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Force majeure as grounds for exemption from liability: International approach and Ukrainian experience in terms of the military conflict

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Abstract

The article is devoted to the study of the category of "force majeure" and the characteristics of the exemption from liability in circumstances of force majeure. In addition, the definition of force majeure in international normative acts is studied, the categories of force majeure, irresistible force and state of emergency are compared. The regime of grounds for exemption from liability and the place of force majeure in it are considered. The peculiarities of changing and terminating the contract as a result of a significant change in circumstances in case of force majeure in accordance with the legislation of European countries and Ukraine are analyzed. The article pays special attention to the qualification of circumstances as force majeure in the context of the anti-terrorist operation and the war in Ukraine. It is concluded that the concept of force majeure has its origin in Roman law and today it is known both in the civil and common law systems. From the time of Roman law, there was both a legislative regulation of exemption from liability for the occurrence of force

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majeure circumstances, as well as a contractual practice of formulating exemption from liability clauses.

Keywords: force majeure; irresistible force; exemption from liability; performance of obligations; war in Ukraine.

La fuerza mayor como causal de exención de responsabilidad: enfoque internacional y experiencia ucraniana en materia de conflicto militar

Resumen

El artículo está dedicado al estudio de la categoría de «fuerza mayor» y las características de la exención de responsabilidad en circunstancias de fuerza mayor. Además, se estudia la definición de fuerza mayor en los actos normativos internacionales, se comparan las categorías de fuerza mayor, fuerza irresistible y estado de emergencia. Se considera el régimen de causales de exención de responsabilidad y el lugar de la fuerza mayor en el mismo. Se analizan las peculiaridades de cambiar y rescindir el contrato como resultado de un cambio significativo en las circunstancias en caso de fuerza mayor de acuerdo con la legislación de los países europeos y Ucrania. El artículo presta especial atención a la calificación de las circunstancias como fuerza mayor en el contexto de la operación antiterrorista y la guerra en Ucrania. Se concluye que el concepto de fuerza mayor tiene su origen en el Derecho romano y hoy es conocido tanto en el sistema civil como en el del *common law*. Desde la época del Derecho romano, existía tanto una regulación legislativa de la exoneración de responsabilidad por la concurrencia de circunstancias de fuerza mayor, como una práctica contractual de formulación de cláusulas de exoneración de responsabilidad.

Palabras clave: fuerza mayor; fuerza irresistible; exención de responsabilidad; cumplimiento de obligaciones; guerra en Ucrania.

Introduction

The category of civil liability is one of the key ones in civil law, as civil liability is a sanction that ensures the proper fulfillment of obligations and guarantees the stability of civil circulation. However, based on the principle of justice, in some cases a person can be exempted from responsibility for non-performance or improper performance of an obligation. This

is possible, as a rule, in situations where certain external circumstances, independent of the debtor, affected the course of execution. Therefore, grounds for exemption from liability as a way of protecting the rights and interests of legal relationship participants are of particular importance for ensuring the balance of the interests of legal relationship participants.

The central place in the system of grounds for exemption from civil liability is held by force majeure. The problem of legal regulation of force majeure has a long history, dating back to Roman law, where force majeure was considered an equitable basis for exemption from liability.

The concept of "force majeure" ("irresistible force") (vis major, forse majeure, act of God) has existed for millennia and means a higher force, "God's providence", an event that surpasses in strength those human forces that can be opposed to it and therefore exempts from responsibility. This concept was known to the Roman private law of the classical period, the civil law of the countries of continental Europe, and the Anglo-American civil law. In the decisions of July 12, 1929 in The Hague in the cases of Serbian and Brazilian loans placed in France, the Permanent Chamber of International Justice recognized force majeure as a general principle of law.

With the development and complication of private legal relations, the issue of releasing the debtor from liability for breach of obligation as a result of force majeure circumstances has acquired special importance, therefore they often become the object of scientific discussions. In addition, the problem of clarifying the essence and list of circumstances that can be considered force majeure in the civil law of Ukraine is reinforced by war conflict and European integration processes.

Given the significant importance of the concept of force majeure (irresistible force) for civil theory, civil legislation and law enforcement practice and its importance in terms of the war conflict in Ukraine, the purpose of this article is the study of the force majeure category, drawing of special attention to the war conflict as a ground for exemption from liability.

