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Problems of Performance of Contractual Obligations Due to War Time

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The paper aims to elucidate the legal consequences of the impossibility or hardship of performing contracts due to war or circumstances caused by war under the laws of Ukraine, Germany and Switzerland. Since in all the jurisdictions studied they can be determined by both contractual and legislative provisions, the paper first focuses on the interpretation of force majeure clauses under the laws of Ukraine, Germany and Switzerland. It also analyzes what consequences of the impossibility of performing a contract due to war or circumstances caused by war may arise when the contract does not define them.
Keywords: contractual performance, force majeure, war, sanctions, martial law, restrictions of export of goods, interpretation of contracts.

Sutartinių prievolių vykdymo problemos dėl karo padėties

Straipsnyje siekiama išsiaiškinti teisinius padarinius, kylančius pagal Ukrainos, Vokietijos ir Šveicarijos įstatymus, kai neįmanoma arba sunku įvykdyti sutarties sąlygas dėl vykstančio karo ar jo sukeltų aplinkybių. Visose tirtose jurisdikcijose juos gali lemti ir sutartinės, ir teisės aktų nuostatos, tačiau darbe daugiausia dėmesio skiriama *force majeure* sąlygoms aiškinti pagal Ukrainos, Vokietijos ir Šveicarijos įstatymus. Taip pat analizuojama, kokių gali kilti sutarties nevykdymo dėl karo ar jo sukeltų aplinkybių padarinių, kai sutartyje jos nėra apibrėžtos.
Pagrindiniai žodžiai: sutarties vykdymas, *force majeure*, karas, sankcijos, karo padėtis, prekių eksporto apribojimai, sutarčių aiškinimas.

Introduction

War significantly affects the ability to perform contractual obligations. Thus, in some cases, what was to be transferred under the contract was completely destroyed, whereas in other cases it ended up in the occupied territory, and there is no access to the required asset. In addition, contractual obligations can be affected by acts triggered by war (export restrictions, sanctions). **The aim of this paper**[1] is to determine to what

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extent the existing legal constructions (e.g., unstoppable force, force majeure, change of circumstances) of the Ukrainian, German and Swiss Law applicable in the case of impossibility or hardship of contractual obligations can be used in the case of the failure to perform due to the war or the circumstances caused by war. To achieve this aim, the paper solves the following **tasks:** 1) it outlines the main characteristics of force majeure and explains the difference between force majeure and a significant change of circumstances under the Ukrainian legislation and Case Law; 2) it addresses the issues of the impact of war to contracts under the Ukrainian Law. In particular, it explains how martial law, sanctions, and export restrictions influence contractual obligations; 3) it reveals the interpretation of force majeure clauses in the Ukrainian Case Law by: (i) analyzing the general approaches to contractual interpretation in Ukraine; (ii) focusing on Case Law which interprets force majeure clauses if contractual non-performance was caused by armed aggression or circumstances triggered by it; 4) it explains the attitude to force majeure in the German Law; 5) it addresses the mechanisms of the German Law applicable when the performance of a contract is impossible or significantly complicated due to extraordinary circumstances; 6) it focuses on the impact of sanctions on the performance of contractual obligations under the German Law; 7) it explains the attitude to force majeure in the Swiss Law; 8) it outlines the attitude to force majeure in the German Law; 9) it focuses on the mechanisms of the Swiss Law applied when the performance of a contract is impossible or significantly complicated due to extraordinary circumstances; 10) it addresses the impact of sanctions triggered by the war to the performance of contractual obligations under the Swiss Law. The following **methods** were used to solve the tasks: formal-logical, systematical, and comparative. The formal logical method allowed us to clarify a number of important issues related to the interpretation of force majeure clauses. The systematic method enabled us to analyze the legislative mechanisms introduced in connection with the war which affect the performance of contractual obligations. The comparative method made it possible to identify common and distinctive features of the legal regulation of the impossibility of performing contractual obligations under the Ukrainian, German and Swiss Law.

1. Understanding of force majeure (unstoppable force) in Ukrainian Law

Article 29 of the Civil Code of Ukraine (hereinafter – *CCU*) enshrines the principle of *pacta sunt servanda*. In the case of a violation of this principle, the parties are liable under the contract or the Law (Luts, 2019, p. 153). At the same time, they may be exempted from liability. One of the factors exempting from liability for a breach of contractual obligations is unstoppable force (Art. 617(1) of CCU). A party in breach of a contract can refer to it if there is a causal link between such a breach and the effect of unstoppable force; the burden of proving the unstoppable force, as well as the causal link, rests with that party[2]. Unstoppable force constitutes the ground for exemption from liability under a number of rules of CCU[3].

Article 617(1) of CCU allows one to be released from liability for the non-performance of contractual obligations even if the contract does not contain a force majeure clause (Luts, 2008, p. 799). In

[2] Article 617(1) of CCU provides that: "The person in breach of an obligation shall be released from liability for the breach of an obligation if he proves that the breach was due to an event or unstoppable force."

[3] E.g., if a seller has provided a guarantee of quality of goods, he is responsible for defects in the goods, unless he proves that they arose after their transfer to the buyer due to violation by the buyer of the rules of use or storage of the goods, the actions of third parties, an accident or unstoppable force (Art. 679(2) of CCU).

The professional keeper is responsible for the loss (shortage) or damage to the thing, unless he proves that this was due to unstoppable force, or due to such properties of the thing of which the keeper, accepting it for storage, did not know and could not know, or due to wilfulness or gross negligence of the depositor (Art. 950(2) of CCU).

addition, this rule allows to be released from liability when a party has sent a notice of force majeure to the other party in violation of the term for such a notification provided by the contract, if the contract did not stipulate the consequences of such a violation (i.e., the contract did not provide that the party loses the right to invoke force majeure if it does not notify the other party in time) (Supreme Court Ruling of 31 August 2022 in a commercial case).

The characteristics of the circumstances of unstoppable force, as well as an approximate list thereof, are listed in the Law on Chambers of Commerce and Industry in Ukraine[4] (hereinafter – *the Law on CCIU*) and the Rules for Certification of Force-Majeure Circumstances by the Ukrainian Chamber of Commerce and Industry and Regional Chambers of Commerce and Industry (hereinafter – *Force Major Rules*).

As follows from these documents, the features of unstoppable force (force majeure) circumstances are their extraordinariness and inevitability that objectively exclude the performance of obligations. As the Supreme Court has explained, extraordinary circumstances occur where the time, place, duration and consequences of the occurrence of such circumstances are not foreseeable, even though the fact of their occurrence is foreseeable (Supreme Court Ruling of 15 June 2018 in a commercial case). In this regard, it should be noted that Ukrainian lawyers are still more commonly expressing the opinion that if a force majeure event is a war, its extraordinary nature (unforeseeability) will depend on when the contract was concluded. For contracts concluded before the full-scale invasion of Ukraine by the Russian troops, the war will certainly be a force majeure event. However, this will not be the case for contracts concluded after it, precisely because it will be difficult to prove the unforeseeability of the war (Hanziienko, 2019). In general, while agreeing with this statement, however, it can be added that, in some cases, proving the unforeseeability of the war may be problematic even in relation to agreements concluded before 24 February 2022, because the war in Ukraine began long before that date, although it was not full-scale.

Circumstances are unavoidable when they are beyond the control of the parties and are not related to their actions (Supreme Court Ruling of 15 June 2018 in a commercial case). Force majeure makes it impossible in principle to perform an obligation, irrespective of the efforts and material costs that the party has incurred or may have incurred (Supreme Court Ruling of 21 July 2021 in a commercial case). According to the Supreme Court, force majeure circumstances do not have a prejudicial character; in case of their occurrence, a party referring to them should prove not only their existence as such, but also the fact that they made it impossible to perform a particular obligation (Supreme Court Ruling of 1 June 2021 in a commercial case).

