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Change of Circumstances as Excuse for Contract Performance
Aplinkybių pasikeitimas, kaip pagrindas atleisti nuo sutarties vykdymo

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ABSTRACT AND KEY WORDS

This work analyzes the doctrine of change of circumstances and the main grounds for its application based on the analysis of legal acts and case practice. The historical prerequisites for the emergence of the doctrine have been studied, starting with the clausula rebus sic stantibus. The terminological differences of the doctrine of change of circumstances in different legal systems have been examined. Emphasis is placed on the development of doctrine in the context of new modern challenges, such as Covid-19 and war.

Keywords: clausula rebus sic stantibus, frustration of purpose, hardship, Covid-19, war.

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INTRODUCTION

The relevance of the topic. The fulfillment of contractual obligations is the basis of the stability of the economic and legal system. However, circumstances may arise, especially with long-term contracts, when the fulfillment of obligations becomes impossible, unprofitable, or one of the parties simply loses interest. Even many centuries ago, people understood that the principle of the *pacta sunt servanda* cannot always be fulfilled, life circumstances make their own corrections. The Latin expression *clausula rebus sic stantibus*, which has been modified for many centuries, found its expression in the legal systems of almost all modern states of the world, for some only at the level of doctrine, for others – in a legalized form.

Today various terms are used in relation to the doctrine of change of circumstances – impracticality, impossibility, frustration, force majeure and others. It is important for us to find out whether they describe the same phenomenon or they differ and in which situations the terms can be used. It is essential to highlight the characteristic features of the doctrine of change of circumstances. The problem of changed circumstances is not new, but the economic crises, the recent pandemic Covid-19 and the full-scale russian invasion of Ukraine forced lawyers to take a new look at the doctrine of changed circumstances and the possibility of its application, because the performance of many contracts turned out to be questionable. In order to understand how the institute of changed circumstances can help us in modern conditions, it is necessary to turn to its very origins and trace its historical development, as well as conduct a comparative analysis of the approaches of different legal systems.

The aim is to find out the characteristic features of the change of circumstances as excuse for contract performance and how it can be used in modern legal systems.

In order to achieve the aim, the following **objectives** are established: 1) upon analyzing the historical development of the *clausula rebus sic stantibus* to find out the prerequisites for the emergence of the doctrine of change of circumstances; 2) looking at the approach of different legal systems to find out whether the terms of frustration, impossibility, impracticality, force majeure and others can all be united by a single concept of change of circumstances; 3) after analyzing the international instruments of contract law, to highlight the necessary characteristics of change of circumstances, to clarify whether the doctrine can be applied to the current challenges of Covid-19 and war and in the future.

In order to achieve the objectives, the following **tasks** are established**:**

- to analyze the historical origins of the doctrine of change of circumstances in the context of the *clausula rebus sic stantibus* of the times of Roman law;

- to look over the most famous court cases related to the change of circumstances and their influence on the development of the doctrine of changed circumstances in different legal systems on examples of France, Great Britain and Germany;

- to find out the key characteristics that give grounds for applying the doctrine on the basis of international instruments: the UNIDROIT Principles of International Commercial Contracts (hereinafter – PICC), the Principles of European Contract Law (hereinafter – PECL), the Draft Common Frame of Reference (hereinafter – DCFR);

- to analyze the arguments of scientists regarding the possibility of applying a change of circumstances doctrine through the prism of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter – CISG);

- consider the possibility of using "safe" clauses by the parties in their contracts, types of clauses;

- to investigate which countries of the world have recently made changes to their legislation related to the implementation of the doctrine of change of circumstances;

- to analyze the case practice of different countries during the Covid-19 period and the possibility of using the doctrine for contracts affected by the war in Ukraine;

- to formulate conclusions, based on analysis made.

Methods. The analysis of the mechanism of change of circumstances is presented on the basis of scientific literature, articles, case law of Great Britain, France, Germany, Belgium, Switzerland and their civil codes, international legal instruments – PICC, PECL, DCFR and CISG. The stated objectives will be implemented through the following methods: logical-analytical (otherwise, generalization), comparative and document analysis methods.

One of the research methods used in this work is the analysis method, according to which on the basis of scientific sources and articles, judicial practice, the main characteristics of the change of circumstances were highlighted. The most widely used method here is the comparative method, which needs to be used to compare different theorists' opinions, related to the concept, application of the changed circumstances institute in different states and characteristics of institute that are described in 4 international instruments. The document analysis method helps analyze foreign authors' scientific literature, official publications, legislation and case-law, related to the institute of change of circumstances.

Having in mind all the above said, the **originality** of the topic is undeniable. Already existing works only point-wise reflect the characteristics of the doctrine, without comprehensive analysis, or focusing only on a certain state or region. In addition, the lack of recent new publications on the impact of Covid-19 and the war on the institution of change of circumstances, taking into account also the introduction of change of circumstances as excuse for contract performance to their legislation by several states is clearly observed.

The research materials consist of legal and non-legal **sources**. Legal sources include national law of different states, soft law and international convention, as well as relevant case-law. Furthermore, legal sources include legal articles, books, journal publications. As to non-legal sources, they are used in this work in order to present relevant information and current opinions regarding recent events.

1. HISTORICAL DEVELOPMENT AND EVOLUTION OF THE DOCTRINE OF CLAUSULA REBUS SIC STANTIBUS

The theory of the *clausula rebus sic stantibus* (from Latin “as things stand”) finds its roots in Roman philosophy, although the doctrine was not part of Justinian's codification. Roman law strove to ensure its maximum stability, and although the parties could prescribe certain conditions in their contracts, Roman jurists generally did not recognize a special theory of the possibility of changing a contract due to a change of circumstances (Hondius, Grigoleit, 2011, p. 16). A kind of “golden rule”, that has also reached our days, at that time was *pacta sunt servanda* (from Latin “agreements must be kept”).

Marcus Tullius Cicero can be considered one of the first philosophers who started a discussion about the need to depart from the “golden rule” of the contract in certain cases. He argued that it would be unethical to return a sword to its depositor if this depositor had become insane in the meantime (Harries, 2006). The formula of the *clausula rebus sic stantibus* was created by Seneca (4 BC – AD 65) stating that “all conditions must be the same as they were when I made the promise if you mean to hold me bound in honour to perform it” (Inwood, 2005). That is, the doctrine was not created as a legal text, it was first born as a moral teaching.

These philosophical statements later found their development in medieval canon law. The theory was formed in the 12th century as a result of an unstable economic situation. Medieval legal thought was closely related to religious teachings; consequently, concepts and principles of justice and equality not only during the conclusion of the contract, but also afterwards, required the emergence of a special mechanism. An important person in the discussion was Andreas Alciatus (1492-1550), who argued that the condition *rebus sic stantibus* was not always part of the will of the parties and that, therefore, also a change of their contractual will could not be assumed in every case of changing circumstances (Alciatus, 2004). He distinguished between those acts that were established on the basis of the unilateral will of the party to contract, where a change of circumstances necessarily affects the will of the party to conclude a contact, and acts that are based on mutual intention, where this rule cannot be applied, because the will of both parties is of decisive importance. Ulrich Zasius (1461-1535), for example, widened the concept of the *clausula rebus sic stantibus*, stating “as every agreement contains the tacit condition, i.e., *rebus sic stantibus*, a change of the things results in a change of the state of the agreement” (Zasius, 1966).

Used in the Decrees and later supported by glossators, the idea that a person makes a promise to adhere to a contract and fulfill its condition relying on the circumstances that exist at the moment, accordingly, when the circumstances change, the previously made promise loses its meaning and gives the person the right to talk about the possibility of not following the given promises, the so-called "tacit condition".

During the Middle Ages, the idea of the *clausula rebus sic stantibus* continued to develop. There was a change of focus from the change of circumstances itself to the fact that the parties in their will anticipated, that is, took or could take it into account when making a promise to comply. According to theologian Hugo Grotius (1583-1645), the binding force of the promise, that was given, can be limited in two cases: if the underlying will of the obligation was defective or if a situation emerged that resulted in a contradiction to the will (Grotius, 1625). Hugo Grotius developed a more objective approach to the will of the parties and change of circumstances, using the Aristotelian principle of equity, emphasizing the *ratio* in the will of the individual.