1. Emergence of the "force majeure" category in Roman private law

In classical Roman law, the debtor's responsibility for non-fulfillment of contractual obligations was determined objectively: the obligation to compensate damages occurred without ascertaining the reasons for the non-fulfillment of the obligation, that is, regardless of whether the debtor was at fault or force majeure acted. Later, the principles of objective responsibility were replaced by the principles of subjective responsibility of the debtor.

If the debtor was not guilty of non-fulfillment of the contractual obligation, i.e., took care of the obligations assumed, he was released from responsibility. In such cases, non-fulfilment was attributed to force majeure (vis majeure). They meant all unpredictable and unforeseeable circumstances, the consequences of which could not be eliminated, even if they could be foreseen (Pukhan & Polenak-Akimovskaya, 1999).

The case under Roman law was divided into simple case (casus minor) and force majeure (casus major or vis major). Force majeure (vis major) and case (casus) were recognized under Roman private law as grounds for exemption from liability. The case meant either the destruction of the thing or other impossibility of performance in the absence of the debtor's fault. Force majeure included unforeseeable, spontaneous and such that cannot be eliminated, forces of nature that led to the impossibility of fulfilling the obligation and exempted the debtor from responsibility (Pidoprygora & Kharytonov, 2003).

It should be noted that along with the main principle of the debtor's subjective responsibility in Roman law, the principle of objective responsibility continued to operate in relation to a number of obligations. This responsibility was called custodia and was applied in service contracts, contracts between shipowners, innkeepers, and some lease contracts. In the mentioned cases, the debtor's responsibility came even for an accident.

However, in Romanistic literature, the issue of innocent liability under Roman law is disclosed in sufficient detail. In particular, the analysis of Digests regarding lawsuits against shipowners and owners of hotels and inns allows us to conclude that, contrary to the generally accepted point of view, tortious liability of shipowners, owners of hotels and inns arose regardless of fault. There is nothing about liability without fault in Digests, but about liability for the actions of third parties (service personnel of the ship or hotel and regular guests of the hotel). According to scientists, there is nothing similar to general, unconditional and fault-independent responsibility (Passek, 2003).

The provisions of Roman law with regard to liability for intentional non-fulfillment of an obligation are of particular interest. This rule had an imperative coercive nature and could not be eliminated by a prior agreement of the parties. It was created in view of the fact that the parties, upon concluding the contract, began to formulate a disclaimer of liability. Thus, in Roman law, there was both a statutory regulation of exemption from liability due to the occurrence of circumstances of force majeure, and a contractual practice of formulating clauses on exemption from liability. Moreover, it was prohibited by law to enter into preliminary agreements on exemption from liability for intentional breach of obligation (Dziuba, 2003).

As a result of the reception of Roman private law in the continental systems of law, the clause on the release from liability of the debtor due to force majeure was established. The term "force majeure" first appeared in the French Napoleonic Code of 1804 (Vasiliev, 1993). According to Art. 1148 of this Code, there are no grounds for recovery of any damages if, due to force majeure or unforeseen circumstances, the debtor was unable to give or do what he was obligated to do, or did what he was forbidden to do (Kulagin, 1997).

German law establishes the principle according to which the impossibility of performance due to the occurrence of force majeure circumstances excludes the liability of the debtor (the debtor is released from the performance of the obligation if it became impossible due to circumstances for which the debtor is not responsible and which occurred after the obligation arose) (Chung, 2017).

2. Definition of force majeure in international legal acts

In order to find out what force majeure is, it is worth to analyze authoritative international sources, namely the Vienna Convention of 1980 (United Nation, 1980). Article 79 (1) of the Vienna Convention of 1980 stipulates that a party is not liable for failure to perform any of its obligations if she proves that it was caused by an obstacle beyond her control and that it was unreasonable to expect it to take into account this obstacle at the time of concluding the contract or to avoid or overcome this obstacle or its consequences. However, such exemption remains only for the period of existence of such an obstacle. Also, the Vienna Convention of 1980 specifies the notification of the other party about the occurrence of such obstacles as a mandatory condition for exemption from liability.

The notion of "force majeure" ("irresistible force") is not mentioned in the Vienna Convention of 1980 at all. It seems that international private law deliberately does not use this concept, and accordingly, the signs of emergency and exclusivity. Such an approach gives the parties of the contract the opportunity to independently determine the circumstances that exempt them from responsibility. However, in the Vienna Convention of 1980 the signs of unpredictability (it was unreasonable to expect the person to take the obstacle into account) and inevitability (the obstacle is beyond her control) are preserved.