In addition, as Case Law shows, force majeure exempts from the liability for failure to perform an obligation, but not from the performance of an obligation. For example, in one of the cases, the defendant was exempted from paying the penalty, but was obliged to pay the principal debt (in this case, the force majeure circumstance was anti-terrorist operation in the Luhansk Region, confirmed by the CCIU certificate) (Supreme Court Ruling of 30 November 2021 in a commercial case).

It should also be noted that the Ukrainian Law distinguishes force majeure from a significant change in circumstances (Article 652 of CCU). In the case of significant changes in circumstances, the contract may be terminated or amended by the court (subject to certain conditions)[5]. According to the Supreme

[4] Article 14-1 of the Law on CCIU uses the term 'circumstances of unstoppable force' as a synonym for the term 'force majeure circumstances'.

[5] Under Article 652 of CCU: "1. In case of a significant change in the circumstances, on which the parties were relying when entering into the contract, the contract may be amended or terminated by agreement of the parties, unless otherwise provided by the contract or follows from the essence of the obligation. The change of circumstances is significant if they have changed so much that, if the parties could have foreseen it, they would not have concluded the contract or would have concluded it on other terms. 2. If the parties have not reached a consensus on bringing the contract in line with the circumstances that have changed significantly, or on its termination, the contract may be terminated, or changed by a court decision

Court, "in contrast to force majeure, which make[s] it impossible to perform the obligation in principle, a significant change in circumstances is an evaluative category, which consists in the development of a contractual obligation in such a way that the performance of the obligation for one of the parties to the contract becomes more burdensome, complicated (for example, due to an increase in the value of the performed or reduced value of the performance received by the party, which significantly changes the balance of contractual relations, leading to the impossibility of performing the obligation)" (Supreme Court Ruling of 31 August 2022 in a commercial case).

2. The impact of war on performance of contractual obligations under Ukrainian Law

The threat of a war, an 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, hostilities, a declared or undeclared war, acts of public enemy, riots, acts of terrorism, sabotage, piracy, riots, an invasion, a blockade, a revolution, a rebellion, an insurrection, and riots are expressly referred to as 'force majeure' by Art. 14 of the Law on CCIU.

The legislation of Ukraine does not define the concept of 'war'; however, it defines the concept of 'armed aggression' as certain actions against Ukraine by another State or group of States[6]. As one can see, the definition employed by the Ukrainian legislation is similar (although not identical) to the definition of 'aggression' in the United Nations General Assembly Resolution (1974).

The terms 'war' or 'armed aggression' as such were not subject to interpretation by the Ukrainian courts, and, even before the full-scale invasion of the Russian Federation into the territory of Ukraine, they did not analyze whether the actions of the Russian military on the territory of Ukraine constitute a 'war', 'armed aggression' or 'hostilities' mentioned in force majeure clauses to contracts due to considering it as a well-known fact. Thus, for example, in the case *the Joint Stock Company "Russian*

at the request of the interested party (on the grounds provided by paragraph 4 of this Article), provided that the following conditions are met simultaneously: 1) at the moment of conclusion of the contract the parties expected that such change of circumstances would not occur; 2) the change in circumstances is due to reasons that the interested party could not eliminate after their occurrence with all the care and diligence required of it; 3) the performance of the contract would disrupt the correlation of property interests of the parties and deprive the interested party of what it expected when concluding the contract; 4) it does not follow from the essence of the contract or the customs of business turnover that the risk of change of circumstances is borne by the interested party. 3. In the event of termination of the contract due to a significant change in circumstances, the court, at the request of either party, determines the consequences of termination of the contract based on the need for fair distribution between the parties of the costs incurred by them in connection with the implementation of this agreement. 4. Amendment of the contract due to a material change of circumstances is allowed by the court decision in exceptional cases, when termination of the contract is contrary to the public interest or will cause damage to the parties, which significantly exceeds the costs necessary for the performance of the contract on the terms changed by the court."

[6] Article 1 of the Law of Ukraine On Defence of Ukraine, 1991, defines armed aggression as "the use of armed force against Ukraine by another state or group of states. Armed aggression against Ukraine includes any of the following actions: invasion or attack of the armed forces of another state or group of states on the territory of Ukraine, as well as occupation or annexation of part of the territory of Ukraine; blockade of ports, coasts or airspace, disruption of communications of Ukraine by the armed forces of another state or group of states; attack by the armed forces of another state or group of states on the military land, sea or air forces or civilian sea or air fleets of Ukraine; the sending by or on behalf of another State of armed groups of regular or irregular forces committing acts of armed force against Ukraine which are of such a serious nature that they are equivalent to the actions listed above in this Article, including significant participation of a third State in such actions; the actions of another state (states) which allows its territory, which it has placed at the disposal of a third state, to be used by this third state (states) to commit the acts listed above in the Article; the use of units of the armed forces of another state or group of states, which are on the territory of Ukraine in accordance with international treaties concluded with Ukraine, against a third state or group of states, other violation of the conditions provided for by such treaties, or the continuation of the stay of these units on the territory of Ukraine after the termination of these treaties."

Aircraft Corporation "MiG" v. the State Enterprise "Zhuliansky Machine-Building Plant "VIZAR", the court noted that "it is a well-known fact that since the beginning of 2014 there has been an armed aggression of the Russian Federation, which began with undeclared and covert invasions of the territory of Ukraine by units of the armed forces and other law enforcement agencies of the Russian Federation, as well as by organizing and supporting terrorist activities. And, at present, the Russian Federation is committing a crime of aggression against Ukraine and is temporarily occupying part of its territory with the help of armed formations of the Russian Federation" (Judgment of the Northern Commercial Court of Appeal of 25 March 2019 in a commercial case).

A war or an armed aggression cause the introduction of **sanctions** "in relation to a foreign state, a foreign legal entity, a legal entity controlled by a foreign legal entity or a non-resident individual, foreigners, stateless persons, as well as entities"[7]. The definition of sanctions, which are imposed, *inter alia*, as a response to armed aggression against Ukraine or other actions related to it (for example, financing of armed aggression or other actions), their types and the mechanism of their introduction are determined by the *Law of Ukraine on Sanctions* (2014). As one can see from their non-exhaustive list provided in Article 4 of this Law, most of them have a significant impact on the ability to perform contractual obligations.

This Law has already become the basis for the application of sanctions[8] through the adoption of resolutions by the *Verkhovna Rada of Ukraine* (i.e., the Parliament of Ukraine). In addition, according to Article 3 of this Law, resolutions of the General Assembly and the Security Council of the United Nations and decisions and regulations of the Council of the European Union also constitute a ground for imposing sanctions. It follows from Art. 14 of the Law on CCIU[9] and Art. 3.1 of the Force Major Regulation[10] that sanctions are force majeure circumstances.

Even before the full-scale invasion, Ukraine imposed **restrictions on the export of goods** to the Russian Federation due to the armed aggression of the latter in the east of the country. In this context, it is appropriate to recall the *Decision on Measures to Improve the State Military-Technical Policy*, 2014, by which the Cabinet of Ministers of Ukraine undertook to take measures to stop the export to the Russian Federation of military and dual-use goods for military purposes, except for space technology used for research and use of space for peaceful purposes within the framework of international projects. The term 'sanctions' was not used in relation to these restrictions, apparently because the *Law of Ukraine On Sanctions*, 2014, understands them as restrictive measures in relation to a foreign state or other particular persons. Export restrictions imposed by this Decision were considered by the courts of Ukraine as force majeure (Judgment of the Northern Commercial Court of Appeal of 25 March 2019 in a commercial case).

Besides, starting from 2014, Ukraine has introduced special legal rules regarding certain transactions concluded in the occupied territory, or with businesses located in such a territory. Thus, for example, any real estate transaction in the temporarily occupied territory committed in violation of the laws of Ukraine is considered invalid from the moment of its conclusion and does not create legal consequences, except for those related to its invalidity[11]. Also, a transaction to which a party is a business whose location (place of residence) is the temporarily occupied territory is void[12].

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[7] Article 2 of the Law of Ukraine on Sanctions (2014).