Augustin Leyser (1683-1752) also played an important role in the development of the doctrine. He was one of the first to talk about modification as one of the alternative options to cope with the consequences of changing circumstances, as opposed to radical rescission. Furthermore, in contrast to the popular at that time, rather broad formulation of the *clausula rebus sic stantibus* theory, mainly focused on the promise and will of the parties, he found criteria by which it would be possible to limit this theory for the sake of justice. In order to prevent to some extent the abuse of this tool for the protection of the interests of the party to the contract, Leyser argued that a change of circumstances could result in a rescission of the contract only if three conditions were fulfilled: (i) the promise would not have been given if the new circumstance had been present at the time of the original contractual agreement; (ii) the party claiming a rescission of the contract must not have been responsible for the change of circumstances; and (iii) the change of circumstances could not have been foreseen and prevented by the parties (Leyser, 2011). As we will see later, these criterias with additions were laid as the basis for the creation of modern legal acts on changing the circumstances of the contract.

One of the first German Code – Codex Maximilianeus Bavaricus (1756), still reflected the doctrine of the *clausula*, the only thing was that it was supplemented with certain conditions: the change in circumstances could not be related to the fault of the party to the

contract, nor could it be foreseen and that it must satisfy an objective standard of intolerability before performance would be excused (Hutchison, 2009, p. 70). In general, we see that nothing radically new was added, the codifiers took as a basis the thoughts of Roman philosophers, medieval theologians and glossators, only adapting them to the relevant realities.

German and French codifiers expressed varying degrees of rejection of the doctrine of tacit consent. The beginning of the 19th century is characterized by the weakening of the influence of the *clausula* theory in the legal field. It became clear to lawyers that the doctrine could threaten the stability of contracts. These were the times of enlightenment, natural law and criticism of the absolutism of the government, which eventually led to the revolution in France. Lawyers tried to simplify the law and codify it (Hutchison, 2009, p. 70). For instance, in France the creators of the Code Civile were inspired by individualistic thought, they drew an analogy with legislation, believing that just as a law created by a legislator cannot be changed without his will, so a contract cannot be changed without the will of the parties (Čobeljić,1972, p. 15). In the French Civil Code (1930) we find no mention of the doctrine of the *clausula.* French law strictly followed the doctrine of *pacta sunt servanda*, rejecting the developing doctrine of "revision pour imprevision" (analogue of the *clausula rebus sic stantibus*).

Afterwards in Germany, the author Bernhard Windscheid (1817-1892), who rejected the traditional doctrine and developed his own theory of presupposition ("Voraussetzungslehre"), had a significant influence. Introduced the doctrine of presupposition, as what the parties expect when concluding a contract, and thus their expectations become elements of this contract. In contrast to the protection against the uncertainty of events, which took place in the *clausula rebus sic stantibus* doctrine, the scientist focused more on the initial intention of the parties. However, this theory was not accepted by the legislator and was not codified in German law (Windscheid, 1892, p. 195). Instead, the German Reichstag adopted the concept of another scientist – Paul Oertmann (1865-1938), who supplemented the Windscheid doctrine, adding that such presuppositions of the parties would be relevant for discharging the contract due to changes of circumstances only if they are common for both parties (Oertmann, 1921).

In the 19th century in the English common law courts began to apply the doctrine of frustration (Windscheid, 1850). The doctrine of frustration originates from the case of Taylor v. Caldwell in 1863. The plaintiff rented a music hall for four concerts which was destroyed by an accidental fire. The plaintiff demanded compensation for what was spent on organization

and advertising. Judge Blackburn stated that "the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor" (Taylor v. Caldwell, 1863). The second typical example of frustration of purpose in English law was the case of Krell v. Henry or the "coronation case". The plaintiff rented an apartment on the day of the coronation of King Edward VII in order to watch the procession from the window, but the route of the procession was changed, as a result of which the plaintiff seeks to return the money, since the circumstances that caused the rental ceased to exist and lost their meaning for the plaintiff (no. 2 KB 740, 1903). The Court of Appeal ruled that the change in the route of the procession discharged the contract, since this particular purpose was at the root of the conclusion of the contract for the plaintiff. These exemplary cases represent the pinnacle of the development of English legal thought, where the principle of unconditional performance of the contract was questioned. In later decisions, courts have limited the application of the Krell doctrine in favor of the principle of commercial certainty (Hondius, Grigoleit, 2011, p. 29).

In fact, by the end of the 19th century, one can speak of a certain decline of the doctrine. The Codes of the two great states of Europe at that time, were promulgated without mentioning the change of circumstances, and the courts of common law in England also refused to use the doctrine of frustration. However, this decline happened not for a long time. As a result of the I World War, many debtors were unable to fulfill their obligations, the courts were overloaded with numerous lawsuits. For instance, following the collapse of the German currency in 1923 the courts were forced to introduce the doctrine of "Wegfall der Geschäftsgrundlage" to sort out the injustice which the hyperinflation has produced (Hutchinson, 2009, p. 72). The disappearance of the doctrine of the *clausula* from the legal field of the European countries in the 19th century did not mean the disappearance of the doctrine of change of circumstances in general. This only made room for the new modern doctrines of changing circumstances to fill it. European legislators were forced to look for a theoretical justification for not fulfilling all these long-term contracts. Then the theory of the *clausula rebus sic stantibus* was revived, which exists in different states to this day under different names: impartibility, hardship, doctrine of assumption, frustration of purpose, imprevision etc.

2. COMPARATIVE ANALYSIS OF THE CONCEPT OF CHANGE OF CIRCUMSTANCES IN DIFFERENT LEGAL SYSTEMS: IMPARTIBILITY, HARDSHIP, DOCTRINE OF ASSUMPTION, FRUSTRATION OF PURPOSE, IMPREVISION (COMMON LAW AND CIVIL LAW APPROACHES ON THE EXAMPLES OF FRANCE, GREAT BRITAIN AND GERMANY)

In connection with different legal traditions and historical conditions, different states have developed their own approach to the application of the doctrine of change of circumstances. One fact remained unchanged – law cannot exist without such a mechanism, the principle of the *pacta sun servanda* cannot be absolute, and the states, using already formed doctrines, tried to adapt them to their own reality as best as possible.

Until recently, it was not achievable to find special provisions in the French Code that would regulate the issue when the performance of the contract becomes cumbersome for one of the parties due to a change in circumstances. The French legal system has historically maintained its strictness in the matter of contract enforcement. A party may be exonerated from the performance of a contract only in the case of superior force (force majeure), an accidental event (cas fortuit), or an external cause (cause étrangère). However, all three reasons refer to more objective circumstances under which the performance of the contract becomes impossible, leaving out the subjective aspect, when the object of the contract has lost its meaning for the parties, has become unprofitable.

The Canal de Craponne case can be considered a classic example of such an approach (French Cour de Cassation, 1876). In this case, in 1567, a contract on irrigation of gardens was concluded, it was valid for 300 years and, accordingly, during this time, the fee established by the contract became completely inadequate and did not even cover the costs for the executor of the contract. The Court of Appeal adapted the fee, taking into account the change in the economic situation. However, the Court of Cassation reversed the decision of the Court of Appeal stating that: “Since article 1134 is a general and absolute text, it is not for the courts, however just their decision may seem to them, to take account of time and circumstances in order to modify contracts made by the parties” (Harris, Tallon, 1989, p. 228-229). This approach of the French courts remained unchanged for centuries. The creditor could demand performance from the debtor even if such performance became very cumbersome for the debtor. Some authors identify historical reasons of such a strict approach. Since the French Revolution, the French courts suffer from a lack of trust in society and certain resistance to the

proactive role of the judge, including the possibility to modify a contract (Karampatzos, 2005, p. 144).

A different tradition developed in the administrative courts of France. One of the most famous cases is Gaz de Bordeaux case (case no. 59928, 1916). The city of Bordeaux concluded a contract with a private company for the supply of gas and electricity for 30 years. As a result of the I World War, prices increased significantly and the private company tried to increase the fixed fee provided for in the contract. The court granted the lawsuit, explaining that due to the war, prices had risen significantly and the tariff was not adequate to the new economic circumstances (Bell *et al.*, 1998). Therefore, where there is a public interest and the contract concerns a large number of people, French courts are more lenient and apply the doctrine of imprevision. At the same time, between private individuals, the courts prefer the principles of autonomy and the *pacta sun servanda* doctrine.