Paragraph 2 of the specified article states that if non-fulfillment of an obligation is caused by the non-fulfilment of a third party engaged by a debtor to perform the contract, the debtor is released from liability only if the person engaged by him or her would also be released from liability. Thus, provisions of the Vienna Convention of 1980 create the most favorable

regulation of relations between the participants of a commercial agreement.

According to the Vienna Convention of 1980, for exemption from liability on the basis of force majeure, the simultaneous presence of the following grounds is necessary:

- non-performance must be caused by an obstacle beyond the control of the party claiming exemption from liability;
- the party claiming exemption from liability could not reasonably be expected to take this obstacle into account when concluding a contract for the international sale of goods;
- the party claiming exemption from liability could not reasonably be expected to avoid this obstacle or its consequences;
- the party claiming exemption from liability could not reasonably be expected to overcome this obstacle or its consequences.

It is worth noting that, wanting to provide sufficient flexibility to the Vienna Convention of 1980, its developers used abstract categories, in particular, instead of the concepts of "force majeure", "irresistible force" the category "obstacle" was used, and the expression "out of control" was used instead of "fault" (Kondratieva, 2012).

In international public law, force majeure means a situation in which an entity is forced to act contrary to an international obligation as a result of force majeure or an unforeseen event beyond control. International practice knows many cases of references to force majeure as a basis for justifying non-fulfillment of obligations. Most often, such situations arise when the aircraft of one state invades the airspace of another state as a result of damage or weather conditions. The UN Convention on the Law of the Sea emphasizes that passage through the territorial sea includes stopping and anchoring as they are "necessary due to force majeure" (United Nations, 1998).

The UN General Assembly Resolution 56/83 (United Nations, 2001-2022) with regard to force majeure establishes that the illegality of an act of a state that does not comply with an international obligation of that state is excluded in case this act was made due to force majeure, i.e., the manifestation of an irresistible force or an unforeseen event, beyond the control of that state, which make it materially impossible under the given circumstances to fulfill the corresponding obligation. This statement does not apply if: a) the force majeure situation is caused, either entirely or in combination with other factors, by the behavior of the state that refers to it; or b) the state has assumed the risk of such a situation occurring.

As a result, a force majeure situation must meet certain conditions. First, the relevant act must be determined by force majeure or an unforeseen event

beyond the control of the state. Secondly, the fulfillment of the obligation is materially impossible.

Therefore, "force majeure" means that there must be an obstacle which the state was unable to avoid or which it could not prevent. "Unforeseen event" means that its occurrence could not be predicted or was extremely unlikely. In this case, it is necessary to establish whether the breaching party could reasonably be expected to have taken into account the possibility of the relevant event. If such an event can be foreseen, then the defaulting party may be considered to have assumed the risk of performance of the obligation if such an event occurs. The possibility of predicting the event is assessed at the time of acceptance of the obligation. At the same time, the party must take all the measures at its disposal for the proper fulfillment of the obligation, and not passively observe the occurrence of an event that is the reason for its non-fulfillment.

Force majeure or an unforeseen event must be the reason for the material impossibility of fulfilling the obligation, which may be due to a natural event, for example, an emergency landing of an airplane in hurricane conditions on the territory of a foreign state, or human activity, for example, leaving a part of the territory under state control as a result of a rebel. Cases of use of force, coercion by one state against another may also fall under the force majeure situation. Force majeure does not apply to situations in which the fulfillment of the obligation has become more difficult, for example, as a result of a political or economic crisis. This also applies to situations caused by the negligence or inaction of the respective state.

In international law, in addition to force majeure, a state of emergency is also distinguished, which is provided for by a number of conventions. Thus, the Convention of the United Nations Organization on the Law of the Sea allows the stopping and parking of ships at anchor when passing through the territorial sea of a foreign state only when they are due to a state of emergency (Article 18.2). Similar provisions are contained in conventions on prevention of sea pollution.

The state of emergency refers to a specific case when a person, whose behavior is attributed to the state, is in a situation of extreme danger both for herself and for the persons entrusted to her. Larger-scale disasters such as earthquakes, floods and other emergencies may be recognized as force majeure or a state of necessity.