[8] See, for example, Resolution …to Impose Personal …Sanctions, 2022.

[9] Thus, for example, this Article mentions among the list of force majeure circumstances embargo, ban (restriction) of export/import, etc., regulated by the terms of relevant decisions and acts of State authorities.

[10] In particular, this Article states that force majeure may be caused by conditions governed by the relevant decisions and acts of State authorities, a closure of sea straits, embargo, prohibition (restriction) of export/import, etc.

[11] Art. 11(6) of the Law of Ukraine on Ensuring Rights, 2014.

[12] Art. 13(2) of the Law of Ukraine on Ensuring Rights, 2014.

The full-scale invasion of the Russian Federation caused the introduction of **martial law**, which affects the performance of contractual obligations. Martial law was introduced by a Presidential Decree on the 24th of February 2022, first, for 30 days, and then it was extended several times. It has granted to certain authorities specific powers and provided the opportunity to restrict "the constitutional rights and freedoms of man and citizen and the rights and legitimate interests of legal entities with indication of the duration of these restrictions"[13].

The CCU and some other laws have been amended to exempt from liability for breach of contractual obligations during martial law and the period within thirty days after its termination or cancellation. Consequently, in some cases (a borrower's performance of monetary obligations under the contract according to which the borrower was granted a credit (loan) by a bank or another creditor (lender)), martial law as such is a ground for exemption from liability by operation of Law. In particular, the debtor is released from the duty to pay the debt, interest, penalty or fine for the entire period of the debt. Moreover, in this case, martial law does not postpone the performance of a monetary obligation in time, but terminates it, because the law obliges the lender to write off the debt[14].

Besides, the lender is obliged to write off the contractual penalty (fine, interest) and other payments, the payment of which is stipulated in the consumer loan contract, accrued from 24 February 2022 inclusively for late performance (non-performance, partial performance) under such a contract[15]. Martial law has also become a ground for extending the limitation period and the period for exercising the pre-emptive right to purchase a part of common partial ownership[16].

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[13] The definition of martial law is given by Article 1 of the Law of Ukraine On Legal Regime of Martial Law as "a special legal regime introduced in Ukraine or in certain areas thereof in case of armed aggression or threat of attack, danger to the state independence of Ukraine, its territorial integrity and provides for granting to relevant state authorities, military commanders, military administrations and local authorities the powers necessary to prevent the threat, repulsion of armed aggression and ensuring national security, eliminating the threat to the state independence of Ukraine, its territorial integrity, as well as temporary, limitation of constitutional rights and freedoms of man and citizen and the rights and legitimate interests of legal entities with indication of the duration of these restrictions."

[14] According to paragraph 18 of the *Final and Transitional Provisions* of CCU: "18. During martial law or state of emergency in Ukraine and within thirty days after its termination or cancellation in case of borrower's delay in performance of his monetary obligation under the contracts according to which the borrower was granted a credit (loan) by a bank or another creditor (lender), the borrower shall be released from liability defined by Art. 625 of this Code and from liability to pay penalty (fine, interest) for such delay. To determine, that the penalty (fine, penalty) and other payments, payment of which is stipulated by the relevant contracts, accrued inclusive from February 24, 2022 for delay in performance (non-performance, partial performance) under such contracts, shall be written off by the lender (borrower)." According to Art. 625 of CCU: "1. The debtor is not released from liability for his inability to perform his monetary obligation. 2. A debtor who is in default on a monetary obligation, upon the creditor's request, is obliged to pay the amount of debt taking into account the established inflation index for the entire period of default, as well as three per cent per annum on the overdue amount, unless a different amount of interest is established by the contract or by law."

[15] The Law of Ukraine *On Consumer Lending*, 2016, was supplemented by paragraph 6-1 with the following content: "During martial law or a state of emergency in Ukraine and within thirty days after its termination or cancellation, if a consumer is late in performance of his duties under a consumer loan contract, he shall be exempted from liability to the lender for such delay. In case of such delay, the consumer is released, in particular, from the duty to pay the lender a penalty (fine) and other payments, payment of which is provided by the consumer loan contract for delayed performance (non-performance, partial performance) of the consumer's obligations under such agreement. Increase of the interest rate for credit use for reasons other than those specified in the fourth paragraph of Art. 1056-1 of the Civil Code of Ukraine, in case of default on obligations under the consumer loan contract during the period specified in this paragraph, shall be prohibited. The rules of this paragraph apply, *inter alia*, to loans specified in part two of Article 3 of this Law. Penalties (fines, interests) and other payments stipulated by the consumer loan contract for delayed performance (non-performance, partial performance) under such a contract, accrued from 24 February 2022, shall be written off by the lender."

[16] Paragraph 19 of the *Final and Transitional Provisions* of CCU provides that "During martial law or state of emergency in Ukraine, the terms defined in Articles 257–259, 362, 559, 681, 728, 786, 1293 of this Code shall be extended for the period of its validity." Articles 257–259 of CCU are as follows: "General Limitation Period;" "Special Limitation

In addition, martial law suspends certain rights of the mortgagor (if the immovable property belongs to natural persons and is mortgaged under consumer loans). However, this only applies where the real estate has been mortgaged to secure the performance of obligations under the contracts entered into force prior to 17 March 2022 (the date of the entry into force of the Law on Ukraine On Amendments to Legislative Acts during Martial Law, 2022 (hereinafter – *Law of March 15, 2022*) (which amended the Law of Ukraine On Mortgages, 2003, by setting the suspension of these mortgagor's rights) provided that the parties to the contracts have not prolonged the term of the performance of contractual obligations, nor have they reduced the interest or penalties[17].

This provision allows stopping the execution of a judgment under which foreclosure is to be carried out, even if the breach of contract, for the security of which the mortgage contract was entered into, occurred long before the martial law began.

For example, in a recent case, a bank claimed for the recovery of the mortgage of a subject, which secured the performance of the agreement on a credit line concluded in 2007. Under the terms of this agreement, the debtor was required to repay the credit (provided for consumer purposes) in periodic instalments until February 1, 2022. The agreement was breached by the debtor in 2017. In February 2018, the bank sued to foreclose on the mortgage. The case was being considered by all courts for several years (in particular, due to the fact that the debtor, by filing a counterclaim, tried to invalidate the mortgage agreement). The final judgement of the Supreme Court, by which it affirmed the judgement of the Court of First Instance to foreclose on the mortgage, was rendered in July 2022, that is, during martial law. At the same time, by the same judgement, the Supreme Court, referring to the Law of March 15, stopped the execution of the judgement confirmed by it for the period of martial law in Ukraine and within thirty days after its termination (Supreme Court Ruling of 13 July 2022 in a commercial case).

In addition, it should be noted that, in our opinion, all rules of Ukrainian legislation adopted in connection with the conduct of hostilities by the Russian Federation on the territory of Ukraine, which somehow affect the performance of contractual obligations, are overriding mandatory rules within the meaning of Art. 14 of the Law of Ukraine on Private International Law (hereinafter – *PILA*)[18].

Period;" "Modification of the Duration of Limitation Period," respectively. Article 362 of CCU is "Pre-emptive Right to Purchase a Part of Common Partial Ownership." Article 559 of CCU is "Termination of Bail." Article 681 of CCU – "The limitation period that applies in connection with defects in the goods sold". Article 728 of CCU is "Limitation Period Applicable to Claims for the Avoidance of a Gift Agreement." Article 786 of CCU is "Limitation Period Applicable to Claims Arising from Lease Contracts." Article 1293 of CCU is "The Right to Appeal Against the Actions of the Executor of the Will." Paragraph 2 of this Article governs the limitation period for the claims alleging wrongful acts of the executor of the will.

