages is therefore fault-dependent, but termination is available regardless of responsibility for the breach. The responsibility of the debtor is determined according to § 276-278 BGB. The debtor is responsible for intent and negligence if stricter or milder liability is neither determined nor can be inferred from the other content of the obligation (§ 276 BGB). The debtor is also responsible for the fault of his

legal representative and the persons he uses to fulfill his obligation to the same extent as for his own fault (§ 278 BGB). Parties may, however, make differing contractual arrangements¹.

Under §313(1) BGB, if circumstances that have become the basis of the contract have changed significantly after the conclusion of the contract and if the parties had not concluded the contract or had concluded it with different content if they had foreseen this change, the contract can be adjusted to the extent that a part taking into account all the circumstances of the individual case, in particular the contractual or legal distribution of risk, the adherence to the unchanged contract cannot be reasonably expected. In case renegotiation is impossible, the disadvantaged party can withdraw from the contract. In the case of continuing obligations, the right of termination takes the place of the right of withdrawal.

German courts usually have a rigorous approach when assessing these legal requirements. Recent rulings by German courts uphold this standard. One such decision determined that even if a contract can be ended under section 313 BGB, the party terminating the contract may still be responsible for compensating the other party for any losses caused by the termination (OLG Celle, 2 U 64/21, judgement of 2 December 2021). This ruling may also apply to contract modifications under section 313 BGB due to the conflict in Ukraine or related sanctions.

Hardship in Common Law Systems. In the US contract law, there is no common definition of hardship. Nevertheless, hardship clauses can be used, but it is difficult to create the hardship if the relevant event is too vague.

Hardship clauses in US law is used to establish the fact that certain events did not occur as a fundamental precondition for concluding a contract. Frustrating event is one which makes performance of the contract radically different to what the parties intended when the contract was agreed upon. It is necessary to determine which party to the contract assumed the risk of such an event. When concluding contracts for the production and supply of goods at fixed prices in advance, for example, the seller assumes the risk of normal increases in production costs. However, if the cost of the goods for the seller increases sharply, by tens of times, during extraordinary events, the court may determine that the seller did not assume such a risk, based on the fact that the non-occurrence of

¹ Ernst W. (2007) Münchener Kommentar, 5th ed., München: Beck, § 280, nr. 24.

such an extraordinary event was a «fundamental precondition» for the conclusion of the contract. In the situation under consideration, one can speak either of the debtor not assuming such a risk or of the court having the right to relieve him of this risk due to its excessive burden.

English legal doctrine significantly differs from the continental one and is based on the premise that changing a contract undermines its certainty and alters the risks allocated in the agreement. English law provides that termination of obligations under a contract is only possible when, after its conclusion, a change in circumstances makes performance under the contract illegal or impossible¹.

The principles of English contract law assume that the party responsible for a breach of contract is strictly liable. This means that the party who has agreed to a contract has voluntarily accepted the obligation and must be held accountable for any breach. However, there are instances where contractual liability is not strict. For example, in the case of a service that requires a reasonable level of care, the party responsible is only liable if it is proven that they were at fault. This difference between «obligations of result» and «obligations of means» is what distinguishes the level of liability in different types of contracts.

In the UK, the doctrine of frustration is applied, which is only suitable in cases where the performance of the contract has become impossible due to the destruction of the subject matter of the contractual obligation without fault of the parties. In such cases, the court makes a fair and reasonable decision in relation to the parties, which the new situation requires. The court can make such a decision only if the change in circumstances does not fall under the definition of «normally considered» risk. English law does not provide any other means of legal protection in situations of a change in circumstances, except for the aforementioned.

In the leading case *Davis Contractors Ltd v Fareham Urban District Council* [1956] UKHL 3, frustration is defined as a situation where a contractual obligation becomes impossible to perform due to circumstances beyond the control of both parties, which would make the performance fundamentally different from what was originally agreed upon in the contract.