In contrast to force majeure, a person acting in a state of emergency is acting in a situation of "relative impossibility" of fulfilling an international obligation. This situation differs from the state of necessity in that it is not about choosing between compliance with the norms of international law and ensuring the legitimate interests of the state. The interest here directly lies in saving people's lives, regardless of their citizenship.

In contrast to a disaster, a state of necessity does not pose a danger to the lives of people entrusted to a state official, but a serious danger to the main interests of the state itself or the international community. The state of necessity arises when there is a conflict between a significant interest and the obligation of the state, which refers to the state of necessity.

3. Force majeure in the system of grounds for exemption from liability

The grounds for exemption from civil liability are divided into formal (legal norms establishing these grounds) and material (objectively existing life circumstances constituting the content of these norms). The set of material grounds for exemption from civil liability, which has been established in the relevant legal norms, constitutes the material and legal content of the grounds for exemption.

Substantive legal grounds for exemption from civil liability for breach of contract are life circumstances enshrined in the norms of civil legislation that give rise to the right of a person who has not fulfilled or improperly fulfilled an obligation to be exempt from liability.

Material and legal grounds for exemption from civil liability are divided into subjective and objective. Subjective grounds include the presence or absence of the debtor's fault. The criterion for the presence or absence of guilt in specific civil legal relations is the degree of care and prudence required by the nature of the obligation and the conditions of economic turnover. Objective material and legal grounds for exemption from civil liability include irresistible force and various forms of behavior of the participants in the liability relationship.

Force majeure includes: natural events not related to voluntary human behavior (floods, earthquakes, blizzards, etc.); phenomena of social life that do not depend on the behavior of the parties of an obligation (military operations, strikes, suspension or restriction of cargo transportation, etc.). The forms of behavior of the participants in the legal relationship of liability include: dissemination of true information that disgraces honor, dignity and business reputation; skipping the statute of limitations; violation of the rules for using the purchased goods, etc. (Reznichenko & Tserkovna, 2009).

All material grounds for exemption from civil liability can also be divided into several groups: general, special and institutional (separate). The first are established in general provisions on obligations, special ones are contained in separate institutions of civil law. Thus, the owner of the source of increased danger is released from liability if the source of increased danger got out of control of the owner as a result of illegal

actions of third parties. At the same time, the overlap of general, special and separate grounds for exemption from civil liability is not excluded in positive law, which complicates their systematicity and interdependence.

Material and legal grounds for exemption from civil liability can be subjective or objective in nature. The first type of grounds for exemption from civil liability includes the presence or absence of fault of the causer of damage or the victim, and the second - various forms of behavior of the causer of damage, the victim, as well as events (circumstances of social life) that do not depend on their behavior.

In the civil literature, an unjustified confusion of subjective grounds for exemption from civil liability with force majeure is allowed, although civil law establishes them as different (independent) life circumstances that give rise to the right to exemption from liability.

The procedural and legal form of the grounds for exemption from liability is a method of implementation of the material and legal grounds for exemption from civil liability established by the civil procedural legislation.

An analysis of the provisions of the Civil Code of Ukraine reveals that the grounds for exemption from civil liability include: creditor's fault; case; irresistible force; other circumstances causing the impossibility of fulfilling the obligation, if they arose through no fault of the debtor. The list of grounds for exemption from civil liability for damage may be expanded due to necessary defense, extreme necessity, force majeure, and fault of the victim (Tserkovna, 2008).

4. Change and termination of the contract as a result of a significant change in circumstances in the event of force majeure

Force majeure can be the reason for a significant change in circumstances, which is the basis for terminating or changing the contract, and ultimately leads to the change or termination of the obligation. Legal regulation of consequences of a significant change in the circumstances that exist during the conclusion of the contract is, as a rule, built on the basis of one of the two key principles of contract law: the principle that contracts must be fulfilled (pacta sund servanda) or the clause about the immutability of circumstances (clausula rebus sic stantibus). The legislation of many countries contains norms according to which a change in circumstances can be a justification for changing the contract, when the preservation of the contract in its original form leads to extraordinary results incompatible with justice (Zweigert & Katz, 1993).