[17] The final provisions of the Law of Ukraine On Mortgages, 2003, were supplemented by paragraph 5-2: "During martial law or state of emergency in Ukraine and within thirty days after its termination or cancellation with respect to immovable property owned by natural persons and mortgaged with consumer loans, Article 37 (with respect to exercise of the mortgagee's right to acquire the title to the mortgaged property), Article 38 (with respect to exercise of the mortgagee's right to sell the mortgaged property), Article 40 (in relation to the eviction of residents from dwellings and premises mortgaged with a court order to foreclose on such properties), Articles 41, 47 (in relation to the sale of mortgaged property at electronic auction) shall be suspended. This does not apply to immovable property mortgaged to secure obligations under contracts entered into after the entry into force of the Law of Ukraine "On Amendments to the Tax Code of Ukraine and other legislative acts of Ukraine on the duration of martial law" of March 15, 2022, or under the contracts, which after the entry into force of this Law the parties have agreed to change by extending the period of performance of obligations and / or reducing the amount of interest, penalties."

[18] According to article 14 of PILA: "1. The rules of this Law do not limit the effect of mandatory rules of Ukrainian law governing the relevant relations, regardless of the law to be applied. 2. The court, irrespective of the law to be applied in accordance with this Law, may apply mandatory rules of law of another state that have a close connection with the relevant legal relations, with the exception provided by paragraph one of this Article. In doing so, the court shall take

3. Interpretation of force majeure clauses in Case Law

3.1. Interpretation of contracts. General remarks

Article 637 (*Interpretation of the Terms of the Contract*) and Article 213 (*Interpretation of the Content of the Transaction*) of CCU became the ground for the conclusion that the interpretation of the contractual clauses is carried out at three levels. The first level of interpretation is carried out by using the same meanings of words and concepts for the entire content of the contract, as well as the generally accepted meanings of terms in the relevant field of relations. The second level of interpretation (if the first approach fails to interpret the content of the transaction) is the comparison of different parts of the contract both with each other and with the content of the contract as a whole, as well as with the intentions of the parties, which they showed when concluding the contract, as well as what they proceeded from when performing it. The third level of interpretation (if the first two have not yielded results) is to take into account: a) the purpose of the contract; b) the content of preliminary negotiations; c) the established practice of relations between the parties (if the parties were previously in legal relations with each other); d) business customs; e) further behavior of the parties; f) the text of a standard contract; g) other circumstances of significant importance (Supreme Court Ruling of 18 March 2021 in a commercial case).

It is considered that the ways of contract interpretation provided by CCU are not exhaustive (Dzera, 2019, p. 312). This statement is confirmed by the Case Law of the Supreme Court when it uses such doctrines for the interpretation of contracts as *contra proferentem* (Supreme Court Ruling of 18 April 2018 in a commercial case) and *venire contra factum proprium* (Supreme Court Ruling of 22 May 2019 in a commercial case). In recent years, Ukrainian courts have often referred to such documents as the UNIDROIT Principles of International Commercial Contracts, Draft Common Frame of Reference to confirm that their position is in line with the positions existing in international unified documents (even if there is no foreign element in the dispute) (Supreme Court Rulings of 04 August 2021, 10 February 2021, 06 August 2020, in commercial cases). In addition, Ukrainian judges are recommended to refer to the judgments of foreign or international courts in support of their position, and not only when there is a need to apply the law of a foreign state, but also "to emphasize awareness of the issues of the case" (Kuibida *et al*., 2013, p. 78).

Since 2014, Ukrainian courts have repeatedly interpreted force majeure clauses due to the fact that one of the parties could not have performed its contractual obligations either due to armed aggression, or due to the circumstances caused by this aggression.

3.2. Interpretation of the force majeure clauses if contractual non-performance was caused by armed aggression or circumstances triggered by it

3.2.1. The moment of sending a notice of force majeure is closely related to the moment of the term for the performance of the contractual obligation

In *The Joint Stock Company "Russian Aircraft Corporation "MiG" v the State Enterprise "Zhulian-sky Machine-Building Plant "VIZAR" "*, the Russian company (the buyer) requested to recover the prepayment from the Ukrainian company (the seller) under the supply contract (under the terms of the

into account the purpose and nature of such rules, as well as the consequences of their application or non-application." It is recognized in the doctrine that the overriding mandatory rules of Ukrainian Law, referred to in Article 14(1) of PILA, include those that always govern certain relations, ensure important rights and interests of participants in civil law turnover. It is assumed that, depending on the situation, the court may recognize as overriding mandatory rules those that provide the limits of the exercise of civil rights, freedom of contract, consumer protection, etc. (Kysil, 2014, p. 194).

contract, concluded in 2011, the seller was obliged to manufacture the goods and deliver them to the buyer). The buyer made an advance payment of 50% of the cost of the goods in 2012; the seller, who had to deliver the goods by the end of June 2016, did not perform its obligations.

The goods which should have been supplied under the contract were covered by the Decision of the National Security and Defense Council of Ukraine of 27 August 2014 *On Measures to Improve the State Military-Technical Policy*, by which the Cabinet of Ministers of Ukraine undertook to take measures to stop the export to the Russian Federation of military and dual-use goods for military purposes, except for space technology used for research and use of space for peaceful purposes within the framework of international projects.

The contract contained the following force majeure clause: "9.1. The Parties are released from liability for partial or complete failure to perform their obligations under the Contract, if it was the result of force majeure circumstances, if these circumstances directly affected the performance of the Contract. Such circumstances include: flood, fire, earthquake and other natural phenomena, as well as war, hostilities, blockades, acts or actions of state authorities prohibiting export or monetary payments and other circumstances. In this case, the period of performance of obligations under the Contract shall be extended for the period during which such circumstances and their consequences were in force. 9.2. The Party, for which it is impossible to perform its obligations under the Contract, shall immediately notify the other Party within 5 calendar days upon occurrence and termination of the above circumstances. Late notification of force majeure circumstances deprives the Party concerned of the right to refer to them in the future. 9.3. Certificates of the respective Chambers of Commerce shall serve as proper proof of the existence of the above circumstances and their duration."

On 31 May 2016, the seller applied to CCIU for the force majeure certificate and received it on 05 July 2016 and sent it to the buyer on the same day. However, the date of the expiration of force majeure was not specified in the certificate. In addition, according to the buyer, the seller informed the buyer about the force majeure untimely. Therefore, the buyer believed that the force majeure clause should not apply.

In this case, the court ruled in favor of the seller, that is, the court considered that the latter timely and properly informed the buyer about the force majeure and that the seller should not return the prepayment under the contract (Northern Commercial Court of Appeal Judgement of 25 March 2019 in a commercial case).

We also believe that the seller notified the buyer of the force majeure timely because, despite the fact that the export restrictions came into force in 2014 (i.e., after the conclusion of the contract but before the date of performance of the seller's obligations). The seller did not have to notify the buyer of these circumstances in 2014, since the seller's obligations were to be performed only at "the end of June 2016," and if the Russian Federation had ceased its armed aggression before that date, the export restrictions would have been lifted and, accordingly, there would have been no need to notify the buyer of force majeure[19].

[19] Although it should be noted that, in *Limited Liability Company "Defence Technologies of Ukraine" v. Ministry of Defence of Ukraine*, the Supreme Court draws attention to the fact that it is necessary to distinguish between the timely notification of the party about the occurrence of force majeure (which the party must do within the period provided for by the contract) from applying to the Chamber of Commerce and Industry for a certificate of force majeure, which is possible only after the breach of the obligation (according to Article 6.2 of the Force Majeure Regulation, force majeure circumstances are certified upon request of business entities and natural persons regarding a particular contract, the term of performance of which has become impossible to fulfil due to the presence of these circumstances) (Supreme Court Ruling of 31 August 2022 in a commercial case).

However, in *The Joint Stock Company "Russian Aircraft Corporation "MiG" v the State Enterprise "Zhuliansky Machine-Building Plant "VIZAR" "*, the seller's obligation was not only to export the goods, but also to manufacture

As for the fact that the certificate confirming force majeure did not contain the date until which the relevant circumstances were in force, firstly, such a date could not be determined in principle, since it depended on the cessation of the aggression of the Russian Federation, which could not have been foreseen, and secondly, even the force majeure clause itself did not require that the certificate should contain such information.