However, this situation existed until 2016, when a historic reform of the Civil Code of France took place (Ordinance No. 2016-131). For the first time in more than two hundred years of existence of the Napoleonic Code, such significant structural changes were made to it. Under new Article 1195, a party for whom performance of a contract becomes "excessively onerous" due to an unforeseeable change in circumstances (which change was a risk that the party did not agree to bear), will have a right to seek to renegotiate the contract with the counterparty. The 2016 Ordinance leaves to the courts the delineation of the parameters of "unforeseeable changes" that render contract performance "excessively onerous". The new provision is a default rule, the applicability of which parties are free to waive or restrict in the contract (thereby limiting judicial interference with the parties' contractual relationship) (Crepy *et al.*, 2016). As we can see, even France, which for many centuries was strict in the matter of the application of the *clausula* doctrine, preferring the principle of the *pacta sunt servanda* instead, nevertheless recognized the need for a mechanism to change the terms of the contract in case of unforeseen circumstances as a result of which, the performance of the contract becomes too burdensome for a party.

English contract law has its roots in the common law doctrine. The idea that a change of circumstances can in itself lead to the termination or modification of a contract is foreign to English law. A change in circumstances can be significant only if the event that has occurred fundamentally changes what the parties agreed upon. This concept is the basis of the doctrine of frustration, which is inherent in the common law. Mentioned above Krell v. Henry precedent

provided legal grounds for the systemic branch of the frustration doctrine – the frustration of purpose. The frustration of purpose is proof that the English approach is more flexible than the French force majeure legal doctrine (Baranauskas, Zapolskis, 2009, p. 202).

Nevertheless hardship, financial loss or other inconvenience are not recognized by English law as grounds for applying the doctrine of frustration. In this regard, the decision of Davis Contractors Ltd. v. Fareham Urban District Council case (1956) is indicative, where a contract was concluded to build 78 houses at fixed prices in 8 months, but due to the claimants' labor shortage, the construction was completed over a longer period, and costs increased accordingly. However, the House of Lords decided that additional costs alone are not sufficient to apply the doctrine of frustration, Lord Radcliffe explained that "it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for" (Beale, 2002). The same approach was used in the famous Suez Canal case, where the court decided that despite the closure of the Suez Canal due to the war, sellers would have to find other, even more expensive, ways to fulfill their obligations (Mikelėnas, 1996, p. 426).

Since it is common practice in English case law that if the change of circumstances is within the scope of one party's risk, then the doctrine of frustration cannot apply, contracts are rarely set aside for a frustration of purpose. The courts still interpret it quite narrowly, mostly in connection with consumer and not commercial contracts, extending only to the impossibility of performing the contract, and leaving aside cases of commercial impracticability and hardship due to a change in circumstances. The new circumstances must "be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation" (Ruling of the United Kingdom House of Lords July 24 in case no. 2 AC 397, 406, 1916). It is very important to stress that English courts traditionally do not have the right to change the terms of a contract, even after application of the doctrine of frustration. Attempts to interpret this rigid position in a more flexible way have faced resistance from the highest judicial authority in England – the House of Lords (Baranauskas, Zapolskis, 2009). As in France, such a narrow interpretation by the English courts of changes in circumstances as grounds for non-performance of the contract and reluctance to interfere in contractual relations, forced the contracting parties to look for ways to specify as much as possible special adaptation clauses.

Compared to England and France, the German approach to changing circumstances was more flexible. Before the I World War, the mechanism of change of circumstances was used in a rather limited way, but hyperinflation forced the courts to reconsider their approach. Since the drafters of the German Civil Code 1896 chose not to include change of circumstances in this legal act, the courts were forced to adapt the contracts broadly appling the legal doctrine of impossibility ("Unmöglichkeit"), which was quite often criticized (Markesinis *et al.*, 2006, p. 328).

Taking as a basis the theory of Professor Windscheid, which in turn was based on the old theory of the *clausula rebus sic stantibus*, professor Oertmann refined it and a new "Wegfall der Geschäfstgrundlage" doctrine or "the collapse of the foundation of a contract" doctrine emerged. If the circumstances under which the contract was concluded change fundamentally and deviate from the primary status of the contract, the foundation of the contract collapses and the court is entitled to exonerate the parties from the performance of the contract or may change its terms thus restoring a just contractual equilibrium (Markesinis *et al.*, 2006).

After the II World War, just like in the interwar period, the legislator remained indifferent to the issue of changing circumstances in contractual relations, that is why the leading role continued to belong to the courts that applied the doctrine of "Wegfall der Geschäfstgrundlage".

One of the most famous is the "drill hammers" case (1953), in which the parties agreed 600 hammer drills to be delivered from West Berlin to the German Democratic Republic. However, when a third of the hammers were produced, the so-called "Berlin blockade" ensued, which made it impossible to deliver them to the German Democratic Republic and the defendant refused to accept and pay for the goods. The court ruled that the defendant should pay only a fourth part of the due amount: "if in a contract for the delivery and payment of a series of objects, all the individual claims arising out of the contractual relationship are in issue, the court must adapt the entire contractual relationship as a unit to the factual situation, unless a complete release from all obligations is indicated. This adaptation may lead to a modification, especially a reduction, of the individual claims, or to a partial maintenance of the contract in accordance with the ting terms of the contract coupled with the elimination of far-reaching obligations" (no. BGH MDR 1953, 282 I.).

After German reunification, the doctrine of "Wegfall der Geschäfstgrundlage" was renewed and has been successfully applied in numerous decisions in parallel with the principle of good faith. Not until 2002 – after the completion of the reform of German law of obligations – was the doctrine of contractual foundation codified in Paragraph 313 of the German Civil Code (Baranauskas, Zapolskis, 2009, p. 206). In fact, the legislator did not create something new, he only sought to systematize the already existing doctrine-based practice of German courts. The first part of Paragraph 313 establishes that if circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form (objective aspect of the doctrine). The same rules apply in case material assumptions that have become the basis of the contract subsequently turn out to be incorrect (Part 2 of Paragraph 313, subjective aspect of the doctrine). Part 3 of Paragraph 313 sets forth that if adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party may terminate the contract.

So, three different legal systems have chosen different ways of dealing with change of circumstances. Until recently, the French doctrine was one of the most strict, allowing the discharging of the contract only in case of force majeure. However, this approach changed radically with the introduction of amendments to the French Civil Code in 2016, introducing the concept of an excessively onerous contract for a party. In the English legal tradition, the doctrine of frustration has long existed, which also provided for only the option of terminating the contract and not changing it, but an important difference from the French approach was the existence of frustration of purpose, when performance is possible in principle, but it no longer makes sense. In the German legal field, the change of circumstances has long been interpreted by the courts on the basis of legal doctrine, which was later reflected in the Code. However, the main difference of the German approach was the possibility not only to terminate the contract, but also to change it. Surely, this in no way rejects the golden rule of the *pacta sunt servanda*, because German courts resort to changing the contract only in exceptional circumstances and after a thorough investigation of the situation. It should be noted that most states have followed a more flexible (German) approach and established special changed

circumstances provisions in their national legislations. Such provisions exist (naturally, to unequal degrees) in Italy, the Netherlands, Greece. Spain, Portugal, Austria, some of the Scandinavian countries, Lithuania, partly – in the United States (this country acknowledges the doctrine of commercial impracticability), and a number of other states (Baranauskas, Zapolskis, 2009, p. 206). So, different terms can be used to describe the legal doctrine we are studying – Wegfall der Geschäftsgrundlage in Germany, imprévision in France (established in administrative law only), frustration of contract in England (only partly covering the hardship situation), impracticability in the US – but the issue of terminology is not the key one for the doctrine, because, as we will see later, international documents do not use any of the national terms. It is more important to find the main criterias for determining the possibility of change or termination of the contract as a result of a change in circumstances, which distinguish this legal mechanism from others.

3. CHANGE OF CIRCUMSTANCES IN THE INTERNATIONAL INSTRUMENTS: PICC, PECL, DCFR AND CISG

Since national legal systems contain their own peculiarities of the institution of change of circumstances, we consider it efficient to analyze the approach of European instruments of contract law, in which working groups for the preparation of documents tried to find a general approach that would take into account the experience of different legal systems: PICC, PECL and DCFR. One of these instruments, the CISG, is an international convention and is therefore binding for the states parties. The other three can be considered as soft-law or non-legislative codifications in the sense that they are not based on a sovereign's will and have been drafted outside the political sphere of states and governments (Jansen, 2010, p. 7). The use of these legal instruments can have several options: the parties can regulate their legal relations directly with one of these instruments, or only a part of it, another application option is the use by states as a model for reforming legislation at the national level, when these rules affect the parties already as part of the national legislation.