Because English law follows a strict liability approach in contractual liability, there is no need for a general force majeure doctrine. In civil

¹ Beatson J. Anson's Law of Contract. 28 edition. Oxford University Press. P. 530.

law systems, the determination of whether a certain cause constitutes force majeure must be decided on a case-by-case basis. In English law, everything is attributable, except if it is covered by a specific force majeure clause or falls under one of the other excuses discussed earlier. Frustration is determined using a ‘multi-factorial’ approach, and there is no single decisive factor. A contract may include a force majeure clause, which excuses a party from obligations for certain rare events that have been allocated to a specific party. However, such clauses are interpreted narrowly and cannot be invoked when the event is caused by the negligence of the party relying upon it. The force majeure clause may be seen as a species of frustration or a valid excuse, or it may not be considered part of frustration.

3. Hardship in DCFR.

It should be noted that the DCFR allows for the change or termination of a contract if performance of the contract has become so burdensome for the debtor as a result of a fundamental change in circumstances that retaining the obligation would be manifestly unfair to him. In this regard, the court must first determine whether the debtor has taken all possible measures to modify the obligation through negotiations in order to adapt it reasonably and fairly to the changed circumstances. Termination of the contract occurs only if negotiations between the parties have not led to a change of the contract (Art. III-1:110 (2)).

It is significant that parties can contractually decide on which causes are or are not legally attributable to the debtor, by way of a force majeure clause. This type of clause simplifies the process of determining whether an obstacle is a valid excuse and enables parties to assign contractual risks according to their preferences.

Force Majeure Clause v. Hardship Clause (*clausula rebus sic stantibus*) under UKR-CC

In essence, a significant change in circumstances under the civil legislation of Ukraine is a particular category of unforeseen circumstances in which proper performance is possible but significantly complicated due to their unforeseeability. Therefore, force majeure circumstances can

theoretically always be classified as a significant change in circumstances. However, this procedure becomes significant and practical when the question arises about the termination or amendment of a contract, the performance of which has not yet begun, but its further existence is impossible in the future, not on a temporary but on a permanent basis. This segment itself is both force majeure and a significant change in circumstances. Other types of force majeure and circumstances that have undergone a significant change intersect and create contradictions in practice, which cannot be resolved using the existing conceptual arsenal of civil science and current civil legislation. When faced with a demand to amend the contract due to significant changes in circumstances, which make the performance of the contract excessively burdensome, courts often decide cases in two ways. They either reject the demand, citing that performance is impossible, or they try to take into account the given circumstance by using the norms of force majeure, which cannot always be recognized as legal and justified.

In the civil legislation of Ukraine, the difference between a significant change in circumstances and force majeure is not clearly defined. The distinction between force majeure and a significant change in circumstances can be made based on the following grounds: 1) by the functional purpose that these categories of civil law serve: if force majeure is primarily aimed at establishing liability limits and exemption from liability, then the institution of a significant change in circumstances is used to maintain the balance of interests of the parties to the contract and ensure the economic viability of contract performance. However, in some cases, force majeure can also cause the same consequences as a fundamental change in circumstances; 2) by the degree of possibility of performing the obligation: if force majeure indicates absolute impossibility of performing the obligation regardless of the individual capabilities of the parties to the contract, then a significant change in circumstances takes into account the individual characteristics of the participant in the turnover with the prediction and distribution of risks of a significant change in circumstances.

It is believed that the main difference between a significant change in circumstances and force majeure lies in the consequences: a party referring to a significant change in circumstances may demand a change in the terms of the contract for the purpose of its performance on fair

terms, as well as termination of the contract (Art. 652 UKR-CC). In the case of force majeure, proper performance of the obligation by the debtor is impossible, and therefore the party is released from liability for breach of the obligation. At the same time, the parties to the contract are not deprived of the right to foresee the consequences of force majeure in the form of termination or amendment of the contract.

Conclusion

It is crucial to recognize that force majeure and hardship are two distinct principles, although they may be treated as identical at times. They differ in their preconditions and legal consequences. To invoke force majeure, a party's legal obligations must become impossible for everyone due to circumstances beyond anyone's control. On the other hand, hardship is based on the idea that the contractual circumstances have changed in a way that the parties did not anticipate at the contract's inception. Even though the contractual obligations can still be fulfilled in principle, it does not make economic sense to do so.

The legal consequences of both doctrines are significantly different. Force majeure results in one party being unable to fulfill its contractual obligations (impossibility) and therefore being released from such obligations during the force majeure period. The legal implication of hardship is that the party for whom the underlying circumstances have substantially changed can still fulfill their contractual obligations and perform the contract, but the performance has become economically meaningless.