The main consequences of a significant change in the circumstances that the parties were guided by when concluding the contract are: 1) a change in the contract itself, i.e., a change in the terms of the contract (and as a result the obligations between the parties) while keeping the contract itself in force; 2) termination of the contract by agreement of the parties. Thus, in the USA, the doctrine of "impossibility" of execution is used. In order to establish the fact of the non-occurrence of certain events as the main prerequisite for the conclusion of the contract, it is necessary to find out which of the parties to the contract assumed the risk of the given event.

When concluding contracts for the manufacture and delivery of goods at pre-fixed prices, the seller, for example, assumes the risk of an increase in production costs within normal limits. However, if in the course of extraordinary events, the value of the goods for the seller increases sharply, tenfold, the court can determine that the seller did not assume such a risk, based on the fact that the non-occurrence of the extraordinary event was a "main prerequisite" for the conclusion of the contract (Komarov, 1991). In the considered situation, it is possible to say either that the debtor did not take such a risk, or that the court has the right to remove this risk due to its extreme burden.

The common law doctrine differs significantly from the civil one and proceeds from the fact that the modification of the contract undermines certainty and changes the risks allocated in the contract. Common law provides that termination of obligations under a contract is possible only when a change in circumstances makes performance under the contract illegal or impossible (Beatson, 2002).

In Great Britain, the doctrine of "frustration" (frustration of purpose, loss of the contract's meaning) is applied. This doctrine is applied only in cases where the performance of the contract turned out to be impossible due to the destruction of the object of the contractual obligation through no fault of the parties. In such cases, the court makes a just and reasonable decision with regard to the parties, which is required by the new circumstances. The court can make such a decision only if the change in circumstances does not fall under the definition of "normally considered" risk.

In contrast to the doctrine of frustration of the contract, "impossibility" as a basis for exemption from liability consists in the impossibility of fulfilling the obligation provided for in the contract due to unforeseen circumstances that the parties could not foresee at the time of concluding the contract.

French law, as a general rule, is reluctant to change the terms of a contract, even when circumstances have changed. The principle of performance of obligations has priority over ex post modify claims with a few exceptions. In particular, public contracts can be changed or terminated by a court; a contract can be modified if the circumstance standing in the way of the

performance of the obligation could not have been foreseen: for example, after the First and Second World Wars, Parliament allowed the courts to stop treaties that were concluded before the beginning of either of those wars.

Nowadays, civil jurisdiction courts in France do not recognize the doctrine of a significant change in circumstances (imprevidsion), which was the reason for the very detailed elaboration by the parties of the terms of the contract on the grounds for exemption from liability. French law calls force majeure and "unforeseen event" (cas fortuit) grounds for exemption from liability (Castro, 2020). Thus, French law does not allow the termination of the contract on the basis of a significant change of circumstances, while common law allows the termination of the obligation, and the Principles of European Contract Law allow the judicial procedure for the modification and termination of the contract in this case.

In Sweden, the court has the right to change the contract in case the obligation for one of the parties becomes unreasonably burdensome, for example, when the circumstances have changed after the contract has entered into force, the court has the right to change the contract both in its entirety and its individual provisions.

Italian law gives a party to a contractual obligation the opportunity to terminate the contract if its performance becomes excessively burdensome (difficult) as a result of unforeseen circumstances (Vyacheslavov, 2007).

The UNIDROIT Principles (Principles of European Contract Law) are formulated in such a way that each party to the contract fulfills its obligations even if the performance has become more onerous, regardless of whether the value of the performance has increased for the debtor or the value of the performance has decreased for the creditor (Sanjur, 2022). However, in case of a significant burden of performance for the debtor due to a change in circumstances, the principles provide for the obligation of the parties to enter into negotiations with the aim of adapting the contract or terminating it. The complication according to Principles of UNIDROIT has place when events that significantly change the balance of contractual obligations either due to an increase in the cost of performance or a decrease in the value of the performance received by the party occur, as well as:

a) events that arise or become known to the disadvantaged party after the conclusion of the contract;

b) events that could not reasonably have been taken into account by the disadvantaged party prior to the conclusion of the contract;

c) events beyond the control of the disadvantaged party; and

d) if the risk of occurrence of such events was not assumed by the disadvantaged party (UNIDROIT, 2016).

If the parties did not reach an agreement within a reasonable period of time, the court has the right to: terminate the contract, make changes to the contract, as well as decide on the issue of compensation for damages caused by the party's refusal to agree on the changed terms of the contract or unilateral refusal (Rose, 2022).