In the PICC (International Institute for the Unification of Private Law, 2016), the issue of change of circumstances is regulated by Arts. 6.2.1 to 6.2.3, which use the term hardship, in turn, the PECL (Lando, Beale, 2002) and DCFR (Bar *et al.*, 2009) directly use the term of change of circumstances in Arts. 6:111 and III.–1:110, respectively. Certainly, each of the legal instruments recognizes the general rule of *pacta sunt servanda*. For example, the comments to the article of PICC states that "The purpose of this Article is to make it clear that as a consequence of the general principle of the binding character of the contract (see Article 1.3) performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party" (International Institute for the Unification of Private Law, 2016, p. 217). Analyzing the text of these three instruments, we can identify four main characteristics that are required for the application of the change of circumstances mechanism.

3.1. Characteristics of change of circumstances doctrine in PICC, PECL, DCFR

3.1.1. Violation of the fair position of the parties

The first characteristic is a violation of the fair position of the parties, which existed before such a change in circumstances occurred. PICC uses the terminology "fundamentally

alters the equilibrium" (Art 6.2.2), PECL operates with the concept that "the contract becomes excessively onerous" (Art. 6:111), DCFR uses "so onerous that it would be manifestly unjust" (Art, III.–1:110). Neither in the PECL nor in the PICC is there a reference to the justice or injustice of the supervening onerousness or the contractual imbalance made (Momberg, 2011, p. 249). Similarly, domestic laws also avoid any reference to the criteria of fairness or justice. Thus, Art. 1467 of the Italian Civil Code only requires that performance by one of the parties has become excessively onerous. The German Civil Code (Bürgerliches Gesetzbuch) refers to a fundamental change of circumstances (Störung der Geschäftsgrundlage) which has become the basis of the contract. The Dutch Civil Code (Burgerlijk Wetboek) may be considered as an exception because its Art. 6:258 is applicable in the case that "unforeseen circumstances which are of such a nature that the co-contracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form". Some authors believe that the interpretation of the concept of "manifestly unjust" can be problematic. Of course, the doctrine itself is based on the desire to ensure justice, but in the case of using such terminology, we are forced to turn to excessive subjectivity and the courts are forced to go far beyond the contract in search of additional circumstances. which would allow to evaluate this same justice, which in turn also entails enormous processing costs in litigation (Halpern, 1987, p. 1137).

PICC and DCFR provide a more reasonable approach by specifying that a change in the equilibrium and a change in the just state of affairs can manifest itself mainly in two options: either a significant increase in the cost, or a significant decrease in value of performance. Usually the first characteristic relates to the performing party and an example of such an increase in cost could be, like a significant increase in the price of the raw materials, or a change in legislation in such a way that it now requires far more expensive production procedures. The second characteristic is the decrease of the cost of performance, which usually applies to the party accepting such performance (for example, the buyer or the lessee), and it can refer to both monetary and non-monetary obligations. This may be in cases where an embargo was imposed on the purchase of goods intended for export. However, it should be noted that a slight natural increase in the price, which is conditioned by the realities of the market economy, or a change in the subjective opinion of the receiving party cannot be grounds for applying the doctrine of change of circumstances. In practice, it is quite difficult to determine whether a price increase of, for example, 30, 40 or 50 percent should be sufficient

for this criterion. This is left to the discretion of the court, each situation is special and a legal act is created for general regulation so that it can be applied to many cases. Another distinguishing characteristic that I would use in order to determine whether this equilibrium was altered is the question: would each of the parties agree to conclude a contract under the same conditions in such a new state of affairs?

3.1.2. After conclusion a contract

The second characteristic is the time of such a change in circumstances. All three legal instruments under consideration require such a change in circumstances to occur after the conclusion of the contract. This approach is related to both unified legal acts and domestic legal systems, and is mainly aimed at distinguishing a change of circumstances from an ordinary mistake. After all, if such circumstances already existed at the time of the conclusion of the contract, but were ignored by the parties or at least by the injured party, then we can apply mistake provisions. And again, PICC expands and specifies the scope of application and says that there may still be an option that the change of circumstances occurred before the conclusion of the contract but became known to the parties after. The comment to the PICC contains an important remark: "If that party had known of those events when entering into the contract, it would have been able to take them into account at that time. In such a case that party may not subsequently rely on hardship" (International Institute for the Unification of Private Law, 2016, p. 220).

This requirement is a kind of protection mechanism against abuse of the parties. After all, if the circumstances are already known at the time of the conclusion of the contract, then, accordingly, the parties consciously agree to the terms of the contract, which satisfy them, taking into account all the circumstances.

3.1.3. Unforeseeability

The third characteristic is what we can call in one word – unforeseeability. Although legal acts contain more extensive wording: "the events could not reasonably have been taken into account" (Art. 6.2.2. PICC), "the possibility … was not one which could reasonably have been taken into account" (Art. 6:111 PECL), "the debtor did not at that time take into account, and could not reasonably be expected to have taken into account" (Art. III. – 1:110 DCFR).

The introduction of the reasonableness standard involves avoiding the usual subjectivity in assessing the foreseeability of events, the measure has to be in relation to "a reasonable person in the same situation of the debtor" (Momberg R., 2011, p. 251). For example, if A agreed to supply raw materials to country B at a fixed price from country C, despite the understanding that the political situation in this country C is quite acute, riots occur that may lead to civil war. In such a case, the outbreak of war, a sharp increase in the prices of these raw materials do not give the right to apply the articles on the change of circumstances, because such a change was not unforeseeable. Although PICC allows the situation that if a change in circumstances is gradual, but during the existence of the contract the pace of change increases dramatically, which was unforeseen, then this may be grounds for applying a change in circumstances (International Institute for the Unification of Private Law, 2016, p. 220). Article III.-1:110(2)(b) of the DCFR expressly states that the foreseeability test is applicable in relation to the possibility of a change of circumstances (that is, its occurrence) as well as to the scale of such change (that is, its magnitude or intensity). This is an improvement in comparison with the respective provisions of the PECL and the PICC that refer only to the possibility of the occurrence of that change. In some cases, even a foreseeable event may have an unforeseeable intensity (Momberg R., 2011, p. 251).

3.1.4. Risk

The fourth characteristic is the issue of risk. Such a change in circumstances should not be within the scope of the responsibility of one of the parties. After all, when we talk about economic circumstances, they somehow allow a certain percentage of riskiness of activity. The purpose of the change of circumstances mechanism is not to protect the parties from any risks and to create for them the ideal conditions of existence, but to protect them at least from risks that cannot reasonable be in the sphere of their control. All three European instruments use quite similar wording. Only the DCFR stands out for its comprehensiveness, as it indicates that "the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances" (Art. III. – 1:110).

However, it must be noted, that in some areas, for example, insurance, risk is what underlies this commercial activity, which means that war, natural disasters, and so on cannot be the reason for changing or terminating the contract due to a change in circumstances. The DCFR comments on the principle of security seem to imply that the rules on a change of

circumstances are not mandatory, since, as already stated, "the parties remain free, if they wish, to exclude any possibility of adjustment without the consent of all the parties" (Bar *et al.*, p. 47). [1] Therefore, the parties can exclude the use of the mechanism, and in this case, the party affected by the change in circumstances will bear all the risks associated with such a drastic change.

3.1.5. Beyond the control

In addition to the above-mentioned four characteristics, PICC contains one more additional – the events are beyond the control of the disadvantaged party. In my opinion, this is a rather important addition, because let's assume that a change in circumstances significantly changed the fair balance of the parties to the contract, at the time of concluding these circumstances could not be foreseen, they are not in the area of risk of the parties, but at the same time, in the area of its control, the disadvantaged party could influence and prevent this, then there is no reason to apply hardship. In contrast to the PICC and the PECL, the DCFR requires that the change of circumstances must be "exceptional". However, a definition of the term "exceptional" is not provided in the official comment and the corresponding illustration is unclear. In practice it is quite difficult to distinguish the concept of exceptional from the further requirement of foreseeability. Taking into account the mentioned requirement of unforeseeability, one option is to link the exceptional nature of the change of circumstances to objective standards capable of external and even neutral assessment. For instance, the event should be unusual (not frequent or not regular over time) and of a general nature (affecting society as a whole or at least an entire category of parties in the same situation) ((Momberg R., 2011, p. 252). The last assertion is linked to the problem concerning the mandatory or dispositive nature of the provisions on a change of circumstance.