3.2.2. Connection between force majeure and the place of performance of contractual obligations

The application of the force majeure clause often depends on how other terms of the contract are formulated. For example, when part of the territory is occupied as a result of hostilities, the performance of the contract is impossible only in this territory, so it is important how the contractual provisions regarding the place of the performance of contractual obligations are formulated.

This is illustrated, in particular, by the case *Limited Liability Company "Vog Trading" v. State Enterprise "Enterprise for the provision of petroleum products"*, in which, the subject of the dispute was the obligation of one of the parties to the contract to return oil products that were transferred to it for safekeeping in 2013 within the territory of the Autonomous Republic of Crimea which was occupied by the Russian Federation in 2014. The contract contained a force majeure clause, according to which, in the case of force majeure, the term of the performance of obligations under the contract is extended for the duration of the relevant force majeure circumstances.

The defendant believed that the term for the performance of obligations did not come for him since he lost control over the property of the oil depot where the petroleum products were being stored due to the force majeure circumstances (occupation by the Russian Federation of a part of the territory of Ukraine, including the Autonomous Republic of Crimea and the City of Sevastopol), which was confirmed by the conclusion of CCIU on force majeure and about which the plaintiff was duly notified.

The plaintiff believed that the force majeure clause could not be applied in this case because petroleum products are a thing defined by generic characteristics, and therefore, by virtue of Article 184 of CCU, it is a substitute thing. Thus, in his opinion, if the defendant could not give the oil products that were being stored within the territory of the Autonomous Republic of Crimea, he could give any other oil products, as well as perform his contractual obligation in any other part of Ukraine that was not occupied at the time.

The Court considered that the force majeure clause should be applied since the impossibility of the performance of the obligation arose precisely due to the occupation of Crimea, that is, due to a duly confirmed force majeure circumstance. According to the court, the contract had to be performed in Crimea. The court came to this conclusion by applying Art. 532(1), (3) of CCU which provides that "[I]f a place of performance of the obligation is not specified in the contract, the performance of the obligation to transfer the goods (property) is carried out at the place of the manufacture or storage of the goods (property), if this place was known to the creditor at the time of the obligation."

In addition, the court considered that the failure to apply the force majeure clause in this case would lead to a violation of the Law of Ukraine *On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine* from 15 April 2014. Besides, the court considered that the failure to apply the force majeure clause in this case would lead to a violation of

them. The export restriction made it impossible to supply the goods, while the possibility of manufacturing the goods existed in 2014–2016. Therefore, the seller had no reason to notify the buyer of the impossibility of performing the obligation under the contract until it became impossible to export the goods.

this Law, Article 5(6) of which provides that "compensation for material and moral damage caused as a result of the temporary occupation to the state of Ukraine, legal entities, public associations, citizens of Ukraine, foreigners and stateless persons is fully entrusted to the Russian Federation as the state carrying out the occupation" (Supreme Court Ruling of 09 October 2019 in a commercial case).

In this regard, the question arises whether the force majeure clause could be applied if the contract defined the place of performance of the obligation as a place in any part of the territory of Ukraine. In our opinion, the answer is positive because, according to Article 627 of CCU, the freedom of the parties to the contract is limited, among other things, by the requirements of reasonableness and fairness. Failure to apply the provisions of the Law of Ukraine on ensuring rights, and, consequently, refusal to apply the force majeure clause, would lead to the situation when the negative consequences of the illegal occupation of any Ukrainian territory would be borne not by the Russian Federation, but by the party to the contract. This would lead to a violation of the principle of reasonableness and fairness.

3.2.3. Military actions, occupation and inability to use the leased property

In the *State Property Fund of Ukraine v. Pan Ukraine Limited Liability Company*, the subject of the claim was the recovery of a lease payment under a lease agreement for real estate (a tourist base) concluded between the State Property Fund of Ukraine (the landlord) and the Pan Ukraine Limited Liability Company (the tenant). In February 2014, the tenant ceased to pay the lease payments by arguing that it was impossible to use the leased premises for their intended purpose due to the events in the territory of Crimea in February 2014 (the invasion of military forces of an unknown origin into the territory of the Autonomous Republic of Crimea, which started military operations, the blocking of transport connections, airport and other infrastructure in the territory), which was recognized as force majeure.

The landlord argued that there was no causal link between this force majeure and the non-payment of lease payments, since, according to the agreement, the postal and payment addresses of the tenant and the landlord were not in Crimea, but actually in Kyiv. On the other hand, even after the annexation of Crimea by Russia, which followed the invasion of military forces, the landlord remained the owner of the property located in the Crimea since, according to Article 11(1,2) of the Law, "in the temporarily occupied territory, the property right is protected in accordance with the legislation of Ukraine. The state of Ukraine, the Autonomous Republic of Crimea, territorial communities, including the territorial community of the city of Sevastopol, state bodies, local self-government bodies and other subjects of public law retain the right of ownership and other property rights to property, including real estate, including land plots located in the temporarily occupied territory" (Supreme Economic Court of Ukraine Ruling of 16 March 2016 in a commercial case).

It is noteworthy that the courts initially ruled in favor of the landlord; that is, the court of first instance and the court of appeal considered that the invasion of military forces to the Crimea does not indicate the impossibility of using the real estate located there and paying rent (Commercial Court of Kyiv Judgement of 29 July 2014 in a commercial case). However, after the cassation instance returned the case for a new consideration, the courts of all instances decided the case in favor of the tenant (Supreme Economic Court of Ukraine Ruling of 16 March 2016 in a commercial case). In doing so, they referred to Art. 762(6) of CCU which provides that the tenant is exempt from payment for the entire time, during which the property could not be used by him due to circumstances for which he is not responsible. In addition, the courts used Article 607 of CCU, according to which, the obligation is terminated by the impossibility of its performance due to a circumstance for which neither party is responsible.

We agree that such a force majeure circumstance as the occupation of the territory as a result of hostilities is one of the examples of circumstances referred to in Article 762 of CCU, which makes it impossible to use the leased property located in such a territory. At the same time, it should be noted that, in this case, the courts did not analyze the characteristics of the circumstances which make it impossible to use the leased property, and, therefore, exempt from paying lease payments in accordance with Art. 762(6) of CCU.

However, such characteristics were determined by the Supreme Court in *Limited Liability Company "Martorgservice" v. Limited Liability Company "Universal Transport Company in Ukraine"*, which was considered by the courts more recently. In particular, the Supreme Court made a general conclusion that objective impossibility to use the leased property (to be admitted to the premises, to be in the premises, to store things in the premises, etc.) exempts the tenant from the obligation to pay lease payment under Art. 762(6) of CCU (Supreme Court Ruling of 18 August 2020 in a commercial case). In the same case, the Supreme Court gives some examples of objective impossibility to use the leased property: in particular, in case of its illegal seizure by another person, the failure of the landlord to notify the tenant of the rights of third parties to the property, emergency or unsatisfactory technical condition of the property, lawful occupation of the premises by a third party on the basis of a lease agreement previously concluded with the landlord (Supreme Court Ruling of 18 August 2020 in a commercial case).

That is why, in our opinion, the mere presence of the tenant's possessions in the leased premises located in the occupied territory cannot be considered as storage, and, therefore, cannot be classified as the use of leased property. This is due to the fact that the occupation authorities, as a rule, grossly violate the right to property, by illegally appropriating property[20].

4. Attitude to force majeure in German Law

In the German Law, the principle of *pacta sunt servanda* is considered as a necessary "precondition for the functioning of contracts" (Oberhammer et al., 2022, p. 306). At the same time, it is considered that there should be a balance between this principle and good faith, which is ensured, among other things, by certain mechanisms that apply when the obligation cannot be performed due to extraordinary circumstances (Oberhammer et al., 2022, p. 306–307).