In Ukraine, in accordance with Art. 652 of the Civil Code of Ukraine, a significant change in the circumstances from which the parties proceeded when concluding the contract is the basis for its modification or termination, unless otherwise stipulated by the contract or does not follow from the essence of the obligation. At the same time, a change in circumstances is recognized as significant when they have changed to such an extent that, if the parties could have reasonably foreseen it, the contract would not have been concluded by them at all or would have been concluded under significantly different conditions.

In accordance with Part 2 of Art. 652 of the Civil Code of Ukraine in order to change or terminate a contract based on a significant change in circumstances, four conditions must be met: 1) at the time of concluding the contract, the parties assumed that such a change in 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 prudence required of it; 3) performance of the contract would violate the balance of property interests of the parties and would deprive the interested party of what it was counting on when concluding the contract; 4) it does not follow from the essence of the contract or business practices that the risk of changing circumstances is borne by the interested party.

If the parties have not reached an agreement on bringing the contract into line with the circumstances that have changed significantly, or on its termination, the contract may be terminated, and on the grounds established in Part 4 of Art. 652 of the Civil Code of Ukraine, - amended by a court decision at the request of an interested party in the presence of the following conditions at the same time: at the time of concluding the contract, the parties assumed that such a change in circumstances would not occur; the change in circumstances is due to reasons that the interested party could not eliminate after their occurrence with all the care and prudence required of it; performance of the contract would violate the ratio of property interests of the parties and would deprive the interested party of what he was counting on when concluding the contract; it does not follow from the essence of the contract or the customs of business turnover that the risk of changing circumstances is borne by the interested party.

Thus, changing the contract in connection with a significant change in circumstances is allowed by a court decision in exceptional cases when the termination of the contract is contrary to public interests or will cause damage to the parties that significantly exceeds the costs necessary to perform the

contract on the terms changed by the court. In case of termination of the contract as a result of a significant change in circumstances, the court, at the request of any of the parties, determines the consequences of termination of the contract based on the need for a fair distribution between the parties of the costs incurred by them in connection with the performance of this contract.

It should be noted that the provisions of Part 2 of Art. 652 of the Civil Code of Ukraine, as well as in non-state collections of private and contract law (Principles of European Contract Law, Principles of International Commercial Contracts UNIDROIT), do not impose on the interested party the need to take actions to overcome the causes caused by a significant change of circumstances. A similar requirement is contained in Article 8:108 of the Principles of European Contract Law (Commission on European Contract Law, 1995-2002) and in Clause 1 of Article 79 of the UN Convention on Contracts for the International Sale of Goods of 1980, but only with regard to circumstances of force majeure / obstacles (excuse due to impediment): the party does not bear liability for a breach of contract which is caused by a force majeure event which was beyond its control and which could not reasonably have been taken into account at the time of the conclusion of the contract, or which it could not have overcome or prevented.

The rest of the non-state collections of private and contract law, in particular UNIDROIT Principles of International Commercial Contracts or Principles of European Contract Law, Principles, Definitions and Model Rules of European Private Law (Ch. Von Bar et al., 2009) provide only the requirement of the absence of a causal relationship between change of circumstances and actions of the interested party.

Accordingly, Part 3 of Art. 653 of the Civil Code of Ukraine, in case of change or termination of the contract, the obligation is changed or terminated from the moment of reaching an agreement on the change or termination of the contract, unless otherwise established by the contract or determined by the nature of its change. If the contract is changed or terminated in court, the obligation is changed or terminated from the moment the court decision to change or terminate the contract enters into force. Thus, the contract can be terminated or changed because the parties could not reasonably foresee the relevant risks when concluding it or because the risk assumed by the debtor turned out to be extremely burdensome and, in any case, significantly violates the property interests of one of the parties.

Therefore, if there is a significant change in the situation, the responsibility of the parties remains. This means that the party whose right has been violated has the right to claim damages. Therefore, upon termination of the contract due to significantly changed circumstances, the parties may demand not only a fair distribution of the real loss, but also the lost profit (Palmer, 2022).

5. Anti-terrorist operation and war in Ukraine as force majeure circumstances

In Ukraine, the concept of force majeure is defined in the Law of Ukraine "On Chambers of Commerce and Industry in Ukraine" (Verkhovna Rada, 1998). According to the specified Law, force majeure circumstances are extraordinary and unavoidable circumstances that objectively make it impossible to fulfill the obligations stipulated in the terms of the contract or obligations under legislative and other regulatory acts.