3.1.6. Request to renegotiate

The final condition for the application of the change of circumstances mechanism is the request to renegotiate. Both the PICC and the PECL do not directly contain this requirement in the relevant provisions. However, since the fact of going to court presupposes the failure of

[1] The comment refers to Arts. II.- 1:102 (party autonomy) and III.-1:110(3)(c) as a ground for its assertion.

negotiations, we can conclude that this is also one of the conditions. In contrast, Art. III.-1:110(2)(d) of the DCFR expressly requires that "the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation". The concept of "reasonable and equitable" can be interpreted in such a way that the conditions proposed by the debtor cannot completely return the parties to the level of the contractual balance that existed at the time of the conclusion of the contract. These conditions are only to alleviate an excessively complicated situation that arose for one party, that is, the goal is not to transfer the risks to one party, but to make the deal not so bad, at least bearable for the debtor. In similar terms, it has been argued that under the PICC there is no express obligation for the advantaged party to enter into renegotiations, especially if the relevant provision is contrasted with Art. 6:111 of the PECL (McKendrick, 1994). However, this argument is not completely convincing, because the PICC Art. 6.2.3 about the effects of hardship contains a provision that a disadvantaged party has the right to renegotiate. And if this party has the right, then, accordingly, the other advantaged party must have the obligation to enter into these renegotiations, because it would be senseless to grant such a right without a reciprocal obligation. In the same sense, Bonell does not question the existence of a duty to renegotiate as the primary effect of hardship under the PICC, stating that "Art.6.2.3 (Effects of Hardship) grants that party the right to request the renegotiation of the contract in order to adapt its terms to the changed circumstances" (Bonell, 2005, p. 118). In the PECL, we can find the provision on the obligation to renegotiate in the statement "the parties are bound to enter into negotiations with a view to adapting the contract or terminating it" (Article 6:111). That is, although it is not in the list of direct requirements for the application of the article on change of circumstances, the PECL still contains renegotiations as one of the elements. The PECL expressly follow this approach considering the obligation to renegotiate as independent from the remedies granted in a case of changed circumstances. Thus, the last paragraph of Art. 6:111 states: "In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing" (Art. 6:111(2) of the PECL).

If the parties still could not reach an agreement on adapting the contract to the new circumstances, the parties can bring the matter before the court. It is logical that it is the party of the debtor who usually initiates this proceeding, because it is interested in reducing the severity of the consequences that have occurred. All three legal instruments recognize two

discretions for court: termination of the contract or its adaptation. Of course, termination of the contract is an easy and radical way, but very often it does not play in favor of the parties who seek to save economic relations, or especially in cases where third parties or public interests may be involved. However, it is worth remembering that the purpose of the adoption is not to completely restore the balance that existed at the time of the conclusion of the contract, but only to eliminate the excessive onerousness of the performance. Thus, it is incorrect that any costs resulting from the supervening circumstances must be fairly shared by the parties, but only those costs that can be considered to be beyond the "limit of sacrifice", i. e. the threshold where performance has not only become "more onerous", but "excessively onerous" (Brunner, 2009, p. 1003).

It has been suggested that the basic idea underlying the UNIDROIT Principles is *favor contractus* (Bonell, 2005, p. 102). The PICC does not contain a separate provision that deals with this issue, but can be deduced from the provisions on battle forms and hardship. This principle is aimed at preserving the contractual relationship of the parties by limiting the number of situations in which the existence or validity of the contract is questioned or in which it may be terminated (Bonell, 1995, p. 102). It is obvious that the preservation of the contract, despite the difficulties in the process of its existence or execution, is in the interests of the parties themselves, who, under other circumstances, are forced to look for alternative sources of goods or services on the market. That is, the principle of *favor contractus* can significantly help the practice of international trade.

UNIDROIT Principles are designed to be flexible enough to respond to changing economic and technological circumstances. In fact, they are a mixture of tradition and innovation, which take into account concepts that are common to many legal systems, while at the same time bringing innovation (Kornet, 2011). According to the PICC, the contract construction mechanism is also based on offer and acceptance (Article 2.1.1). However, strict adherence to the model of offer and acceptance and strict reflection does not always correspond to international practice, especially in complex commercial contracts, where the conclusion is not preceded by a simple single action, but by a whole sequence of events, when it is difficult to identify which message of the parties we can call an acceptance. PICC tries to avoid the difficulties associated with strict adherence to this model by also allowing the conclusion of a contract "by conduct of the parties that is sufficient to show agreement" (Article 2.1.1).

Analyzing even the basic provisions of this soft law instrument, we see that preference is given to the conclusion of a contract, rather than compliance with formal conditions.

PICC goes by the way of recognition that all contracts are to one degree or another incompletely defined. A rather liberal article, which is not inherent in most national legal systems, facilitates the formation of a binding contract, even if not all its terms have been determined, presuming its conclusion because of the parties' intentions to be bound (Article 2.1.14). Of course, the principle of *favor contractus* cannot be used to eliminate the doubt that the parties are legally bound, as this would contradict another fundamental principle of freedom of contract. There must be sufficient evidence to prove the party's intention to be bound (Kornet, 2011). Nevertheless, have relinquished freedom of contract once, the PICC provides mechanisms to fill in the details or change the contract in accordance with changed circumstances.

The “last shot” approach, which considers the acceptance with additions, limitations and modifications to the offer as a counter offer, was incorporated in the Article 2.1.11 PICC. However, an important exception is the second paragraph of this article: if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance (and not a counter-offer), unless the offeror objects to the discrepancy without undue delay. The offeror bears the risk of failure to identify inconsistencies as well as failure to realize the importance of changes (Kleinheisterkamp, 2009, p. 284). The article tries to avoid situations when one of the parties can question the existence of a contract based on “mirror reflection” only because of insignificant differences between the offer and acceptance due to adverse changes in market conditions. According to the research, commercial parties generally view the risk of inaccuracies in standard terms as less valuable compared to the costs of negotiating to eliminate these conflicting terms (Beale, Dugdale, 1975, p. 48-51).

PICC establishes a number of general principles that are characteristic for the normal functioning of contract law – freedom of contract and the binding force of contract – *pacta sunt servanda.* However, PICC also demonstrates that these principles are not static and absolute. Sometimes, due to changes in technological, social and economic conditions, general principles must be adapted to meet the interests of the parties, the main idea is to favour the existence of a binding contract, to favour the validity of the contract.

Therefore, the three studied codifications fully recognize the institution of change of circumstances as a necessary mechanism of law's response to the changing nature of life. Their

provisions, despite minor changes, can be considered equivalent, although the DCFR sometimes applies a more restrictive approach. The requirement for the exceptional nature of changes as a requirement, as well as the clause of manifestly unjust, is an excessive requirement for the application of this rule, because the requirements of unforeseeability, excessive onerousness for the debtor seem adequate in order to prevent abuse by the party who is simply trying to avoid a bad dealing. On the other hand, the inclusion of the scale of change as one of the elements that helps to determine the unpredictability of circumstances seems justified.

3.2. Change of circumstances in CISG: the possibility of using PICC to supplement the Convention

Among scientists, there is no unambiguous position on whether the doctrine of change of circumstances applies in the field of CISG (United Nations Commission on International Trade Law, 1980). Some say that the CISG provides for the release of a party from responsibility only in case of impossibility, others say that the Convention can also be interpreted and extended in the case of hardship (Momberg, 2011, p. 235). There is, however, an intermediate position between the two just mentioned, which is more convincing. According to this view, the PICC may be used to supplement CISG only as long as they help in clarifying or supporting already existing general principles underlying the Convention (Veneziano, 2010, p. 141).

The CISG is usually regarded as a system of strict contractual liability because a party is liable for all events within its control independently of its negligence (Lindström, 2006, p. 2). After analyzing Article 79 of the Convention, the following prerequisites can be identified for the application of the mechanism of release from liability of the party to the contract: a) an impediment beyond the control of the party; b) it must be reasonably unforeseeable at the time of the conclusion of the contract; c) which cannot be avoided or overcome or its consequences. It is expedient to refer to the system of gap-filing in the CISG, because the authors who insist on the possibility of applying the doctrine of change of circumstances in the CISG, confirm their opinion by the fact, that this can be done based on the general principles.