The *German Civil Code* (BGB) does not define force majeure as a general ground for exemption from liability for failure to perform contractual obligations. This concept is mentioned only in a few paragraphs of BGB (e.g., §206 "Suspension of limitation in case of force majeure," §484 (2)[21] (which entitles the entrepreneur to alter unilaterally the preliminary contract information in order to bring it in line with the changes caused by force majeure); §701 (3) (which provides for exemption from liability of the innkeeper for damage caused by loss, destruction or damage to the guest's things), as well as in another legislative act – the *Road Traffic Act* (Straßenverkehrsgesetz), §7 (3) of which provides for the exemption of the holder of the vehicle from the obligation to compensate for damage caused to a person or property if the accident occurred as a result of force majeure). Therefore, force majeure (*höhere Gewalt*) does not exist in the German Law as "an independent doctrine" (Oberhammer et al., 2022, p. 311).

[20] For more details, see, e.g., (Aksonov, 2022).

[21] This paragraph concerns time-share agreements, contracts relating to long-term holiday products, brokerage contracts and exchange system contracts.

Moreover, since the German Law uses other mechanisms to determine the consequences of impossibility or significant complication of performance of contractual obligations due to extraordinary and unforeseen circumstances (as will be shown below), the German doctrine suggests that it is redundant to include in the contract provisions on exclusion of the debtor's liability in such cases (Bach, 2022, p. 221).

Nevertheless contracts governed by the German Law often contain force majeure clauses (Strubenhoff et al., 2022). If the contract does not contain a definition of force majeure, the concept developed by Case Law is used (Laudahn, 2020). The latter defines force majeure as "[an] external event caused by elementary forces of nature or by the actions of third parties, which is unforeseeable according to human insight and experience, cannot be prevented or rendered harmless by economically acceptable means, even by the utmost care reasonably to be expected in the circumstances, and cannot be accepted by the operating company because of its frequency" (BGH, Urteil vom 16.10.2007).

In the context of the war against Ukraine, German lawyers note that attributing it to force majeure can create difficulties because one of the characteristics of such circumstances is their unforeseeability; in this regard, it is proposed to distinguish between contracts that were concluded before the war and after it began (Hofmann, 2022).

5. Mechanisms of German Law to be applied when the performance of contract is impossible or significantly complicated due to extraordinary circumstances

The German legislation uses other than force majeure mechanisms that can be applied when a war or the circumstances that caused it (for example, the imposition of sanctions) make it impossible to perform the contract or significantly impede its performance. Among them are mechanisms provided by § 275 and §313 of BGB (Strubenhoff et al., 2022).

Under § 275 of BGB: "(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person. (2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance. (3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor. (4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326."

The impossibility, which excludes the claim for performance, can be objective (when performance is not possible for both the debtor and third parties (Ernst, 2022, p. 889) and subjective (when performance is impossible only for the debtor (Ernst, 2022, p. 896). Objective impossibility can be Natural Law (if the contract cannot be performed due to the laws of nature or the state of technology (Ernst, 2022, p. 889), qualitative (if the thing to be transferred under the contract has an irreparable defect (Ernst, 2022, p. 889), legal (when the execution cannot be carried out for legal reasons (Ernst, 2022, p. 890–894), practical of factual (if subsequently, after the conclusion of the contract, the performance is extremely costly (Ernst, 2022, p. 889), personal (if no one other than the debtor can perform the obligation (Ernst, 2022, p. 890), impossibility due to the passage of time (in this regard, there is a distinction between permanent and temporary impossibility; in the latter case, the performance is postponed (Ernst, 2022, p. 894–895).

Another mechanism is provided in § 313 of BGB, according to which "(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke."

The basis of the contract mentioned in this paragraph is understood as the general beliefs of both parties existing at the time of the conclusion of the contract, or the beliefs of one party, which are recognized by another party, and to which it does not object, about the existence or occurrence in the future of certain circumstances, provided that the business intentions of the parties are based on these beliefs (Lorenz, 2022, para. 4). There are subjective and objective bases of the contract (Lorenz, 2022, para. 4). It is believed that § 313 of BGB can be applied in three situations: if the purpose of the contract cannot be achieved due to unforeseen circumstances that arose after the conclusion of the contract; if performance is possible in principle, but impractical; if there is a mistake in the common principal expectations (Oberhammer et al., 2022, p. 313).

The application of § 313 of BGB takes place in two stages: at the first stage, it would be necessary to find out what were the relevant circumstances that gave rise to the conclusion of the contract, and, at the second stage, specifically, whether these circumstances changed significantly after the conclusion of the contract (Ramm, 2022).

An important characteristic of the circumstances referred to in § 313 of BGB is their unforeseeability (Dastis, 2015, p. 94). This means that the occurrence of risks covered by the contract cannot constitute a reason for applying § 313 of BGB (Dastis, 2015, p. 94). German lawyers point out that the massive price increase, which is largely due to the war in Ukraine and the related sanctions, was not foreseeable (Ramm, 2022). Although the courts have so far been reluctant to amend the contract pursuant to § 313 (1) of BGB, it is expected that other decisions may now be taken (Ramm, 2022).

6. The impact of sanctions to performance of contractual obligations under German Law

There are no special rules in the German Contract Law that would regulate the performance of obligations in time of war (Force Majeure – Hardship…Germany, 2022). However, Germany applies the UN Security Council Sanctions as well as the sanctions imposed by the EU (Walther et al., 2022). Many sanctions affect the performance of contractual obligations (e.g., sanctions issued by the EU Regulations and Council Decisions against certain persons and restrictions on certain activities)[22].

[22] One of them is Council Regulation (EU) No. 269/2014 of 17 March 2014, which provided for the freezing of funds of certain persons (Article 2), as well as the possibility of certain derogations from such freezing (Articles 4–6). Another one is Council Regulation (EU) No. 833/2014 of 31 July 2014, which prohibited the sale, supply, transfer, or export, directly or indirectly, of dual-use items and technology (i.e., items that are or may be designated, in whole or in part, for military use or to a military end-user) to any natural or legal person, entity, or body in Russia or for use in Russia (Art. 2). For the full list of Decisions and Regulations, see (EU Restrictive Measures…).

All these Regulations and Decisions made it impossible to satisfy the claims filed by the sanctioned persons (or those persons through whom they act) in connection with any contract or transaction, the performance of which was directly or indirectly, in whole or in part, affected by the respective sanctions[23].

In Germany trade restrictions are considered as an example of overriding mandatory rules (Wilderspin, 2017, p. 1332). Therefore, the EU law rules on sanctions are considered as overriding mandatory provisions (Force Majeure – Hardship…Germany, 2022).

7. Attitude to force majeure in Swiss Law

The Swiss Contract Law is based on the principle of *pacta sunt servanda*, according to which, contracts must be performed as they are concluded (Enz, 2018, p. 1). Another important principle of the Swiss Law is the principle of the freedom of contract, one of the manifestations of which is the freedom to determine the content of the contract, including the consequences of its breach (Huber-Purtschert, 2018, p. 312–313). The principle of the freedom of contract allows the parties, among other things, to include force majeure clauses in the contract, which often contain a definition of this concept and its consequences for the contract (Furrer et al., 2021, p. 721). Force majeure clauses are interpreted on the basis of the principles of contract interpretation (Kalelioglu et al., p. 466). Article 18 of the *Swiss Code of Obligations* is the basis for the conclusion that the basic principle of contract interpretation in the Swiss Law is the principle of will (subjective interpretation) (Huber-Purtschert, 2018, p. 314), that is, the task of the interpreter is to establish the true will of the parties to the contract (Kalelioglu et al., p. 466–467). If the contract does not contain a force majeure clause, the understanding of this concept created by Case Law is used (Furrer et al., 2021, p. 721), according to which, force majeure means an unpredictable, extraordinary event that is not related to the 'activity' of the obliged party, but comes from outside with inevitable force (Urteil vom 25. Juni 1976).