Among such circumstances are mentioned: threat of war, armed conflict or serious threat of such conflict, including but not limited to enemy attacks, blockades, military embargoes, actions of a foreign enemy, general military mobilization, military actions, declared and undeclared war, acts of a public enemy, disturbance, acts of terrorism, sabotage, piracy, disorder, invasion, blockade, revolution, mutiny, uprising, mass riots, introduction of curfew, quarantine established by the Cabinet of Ministers of Ukraine, expropriation, forced seizure, seizure of enterprises, requisition, public demonstration, strike, accident, illegal actions of third parties, fire, explosion, long interruptions in the operation of transport, regulated by the terms of relevant decisions and acts of state authorities, closure of sea straits, embargo, prohibition (restriction) of export/import, etc.

Circumstances qualified as force majeure also cover the ones caused by exceptional weather conditions and natural disasters, namely: epidemic, strong storm, cyclone, hurricane, tornado, flood, accumulation of snow, ice, hail, frost, freezing of the sea, straits, ports, passes, earthquake, lightning, fire, drought, subsidence and landslide, other natural disasters, etc. (Nekit, 2021).

Therefore, terrorist acts, armed conflicts and wars are recognized as force majeure in Ukraine.

However, the analysis of judicial practice in Ukraine leads to the conclusion that the anti-terrorist operation, which lasted in Ukraine from 2014 until the start of a full-scale war, was not always recognized as force majeure. In some cases when, in connection with hostilities, citizens faced the problem of returning loans or bank deposits, entrepreneurs carrying out economic activities in areas where hostilities were or are being waged could not fulfill their contractual obligations, pay taxes, submit reporting, some citizens still cannot receive compensation from insurance companies for lost property, and at the same time, such cases were often justified by the occurrence of force majeure circumstances.

Such situations are possible because in order to confirm the presence of force majeure, it is necessary to obtain the opinion of the Chamber of Commerce and Industry of Ukraine (a special body that confirms the

presence of force majeure circumstances). However, such a body issues a conclusion only if an interested person submits all the documents confirming: a) the occurrence of a force majeure circumstance; b) that force majeure is the reason for the impossibility of fulfilling obligations (a causal relationship is proved); c) that before the occurrence of force majeure circumstances, the terms of the contract were properly fulfilled.

The absence of a conclusion of the Chamber of Commerce and Industry does not give rise to the release of interested persons from liability, in this case the contractual obligations are subject to fulfillment in full and within the prescribed period. Therefore, if a bank or an insurance company refuses to fulfill its obligations under the contract without a conclusion of the Chamber of Commerce and Industry on the occurrence of force majeure circumstances, such a refusal should be considered as a violation of the contractual terms.

Therefore, the very fact of carrying out the Anti-Terrorist Operation (hereinafter - ATO) did not become a basis for exemption from liability for non-fulfillment of accepted obligations. In each specific case, an interested party had to prove that the ATO affected (or could affect) the fulfillment of obligations. Circumstances indirectly related to the ATO, such as a drop in demand in enterprises due to the ATO for products, reduction in turnover, lack of funds to repay the loan, etc., were also not considered force majeure, since the lack of money does not belong to force majeure circumstances.

After the start of a full-scale war in Ukraine, the letter of the Chamber of Commerce and Industry of Ukraine No. 2024/02.0-7.1 dated February 28, 2022 was published, according to which force majeure circumstances from February 24, 2022 until their official end are extraordinary, unavoidable and objective circumstances for legal entities and/or natural persons under the contract, tax and/or other obligations, the fulfillment of which has occurred in accordance with the terms of the agreement, contract, legislative or other regulatory acts and the implementation of which became impossible within the set time due to the occurrence of such force majeure circumstances.

For many parties to civil agreements the mentioned letter became the basis for sending a demand for the conclusion of additional agreements, in which the parties either decided on the possibility to continue deadlines for fulfilling obligations (production, delivery, processing of goods, etc.) or waived any fines in case of delay in the fulfillment of obligations, etc. (Malinovska et al., 2020).

Such a position affected the fulfillment of contracts in the conditions of Russian aggression (Ruiz, 2022). In particular, in insurance contracts, the parties may refer to force majeure as a basis for releasing them from liability for non-fulfillment of the terms of the contract (relevant force majeure clauses with reference to war are always included in insurance contracts in practice).