Article 7.2 of the Convention states that “not expressly settled [questions] in it are to be settled in conformity with the general principle on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international

law". But since the principles contained in the Convention itself are quite limited – they are good faith, as well as those that can be interpreted from other provisions – reasonableness, *favor contractus*, then accordingly we have to look for them in other international sources. In this context, the PICC that can be used as an adequate instrument to supplement the Convention, because even in the Preamble it is indicated that they "may be used to interpret or supplement international legal instruments". It is added that reasons of fairness also support the application of the PICC since resorting to uniform law is better in that it equally protects the interest of both parties rather than solving the dispute according to some domestic jurisdiction which may benefit only one of them (Momberg, 2011). However, difficulties may arise due to the existence of different legal systems and different approaches to the consequences of change of circumstances. For instance, in the common law of Great Britain, applying the doctrine of frustration, the courts can only terminate the contract and not adjust it. On the other hand, according to the US doctrine of commercial impracticability, the provisions of the Uniform Commercial Code provide courts with the opportunity to mitigate the consequences of incomplete contract performance (e.g. restitution, reliance damages), although the courts are extremely reluctant to apply them (Trakman, 1985, p. 471; Hillman, 1987). Honnold states that the concept of impediment in Art. 79 has to be interpreted in the sense that such an impediment must prevent performance, even though that does not mean that such performance has become literally impossible "but rather such extreme difficulty in performance as amounts to impossibility from a practical (although not technical) point of view" has arisen (Honnold, Flechtner, H., 2009, p. 625).

In case law, many decades the trend was to not recognize the possibility of applying the Convention to hardship. Article 79 was applied only in case of complete impossibility of performance of the contract by the parties. And even when the price fluctuation was more than 100%, the courts rejected the claims. For instance, relief was denied in a case where the international market price of the good sin question had increased by between one and two times the contract price from the time of the conclusion of the contract and the agreed date of shipment for the goods (Compound fertiziler case, Nr. CISG/1996/05, 1996). However, Scafom International BV v. Lorraine Tubes S.A.S by the Belgian Supreme Court was one of the first decision that didn't follow the previous trend (no. C.07.0289.N, 2009). In this case, several contracts for the sale of steel tubes were concluded, but after the conclusion of the contract, the price of steel increased by more than 70 percent. Accordingly, the seller began to

request an increase in the contract price, which the buyer refused. The contract did not contain any adaptation clause. Then the parties claimed to the court. In the first instance, the court rejected the seller's request to apply hardship, saying that Art. 79 of the Convention cannot be applied to the hardship. The Court of Appeal annulled the court's decision, stating that while Art. 79 clearly covers cases of force majeure, this does not mean that the Convention *per se* precludes the application of the hardship doctrine based on general principles. The Court of Cassation also rejected the buyer's claim, but motivated its decision on other grounds, arguing that as a result of the change in circumstances there was a disturbance of the contractual balance, which means that this is to some extent an impediment in the context of Art. 79 of the Convention, accordingly, the existing gap should be filled by the general principles of international trade law, and PICC can be used as one of the sources. It would be naive to believe that the parties to the contract can always settle the consequences of change of circumstances on their own, sometimes they simply do not consider the possibility of failure when concluding the contract, and this also requires additional costs and time, a very detailed understanding of each of the parties with the position of the other. By excluding it from the subject of direct regulation of the Convention, the drafters left too wide field for interpretation and forced to rely on different national legal systems, which in turn leads to uncertainty.

Therefore, the approach of the court in this decision shows that case practice departs from the radical rejection of hardship as part of the CISG, and that the concept of impediment is broad enough to include, in addition to complete impossibility, also situations when the implementation becomes excessively burdensome for the parties, for example in the case of a price increase (although both in doctrine and in case law, price fluctuations are considered foreseeable in international trade). The Convention was created in far 1980, even before the writing of the first editions of the PICC, PECL and DCFR, and when the doctrine of change of circumstances was only gaining momentum. The change in the vector of judicial practice in the direction of extended interpretation only confirms the impossibility of the existence of contract law without such an important mechanism as *clausula rebus sic stantibus*. As Windscheid stated more than 100 years ago in relation to the rejection of the inclusion of the *clausula rebus sic stantibus* doctrine in the BGB: “Thrown out by the door, it will always re-enter through the window” (Windscheid, 1892, p. 582).

3.3. Hardship clause and force-majeure clauses

As we explored in the previous section, not every state fully recognizes the doctrine of change of circumstances. In some, courts can only terminate contracts without the right to adjust them, in some there are quite high requirements for the qualification of the grounds for applying the mechanism. In such a case, if the legal system gives priority to the principle of sanctity of the contract, then the party may be obliged to perform the unbearable contract. Or even if there is a mechanism in the legislation for changing the terms of the contract due to a change in circumstances, the available legal remedies applied by the court may not always satisfy the parties to the contract. To reduce these risks, so-called "change of circumstances" or "hardship" clauses were created. In order to increase certainty, parties may wish to regulate this situation in their agreement, independently from the law governing the contract. "Force majeure" clauses, in contrast to "hardship" clauses, are more passive and are mainly aimed at simply releasing the parties from contractual obligations when an event occurs, while "hardship" clauses are more dynamic and aimed to adjust the terms of the contract in order to eliminate the consequences of the event and allow the contract to exist with new difficulties (ICC Force Majeure and Hardship Clauses, International Chamber of Commerce, 2020).

The variability of all these factors is attributable to various causes which result starting from natural causes (natural disaster, such as, poor harvests, floods or epidemics), the social and economic conditions of current international systems of commercial activities (e.g., structural crisis, sales crisis, scarcities, price fluctuations) and their consequent effects on commercial policy (e.g., restrictions, protectionist measures) (Strohbach, 1984, p. 39). From the analysis of the hardship clauses, we can understand that it usually consists of two parts: the first determines when the clause applies, the second – deals with the effects of hardship.

Many businesses incorporate and adapt model force majeure or hardship clauses into their contracts, including model clauses from the International Chamber of Commerce (the "ICC"). In March 2020, the ICC released updated versions of its model Force Majeure and Hardship Clauses (ICC Force Majeure and Hardship Clauses, International Chamber of Commerce, 2020). These clauses were last updated in 2003. Parties can use these model clauses unchanged, or adapt them to their own contractual interests. A new version of the clauses is distinguished by the fact that it is now possible to use a Short Form of clauses, which can be convenient for small and medium-sized businesses. The list of presumed force majeure circumstances from the ICC includes 7 categories of cases: related to war, civil riot, natural

disasters, epidemics, embargoes, sanctions, strikes, and so on. In light of the Covid-19 pandemic, “plague” and “epidemic” are explicitly included, but that “pandemic” is not. However, also note that the model clause includes “compliance with any law or governmental order”. Parties utilizing these model clauses should always turn their mind to whether they should include additional risk events or clarifying language (West, Lange 2020). The updated Hardship Clause “provides several options for amendment or termination of the contract when circumstances make performance of a contract untenably onerous.” In essence, the hardship clause requires the parties to agree on an alternative conditions for the performance of a contract that has become excessively onerous. If, as a result of negotiations, the parties cannot agree on alternative terms of the contract, then the clause provides for 3 ways to change or terminate the contract: party to terminate, judge adapt or terminate, judge to terminate. Altogether, the new model Force Majeure and Hardship Clauses provide parties with effective clauses that can work in concert with, or as part of, a contract’s broader dispute resolution provisions. Contract drafters will need to carefully consider all relevant circumstances on a case-by-case basis before choosing what force majeure and hardship clauses are appropriate to include in their specific agreement (West, Lange 2020).

One of the types of clauses that are related to a change of circumstances doctrine and which parties can include in the contract is price adjustment clause if, for example, the price of production or supply of goods changes. This provision is created so that the long-term contract better reflects market conditions and corresponds to the initial interests of the parties. Such provisions usually provide for an agreed change formula and a time period. High inflation can also be a reason for applying the price adjustment clause (Goldenberg, Singer, 2023). Courts are hesitant to intervene to change the bargain of a contract; it is understood that the parties have agreed on price terms that allocate the risk of price fluctuations in accordance with the parties’ intentions (Rea, 1982, p. 466). In the Churchill Falls case (no. 37238, 2018), a 65-year contract was concluded. Hydro-Québec undertook to purchase most of the electricity produced hydro-electric plant in Labrador in exchange for a provision for a fixed amount of such purchase for the entire 65-year period. It is clear that already after a decade, electricity prices have increased significantly and then the owners of the hydroelectric power plant began to demand a price increase from Hydro-Québec, it did not succeed. Although the case was decided under the civil law of Quebec, the Supreme Court's approach to the contract is instructive. The Court rejected Churchill Falls Corporation Limited’s argument that the parties

had not intended to allocate the risk of electricity price fluctuations as significant as those that had occurred in recent decades. Instead, the Court concluded, "[t]he evidence … shows that the parties clearly intended Hydro-Québec to bear most of the risks associated with the development of the Plant, including the risk of electricity price fluctuations, however large they might be".