The qualification of an armed conflict as force majeure exempting from liability under the contract will depend on when the contract was concluded: its conclusion during the armed conflict (and *not* before its occurrence) will make it impossible to claim its unpredictability (unless the contract contains wording that refers to force majeure existing armed conflicts) (Guibert de Bruet, 2022). If the sanctions imposed against certain persons in connection with the armed conflict are included in the list of force majeure circumstances in the contract, they will certainly be considered as such (Wilhelm, 2022). However, if they are not included in the list of force majeure circumstances, their qualification may be problematic and will depend on the extent to which it can be truly argued that they were unforeseeable (Wilhelm, 2022).

8. Mechanisms of Swiss Law applied when performance of contract is impossible or significantly complicated due to extraordinary circumstances

If the contract does not contain a force majeure clause, the legal consequences of the extraordinary circumstances will be determined depending on whether they create a permanent or temporary impossibility to perform the contract (Law and…Force Majeure… Switzerland). If the impossibility to

[23] See Art. 11 of the Regulation (EU) No. 269/2014, Art. 11 of the Regulation (EU) No. 833/2014, Art. 6 of the Regulation (EU) No. 692/2014, Art. 11 of the Regulation (EU) No. 208/2014, Art. 10 of the Regulation (EU) 2022/263, Art. 7 of the Council Decision 2014/512/CFSP.

perform the contract is permanent and objective[24], its consequences are governed by Article 119 of the *Code of Obligations* (Kalelioglu et al., p. 469), which provides that "1. An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor. 2. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied. 3. This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance."

Depending on the impediment that causes the impossibility, it can be both factual (fire, earthquake, etc.) and legal (issuance of certain acts by State bodies, export restrictions) (Kalelioglu et al., p. 468). However, a simple change in economic circumstances cannot be considered as an impossibility under Article 119 (Kalelioglu et al., p. 469). Application of Art. 119 of the *Code of Obligations* is possible if there is a causal link between the impediment and the impossibility of performance (Kalelioglu et al., p. 469). In addition, the impossibility referred to in Art. 119 must arise after the conclusion of the contract (Eichenberger, 2016, p. 453). The application of Art. 19 is possible only when the impossibility of performance arose without the fault of the debtor (Eichenberger, 2016, p. 453).

Under certain conditions, obstacles in the performance of the contract may not be grounds for the termination of a contract under Article 119 of the *Code of Obligations*, but for application of the doctrine of *rebus sic stantibus*, according to which a judge can adapt a contract if the circumstances have changed significantly and if at least one of the parties requests it (Jentsch, 2020, p. 12–13). To apply this doctrine, it is necessary that the change of circumstances leads to a serious disturbance of the contractual balance (Kalelioglu et al., p. 471). The change of circumstances must arise after the conclusion of the contract. It must also be unforeseeable at the time of the conclusion of the contract (Kalelioglu et al., p. 472).

In addition, the Swiss doctrine and Case Law recognize that a contract may be terminated by a court for a compelling reason at the request of a party to the contract (Kalelioglu et al., p. 474). It is considered that a valid reason for the termination of a contract exists when a party, both objectively and subjectively, cannot reasonably be expected to remain bound by the contract (Kalelioglu et al., p. 474). Moreover, the termination of a contract for a compelling reason is possible not only when the performance of the contract has become unreasonable for the party not only for economic reasons, but also "from other aspects affecting the personality of contracting parties" (Jentsch, 2020, p. 19). A party wishing to terminate the contract for a valid reason must notify the other party immediately after the reason arises; otherwise, it loses the right to terminate the contract under this ground (Kalelioglu *et al*., p. 475).

9. The impact of sanctions triggered by the war on performance of contractual obligations under Swiss Law

The introduction of enforcement measures for the implementation of sanctions imposed by the *United Nations*, the *Organization for Security and Cooperation in Europe* or the most significant trading partners of Switzerland is carried out on the basis of the *Federal Act on the Implementation of International Sanctions* (Embargo Act (EmbA) (Bazzani, 2022). Article 1(3) of the Act implies that the imposition

[24] Although there is also a point of view according to which the application of Article 119 of the *Code of Obligations* is possible both in the case of objective and subjective impossibility. It was described in (Jentsch, 2020, p. 3–4). Yet, the author of the present paper does not share this opinion.

of compulsory measures affects the performance of contractual obligations[25]. It is recognized that the provisions of EmbA override mandatory rules within the meaning of Article 18 of the *Federal Code on Private International Law* of Switzerland (Belkis Viral Celenk, 2018, p. 26–27). Switzerland has also implemented the sanctions imposed by the EU in response to the Russian armed aggression in Ukraine (Bazzani, 2022). Since the Swiss Law distinguishes between *lex fori* overriding mandatory rules and the mandatory rules of foreign law (Kadner Graziano et al., p. 850), it seems that the rules of the EU Regulations providing sanctions can also be considered as overriding mandatory rules and applied irrespective of the law to be applied on the basis of Article 19 of CLIP, since the rules stipulating trade embargoes are considered as overriding mandatory rules that serve political and economic interests (Belkis Viral Celenk, 2018, p. 24). As it was shown above, the introduction of these sanctions also significantly affects the performance of contractual obligations.

Conclusions

First, the war, as well as the circumstances caused by it (sanctions, export restrictions) make it impossible or significantly complicate the performance of contractual obligations. In accordance with the Law of Ukraine, Germany and Switzerland, the consequences of such impossibility or complication may be determined by contracts (force majeure clauses) or Law.

Second, the Ukrainian courts have repeatedly interpreted force majeure clauses in order to determine whether the war or the actions taken in response to it may be grounds for exemption from liability under the contract. These interpretations lead to the conclusion that, under Ukrainian Law, unless otherwise provided by the contract, a party that is unable to perform the contract due to export restrictions imposed in response to an armed aggression must notify the other party of a force majeure when a respective circumstance makes the performance of the contractual obligation impossible (and not when it arose in general). The interpretation of force majeure clauses is carried out by taking into account the content of other contractual provisions, as well as the provisions of a special law that imposes responsibility for material and moral damage caused by the occupation of Ukraine on the Russian Federation.

Third, the tenant's ability under a lease agreement for the real estate remaining in the occupied territory to pay lease payments (when his postal and bank addresses are not located in the occupied territory) does not mean that he is obliged to do so, despite the fact that there is no causal link between the occupation and the performance of obligations to pay the lease payments. The occupation of the territory leads to the objective impossibility of using the leased property located on it, and, therefore, to exemption from the obligation to pay lease payments under Art. 762 of CCU.

Fourth, even if a contract does not contain a force majeure clause, the war, as well as the restrictions or prohibitions imposed in connection with it by State authorities that make the contractual performance impossible, may exempt from liability on the basis of legislative provisions regarding the influence of an unstoppable force (force majeure) to contractual obligations, the characteristics of which are determined partly by the legislation and partly by Case Law.

Fifth, the tenant of the property located in the occupied territory is exempted from the obligation to pay lease payments, by virtue of the provisions of CCU, which exempts the tenant from the obligation to pay payments if the use of the property is impossible for him for reasons beyond his control.

[25] Article 1(3) of EmbA provides that: "Compulsory measures may in particular: a. directly or indirectly restrict transactions involving goods and services, payment and capital transfers, and the movement of persons, as well as scientific, technological and cultural exchange; b. include prohibitions, licensing and reporting obligations as well as other restrictions of rights."

Sixth, if the war, as well as the restrictions or prohibitions imposed in connection with it, significantly complicate the performance of the contract, they may constitute grounds for the termination or amendment of the contract by court in accordance with the provisions of CCU.

Seventh, the German Law and the Swiss Law do not have a legislative definition of force majeure, although its characteristics are determined by Case Law, since the contracts that are governed by their laws often contain force majeure clauses.