However, force majeure circumstances do not release a party from the obligation under the contract, but are only a legitimate reason to delay the fulfillment of such an obligation until the end of their validity and not bear liability for such delay (in the form of fines). In addition, the mere fact of hostilities or the introduction of wartime restrictions does not exempt a party from liability, if such circumstances do not directly prevent a person from physically or legally fulfilling a specific obligation under the contract. It is under such circumstances, for example, that the insurer can delay the insurance payment (following the procedure for notification of force majeure and its confirmation), but will have to make it when the effect of force majeure on him ceases (Antoniv, 2022).

Force majeure does not allow to avoid the fulfillment of obligations, including financial ones (for example, rent payments), but it allows to postpone obligations or exempt the business entity from liability for their non-fulfillment during the existence of such circumstances. If the property is damaged before transfer to the tenant (rentee), force majeure can only be applied if the property can be replaced. In the case of the uniqueness of the subject of rent (hire), the contract is subject to change or termination due to the impossibility of performance.

If the property was destroyed or damaged as a result of hostilities after being transferred for rent for a certain period, the payer of the rent is not released from the obligation to pay it before the end of this period under the conditions established by the contract. If such property is transferred for rent for an indefinite annuity, the payer may demand the termination of the obligation to pay the annuity or a change in terms of the payment.

According to the contract of lease, the lessee is exempt from payment for the entire time during which the property could not be used due to circumstances for which he or she is not responsible. However, there are other options: (pre)suspend the contract in accordance with the principle of freedom of contract, change the form, periodicity of the rent, reduce the rent with the justification of a significant reduction in the ability to use the property, terminate the contract by referring to the force majeure clause in the contract or warning the counterparty in 1 or 3 months for the lease of movable and immovable property, respectively (Zagnitko, 2022).

Conclusions

The concept of force majeure originated in Roman law and today is known both to the civil and common law systems. From the times of Roman law, there was both a legislative regulation of exemption from liability due to the occurrence of force majeure circumstances, and a contractual practice of formulating clauses on exemption from liability. As a result of

the reception of Roman private law, the clause on the release from liability of the debtor due to force majeure was established.

The analysis of international legal acts reveals that, although the force majeure rules are established in public international law, states are very careful about the limitation of liability. French law does not allow termination of the contract on the basis of a significant change in circumstances, English and US law allow for the termination of the obligation, and the Principles of European Contract Law allow a judicial procedure for changing and terminating the contract in this case.

The contract can be terminated or changed because the parties could not reasonably foresee the relevant risks when concluding it or because the risk assumed by the debtor turned out to be extremely burdensome and, in any case, significantly violates the property interests of one of the parties. Therefore, if there is a significant change in the situation, the liability of the parties remains. This means that the party whose right has been violated has the right to claim damages. Therefore, upon termination of the contract due to significantly changed circumstances, the parties may demand not only a fair distribution of the real loss, but also the lost profit.

In cases of force majeure circumstances, the deadline for the parties to fulfill their obligations under the contract is postponed in accordance with the time during which such circumstances and their consequences are in effect.

Ukraine has developed a special practice regarding force majeure circumstances, provoked initially by the anti-terrorist operation in the East of the country as a result of aggression on the part of the Russian Federation, and from the beginning of 2022 also by the full-scale war that the Russian Federation launched against Ukraine. However, despite the fact that wars, armed conflicts and terrorist acts are recognized as force majeure circumstances at the legislative level in Ukraine, this fact alone is not enough to recognize the event as a force majeure circumstance that exempt from responsibility.

To confirm force majeure circumstances, it is necessary to apply to a special authorized body, the Chamber of Commerce and Industry of Ukraine, for a conclusion on the presence of force majeure circumstances. With such a conclusion, the obligation to perform is postponed until the termination of the force majeure circumstances, and the debtor is released from responsibility for the delay. These issues are especially relevant for employment contracts.

However, it is important to note that the force majeure circumstances do not release a party from the obligation under the contract, but is only a legitimate reason to postpone the fulfillment of such an obligation until the end of their validity and not bear liability for such a delay (in the form of

fines). In addition, the mere fact of hostilities or the introduction of wartime restrictions does not exempt a party from liability, if such circumstances do not directly prevent a person from physically or legally fulfilling a specific obligation under the contract.

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