In regard to the specifics of the application of clauses, it may have certain reliefs and certain difficulties. For example, it would be quite difficult to include this provision in a contract between parties where one party is from a developed country and the other is from a third world country. Sometimes the European party will be afraid to include in the contract any provision that may threaten the sanctity of the contract, and sometimes, on the contrary, it is the partner from the third world who will seek certainty in order to get exactly what is stipulated in the contract. Difficulties may arise in including such a clause also in a contract where there is a strong imbalance, then the stronger party may insist on the inclusion of a clause that will work in its favor. Each sector of the economy, each type of contract, each negotiation has its peculiarities. It is clear that a clause on the supply of hard coal will not be the same as a clause on a loan contract on the foreign exchange market. It is impossible to develop a single "ideal provision" that could be applied to all situations, as it would be "a legal monstrosity on account of its size and complexity". A negotiator who wants to include a clause in a contract has to find a balance between giving the clause a proper wording and at the same time fearing that its development could cause the negotiations to fail (Fontaine, Brill, 2009, p. 493).

So it may be important for the parties to separately write a hardship clause in the contract in case 1) the national legal system or the international legal instrument that they choose to regulate the contract does not recognize the doctrine of change of circumstances; 2) if the circumstances from which they want to protect themselves will probably not be recognized by the court as unforeseeable due to the familiarity of economic conditions (that the parties allocated the risks as between themselves when they formed the contract), and the parties would like to settle it by themselves; 3) and if due to the extraordinary complexity of economic relations and the specificity of the field the parties would not like to five to the consideration of the court the issue of changing the terms of the contract.

4. MODERN TRENDS IN THE DEVELOPMENT OF DOCTRINE IN VIEW OF NEW WORLD CHALLENGES: CHANGE TO LEGISLATION, COVID-19, WAR IN UKRAINE.

The last five-year period forced the world to look at the doctrine of change of circumstances in a new way, because we faced challenges that were difficult to imagine before. Initially a global pandemic that forced governments to take measures to quarantine and isolate people. Quarantine has brought down consumer sentiment, almost halting several industries – retail trade, hotel and restaurant business, tourism, air transportation. The outbreak of the coronavirus pandemic caused the world economy, trade volumes and commodity prices to fall. Due to the introduction of government measures, many contracts that were concluded before pandemic became either impossible at all, or deadlines were missed. The question arose: what to do with the fulfillment of own contractual obligations and how to respond to problems with the fulfillment of contractual obligations by counterparties (Pravovi naslidky poshyrennia koronavirusu COVID-19 dlia vykonannia dohovoriv, 2020)? Russia's full-scale invasion of Ukraine affected every country and created long-term trends for the global economy: rising commodity prices and inflationary pressures, disrupting trade and supply chains between neighboring countries. Destroyed numerous logistics connections, blocked sea routes to Ukrainian ports, suspension of air traffic – all this led to the impossibility of fulfilling contractual obligations, both at the state and international level (Galiani, 2023).

On 10 February 2020, a spokesperson for the PRC's Legislative Affairs Commission of the National People's Congress Standing Committee announced that measures which were implemented by the Chinese government to combat the virus and which interfere with contracts should be considered force majeure events (The Economist, 2020). Accordingly, until 25 March 2020, the China Council for the Promotion of International Trade (CCPIT), a quasi-governmental organization, has granted record 6454 certifications of force majeure to Chinese businesses in order to release local exporters from liability with foreign counterparties and to prove that their failure to fulfill their obligations was related to measures against Covid-19 and quarantine (Christie *et al.*, 2020). However, the certificates issued by the Chinese government on exemption from liability due to force majeure cannot by themselves give a legal assessment of the circumstances of the pandemic as force majeure. They may be binding on the interpretation of domestic force majeure by Chinese courts in the Civil Code, but cannot prejudge the actual assessment by a national court of another state or by international arbitral

tribunal (Berger, Behn, 2020). Accordingly, it makes sense to examine the case law of this period in different jurisdictions.

Article 1218 of the French Civil Code refers to the concept of force majeure, for its application three conditions are necessary: an event beyond the control of the debtor, the event could not be foreseen at the time of the conclusion of the contract, the consequences could not be avoided by the measures taken. The legal consequence of the application of the article is that if the performance is temporarily prevented, then the performance is suspended unless the delay justifies the termination of the contract. In case of a permanent obstacle, the contract is terminated altogether. and the parties are released from liability. The recent introduction of Art. 1195 of the French Civil Code requires the revision of the contract if, as a result of a change in circumstances that were unforeseeable at the time of the conclusion of the contract, it has become excessively onerous. In case of unsuccessful negotiations, the parties may terminate the contract by agreement or apply to the court for revision or termination of the contract. However, in general, French courts are quite strict in determining the criterias for the application of hardship and force majeure. Whether the consequences of the Covid-19 pandemic led to the application of the legal mechanism of force majeure or hardship depends on the degree of impact of the pandemic on the commercial contract (Kaps, 2020).

Although other European countries (and even France, which for a long time refused to legalize hardship), have long since included hardship or change of circumstances in their legal systems, but until this year it was not provided in Belgian law, except the field of public procurement. However, case law gradually reduced the rejection of the doctrine of hardship in Belgian law: either by applying the principle of prohibition of abuse of rights or by more flexible interpretation of the doctrine of impossibility and force majeure. Nevertheless, this approach led to uncertainty, because the decision depended on a specific judge and his subjective opinion. The parties to the contracts also tried to solve this issue by including special conditions in the contract, such as the clause on MAC (significantly adverse change) or MAE (significantly adverse event). This type of condition gives one of the parties the right to terminate the contract if adverse changes occur between signing and closing (Brohez *et al.*, 2023).

On 1 January 2023, the new Book V of the Belgian Civil Code entered into force. It allows a party to request his co-contractor to renegotiate the contract with a view to adapting it or terminating it if the following cumulative conditions are met:

- a change in circumstances makes the performance of the contract excessively onerous, such as natural (earthquake), economic (collapse of a commodity or currency), legal (change in legislation, embargo), political (war or coup d'état) or health (pandemic) events;
- this change could not have been foreseen when the contract was concluded;
- the change is not attributable to the debtor;
- the debtor has not assumed the risk;
- the law or the contract does not exclude this possibility;
- the new law also explicitly provides that during renegotiations the parties are obliged to continue to fulfil their obligations (Formerly Peeters Law, 2020).

It is worth noting that it is still possible to exclude the application of hardship in the contract.

Nevertheless, during the height of Covid-19, the new Art. 5.74, which deals with change of circumstances was not yet applied (Belgian Civil Code, 2022). Belgian case law during this period mainly concerned the issue of commercial leases. The Belgian courts held the position that as a result of the introduction of government restrictive measures, that compel the closure of a commercial business, the tenant has the right to reduce the rent. Some argue that such decisions are wrong, referring to too great a burden for the landlord. Some of these decisions were overturned in appeal, but the appeal courts also ruled that the good faith performance of the contract implies that the consequences of government measures should be borne by both parties, although allowing for some price reduction for the tenant (Litigation and Arbitration Newsletter by Andersen, 2022).

In Germany the principle of the *rebus sic stantibus* is codified in Sec. 313 of the German Civil Code (BGB, 2022). For German courts, the main issue was also the issue of the execution of commercial contracts. Can an officially introduced lockdown be the basis for applying Article 313 of the Code? For example, its first decision dated 12 January 2022 (file No XII ZR 8/21), the court decided that the lockdown is not a reason for the impossibility of fulfilling the contract by the lessor, since the closure was not based on any structural features of the store building, but on the official decision of the authorities, which was in effect throughout the whole state of Hessen. However, the court found that the tenant can demand a reduction in rent based on Article 313 (1) of the Code, but all the circumstances of the case must be taken into account, including the financial assistance that was paid to businesses by the state to combat the consequences of Covid. The same approach was confirmed in two further decisions dated

16 February 2022 (no. XII ZR 17/21) and dated 2 March 2022 (no. XII ZR 36/21) (Litigation and Arbitration Newsletter by Andersen,2022).

It is worth adding an important remark that the process of proving the grounds for applying of force majeure or hardship was much easier for contracts that were concluded before Covid-19, since there was a necessary characteristic of the unforeseeability of such a pandemic. However, when the parties enter into contracts after pandemic, they should, accordingly, take into account the situation that arose and assume all risks. Force majeure could not be used to terminate the lease or for delay or non-payment of rent, because the premises itself remained usable, and only the loss of income, according to the court, is a risk that belongs to the tenant (unless the parties specifically stipulated in the contract rent payment upon reaching a certain income) (Litigation and Arbitration Newsletter by Andersen, 2022). The doctrine of hardship in this case somehow allowed to ease the debtor's situation. After all, in long-term contracts, if any event occurred after the conclusion of the contract, that is likely to jeopardise the party's substantial legal interest, it could not be foreseen, the parties did not cause such an event to appear, and such a change is not considered a normal business risk the contract can be amended (the amount of service and remuneration may be adjusted).