Eighth, in all the studied jurisdictions, one of the characteristics of force majeure is its unforeseeability. Therefore, the classification of the war or restrictions and prohibitions caused by it as force majeure will depend on whether the contract was concluded before or during the war (unless the contract provides otherwise). The German Law and the Swiss Law release the debtor from the performance of a contractual obligation in the event of the impossibility of its performance, the understanding of which is developed in detail in Case Law and doctrine. A significant change in the circumstances makes it possible to amend or terminate the contract under the German Law and the Swiss Law.

Ninth, in all the studied jurisdictions, legal rules affecting the performance of contracts, which were introduced in response to the armed aggression, can be considered as overriding mandatory rules in the sense of Private International Law.

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Problems of Performance of Contractual Obligations Due to War Time

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S u m m a r y

The war, as well as the circumstances caused by it (sanctions, export restrictions) make it impossible or significantly complicate the performance of contractual obligations. In accordance with the law of Ukraine, Germany and Switzerland, the consequences of such impossibility or complication may be determined by contracts (force majeure clauses) or law.

Ukrainian courts have repeatedly interpreted force majeure clauses in order to determine whether the war or actions taken in response to it may be grounds for exemption from liability under the contract. These interpretations lead to the conclusion that under Ukrainian law, unless otherwise provided by the contract, a party that is unable to

perform the contract due to export restrictions imposed in response to armed aggression must notify the other party of force majeure when a respective circumstance makes the performance of the contractual obligation impossible (and not when it has arisen in general). Interpretation of force majeure clauses is carried out taking into account the content of other contractual provisions, as well as the provisions of a special law that imposes responsibility for material and moral damage caused by the occupation of Ukraine on Russian Federation.

The tenant's ability under a lease agreement for real estate that remains in the occupied territory to pay lease payments (when his postal and bank addresses are not located in the occupied territory) does not mean that he is obliged to do so, despite the fact that there is no causal link between the occupation and the performance of obligations to pay lease payments. The occupation of the territory leads to the objective impossibility of using the leased property located on it, and therefore, to exemption from the obligation to pay lease payments under Art. 762 of the CCU.

Even if the contract does not contain a force majeure clause, the war, as well as restrictions or prohibitions imposed in connection with it by state authorities that make the contractual performance impossible, may exempt from liability on the basis of legislative provisions regarding the influence of unstoppable force (force majeure) to contractual obligations, the characteristics of which are determined partly by the legislation and partly by case law.

The tenant of the property located in the occupied territory is exempted from the obligation to pay lease payments, by virtue of the provisions of the CCU, which exempts the tenant from the obligation to pay payments if the use of the property is impossible for him for reasons beyond his control.

If the war, as well as restrictions or prohibitions imposed in connection with it, significantly complicate the performance of the contract, they may constitute grounds for termination or amendment of the contract by court in accordance with the provisions of the CCU.

German and Swiss law do not have a legislative definition of force majeure, although its characteristics are determined by case law, since the contracts that are governed by their laws often contain force majeure clauses.

In all studied jurisdictions, one of the characteristics of force majeure is its unforeseeability. Therefore, the classification of the war or restrictions and prohibitions caused by it as force majeure will depend on whether the contract was concluded before or during the war (unless the contract provides otherwise). German and Swiss law release the debtor from the performance of a contractual obligation in the event of impossibility of its performance, the understanding of which is developed in detail in case law and doctrine. A significant change in circumstances makes it possible to amend or terminate the contract under German and Swiss law.

In all studied jurisdictions, legal rules affecting the performance of contracts, which were introduced in response to armed aggression can be considered as overriding mandatory rules in the sense of private international law.

Sutartinių prievolių vykdymo problemos dėl karo padėties

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S a n t r a u k a

Karas, taip pat jo sukeltos aplinkybės (sankcijos, eksporto ribojimai) neleidžia arba labai apsunkina sutartinių įsipareigojimų vykdymą. Pagal Ukrainos, Vokietijos ir Šveicarijos įstatymus tokio neįmanomo ar sudėtingo sutartinių įsipareigojimo vykdymo dėl karo ar jo sukeltų aplinkybių padariniai gali būti nustatyti sutartimis (*force majeure* sąlygos) arba įstatymu.

Ukrainos teismai ne kartą aiškino *force majeure* sąlygas, siekdami nustatyti, ar karas arba veiksmai, kurių buvo imtasi reaguojant į jį, gali būti pagrindas atleisti nuo atsakomybės pagal sutartį. Šie aiškinimai leidžia daryti išvadą, kad, pagal Ukrainos teisę, jei sutartyje nenumatyta kitaip, šalis, kuri negali vykdyti sutarties dėl eksporto apribojimų, taikomų reaguojant į ginkluotą agresiją, privalo pranešti kitai šaliai apie *force majeure* aplinkybes. *Force majeure* sąlygos aiškinamos atsižvelgiant į kitų sutarties nuostatų turinį, taip pat į specialaus įstatymo nuostatas, numatančias atsakomybę už materialinę ir moralinę žalą, padarytą Ukrainai dėl Rusijos Federacijos įvykdytos okupacijos.

Nuomininko galimybė pagal nekilnojamojo turto, kuris lieka okupuotoje teritorijoje, nuomos sutartį mokėti nuomos įmokas (kai jo pašto ir banko adresai yra ne okupuotoje teritorijoje), nereiškia, kad jis privalo tai daryti, nepaisant to, kad tarp teritorijos užėmimo ir prievolių mokėti nuomos įmokas vykdymo nėra priežastinio ryšio. Teritorijos užėmimas lemia objektyvų negalėjimą naudotis joje esamu išnuomotu turtu, todėl atleidžiama nuo prievolės mokėti nuomos mokesčius pagal 2006 m. 762 CCU.

Net jei sutartyje nėra nenugalimos jėgos sąlygos, karas, taip pat su juo susiję valstybės institucijų nustatyti apribojimai ar draudimai, dėl kurių sutarties vykdymas tampa neįmanomas, gali atleisti nuo atsakomybės remiantis teisės aktų nuostatomis dėl nenugalimos jėgos (*force majeure*) poveikio sutartinėms prievolėms, kurių požymius iš dalies nustato teisės aktai, o iš dalies – teismų praktika.

Užimtoje teritorijoje esamo turto nuomininkas atleidžiamas nuo prievolės mokėti nuomos įmokas pagal CMS nuostatas, kurios atleidžia nuomininką nuo prievolės mokėti įmokas, jeigu jam neįmanoma naudotis turtu nuo jo nepriklausančių priežasčių.

Jei karas, taip pat su juo susiję apribojimai ar draudimai labai apsunkina sutarties vykdymą, jie gali būti pagrindas nutraukti ar pakeisti sutartį teisme vadovaujantis CK nuostatomis.

Vokietijos ir Šveicarijos teisėje nenugalimos jėgos apibrėžimas nėra įstatyminis, nors jo ypatybes nustato teismų praktika, nes sutartyse, kurioms taikomi jų įstatymai, dažnai yra nenugalimos jėgos sąlygų.

Visose tirtose jurisdikcijose viena iš *force majeure* ypatybių yra jos nenuspėjamumas. Todėl karo ar dėl jo atsiradusių apribojimų ir draudimų priskyrimas nenugalimos jėgos aplinkybėms priklausys nuo to, ar sutartis buvo sudaryta prieš karą, ar jo metu (jei sutartyje nenumatyta kitaip). Vokietijos ir Šveicarijos teisės aktai atleidžia skolininką nuo sutartinės prievolės, kurios supratimas yra detaliai išplėtotas teismų praktikoje ir doktrinoje, vykdymo tuo atveju, kai neįmanoma jos vykdyti. Esminėms aplinkybėms iš esmės pasikeitus suteikiama galimybė pakeisti arba nutraukti sutartį pagal Vokietijos ir Šveicarijos įstatymus.

Visose tirtose jurisdikcijose teisinės taisyklės, turinčios įtakos sutartims vykdyti, kurios buvo nustatytos reaguojant į ginkluotą agresiją, gali būti laikomos viršesnėmis imperatyviomis taisyklėmis pagal tarptautinę privatinę teisę.

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