When considering the impact of the pandemic Covid-19 on commercial contracts, it is important to distinguish between three broad time frames, as suggested by Professor Ewan McKendrick (McKendrick, 2022). Although we will make certain modifications here, since the professor's analysis takes place through the prism of frustration applied in law of Great Britain. The first period can be considered until January 2020, when the threat of the pandemic was not recognized, only there were certain predictions that it might begin. In such a case, it is easier for the parties to rely on the doctrine of hardship, *rebus sic stantibus* (or in the narrow interpretation of the professor – frustration), because there is such an important element as unpredictability, although it is worth noting that all hardship or force majeure clauses were concluded without taking into account the possibility of the start of a pandemic. The second period is from January 2020 to March 2020, when it is more difficult to rely on the doctrine of the *rebus sic stantibus*, because the pandemic, especially in China, is already quite predictable, the parties enter into contracts being more or less informed about the risks. In the next, third period after March 2020, it will be much more difficult for the parties to prove the possibility of applying hardship, rebus sic stantibus, and frustration (common law tradition), because the

existence of the pandemic is already real, there is no characteristic of unpredictability (McKendrick, (2022).

It will also be interesting to refer to one of the first cases regarding the reduction of rent due to Covid-19, which was heard in the Zurich Rental Court in Switzerland (Zürcher Mietgerichtspraxis, 2021). The Rental Court addressed the possible avenues for the assertion of such a rent reduction, namely a reduction of rent according to Art. 259d of the Swiss Code of Obligations (CO/ CO, SR 220.), subsequent to objective impossibility (article 119 of the CO) and judicial adjustment (*clausula rebus sic stantibus*). Under the circumstances of the case, the parties entered into an agreement in 2013 to lease a store on the first floor and a basement for a warehouse. Due to the disruption of the store due to the onset of the pandemic, the tenant stopped paying the rent in April and May 2020, and later paid only a third until January 2021 and then stopped the lease payments again. The landlord motivated his position by the fact that due to restrictive measures, the flow of buyers decreased seven times, since only one buyer was allowed to enter. The lessee claimed that the parties had agreed on the use of this premises precisely as a store in the contract and, moreover, it was obvious from the intentions of the parties. She also claimed that due to the closing of the store, and then the restriction of use, it is possible to talk about the defects of the premises, and in addition, a serious violation of the equivalence of the contract, which is the basis for the application of *rebus sic stantibus*. However, the tenant still refused to disclose her accounts for reasons of confidentiality, but claimed that she had done everything necessary to reduce the negative impact of the restrictive measures. The landlady, in turn, claimed that the use of this premises as a store was not directly stipulated by the contract, and the restriction of its use cannot be considered a defect of the premises. She also argued that the *rebus sic stantibus* could not be applied because there was no serious equivalence disorder for the parties. Another argument of the landlady was that in the end the lessee did not disclose her accounts and did not justify what in the end was a serious change in sales.

The Zurich court considered that the reference to the use of the leased premises as a shop and warehouse is only a description in general terms and not an agreement on specific use. The court held that parties usually prescribe a specific use in the contract itself, not in the general terms. The court refused to apply the doctrine of impossibility because the end of the restrictive measures was entirely foreseeable. In addition, the court established that there is no reason to talk about the defects of the premises, because the contract itself does not contain

guarantees from the lessor regarding the operation of the store, as well as there is no obligation to use the premises as a store. The court recognized that these circumstances may be the basis for the application of the doctrine of *rebus sic stantibus*, however, the tenant refused to disclose information about financial losses due to the pandemic, therefore it is impossible to assess and confirm these losses, there is not enough information to talk about a violation of equivalence, because there is a practice of the same Internet-stores. who find an incentive to continue their business activities even despite the pandemic. However, it is worth recalling that the court did not satisfy the tenant's claim for a rent reduction mainly because she refused to disclose her financial accounts, as the court did not reject the possibility of applying rebus sic stantibus itself (Lips, Rickenbach, 2021).

As we can see, the court's decision cannot be generalized, because the terms of each individual contract and circumstances, the financial impact of restrictive measures and losses, the agreement of specific use and the tenant's obligations regarding specific use are of great importance. The majority of lawyers agree that the violation of the use of leased commercial property due to the pandemic is not a defect of the premises itself, and the lessor in the contract assumes such a business risk. Therefore, it is important to write down the specific purpose of use in the contract, and in this case, ensuring the specific purpose will be the lessor's obligation. Regarding the application of the impossibility doctrine, this is also limited because the impossibility due to the pandemic is not permanent. And in this case, the doctrine of the *clausula rebus sic stantibus* will come to our aid, which allows us to adjust the terms of the contract for the existence of a list of necessary grounds, which we have already mentioned several times.

The governments of the countries of the world had to pour huge funds into the economy and help businesses in order to somehow smooth out the consequences of the pandemic and prevent a global crisis. And two years later, on 24 February 2022, russia launched a full-scale invasion of Ukraine and started a war. In addition to the devasting human cost of russia's invasion of Ukraine, unarguable human tragedies and losses, the war led to the rise in prices of many basic types of raw materials, high inflation and problems with the fulfillment of obligations under many contracts. Normally, the risk of resource cost increases rests with the contractor, but this is if we are talking about normal predictable economic changes, but the war put the contracting parties at an extreme disadvantage.

We can distinguish three main categories of situations that arose in international commercial contracts in connection with the russian invasion of Ukraine. First, it is a voluntary decision of many European companies to refuse business in russia due to their reluctance to allow negative consequences for their reputation; secondly, it is non-fulfillment of contracts due to sanctions imposed on russia by Western governments; the third is disputes due to non-fulfillment of contracts directly due to hostilities. For example, some suppliers were unable to deliver products caused by the blocking of Ukrainian ports in the Black Sea. Or, for instance, an IT service provider could not fulfill its contractual obligations because its main facilities were destroyed during the war.

In connection with the war in Ukraine, the first mechanism that comes to mind in the field of contract law is force majeure, since war is usually one of the listed reasons in a force majeure clause. However, this issue requires research, because the mere inclusion of a clause in the contract is not enough to talk about the release of the parties from liability; more important is the formulation of the impact of the event on specific obligations: is it the reference to the fact that war makes impossible the performance or a much broader wording that it affects performance? These provisions must be evaluated in each specific contract (Impact of the Ukraine war …, 2022). The precise wording of such a clause is very important. For example, some force majeure clauses are worded as the unforeseen event having to "prevent" performance of the contract, whereas others use the language of "hinder" or "delay" (Inside Arbitration …, 2022). The party to the contract is not responsible if the non-fulfillment of the contract is caused by force majeure, if it is an external event that the parties cannot influence (the war in Ukraine satisfies this criterion), the unpredictability of the event (this condition is met for contracts concluded before the russian invasion), impossibility of performance – the event must prevent performance of the contract. The latter condition cannot be fulfilled easily by relying only on the human reasonable criterion of impossibility; the only obvious one is the prohibition of trade or when the actual lack of raw materials makes production impossible (however, only if there are no alternatives to obtain these raw materials from other sources, because in this case only the complexity and higher cost of the process does not constitute force majeure). For example, even if the service provider is located in Ukraine, but warehouses with products have survived and there are no active hostilities in the territory and there are no obstacles to the supply of products, the counterparty cannot refer to the use of force majeure because of war (Kulcsar, 2023). In most cases, the war in Ukraine will not prevent the

performance of the contract at all, but rather make it more onerous or difficult, which is not enough to qualify as force majeure, but may be a reason to use the hardship mechanism or already known *clausula rebus sic stantibus*. If it is temporarily impossible to fulfill the obligations, then the contract is not terminated at all, but only suspended, while the obligations of the other party are also suspended. If the impossibility of performance is permanent, or waiting for performance does not make sense, then the contract is terminated altogether (The Impact of the War in Ukraine on Contracts …, 2020).

In response to the war in Ukraine, the European Union introduced a number of sanctions that prohibit operations on the export of certain types of goods (for example, technology, the aerospace industry, luxury goods, and so on), the import of steel and aluminum products (EU restrictive measures …, 2023). Any performance of the contract that is inconsistent with the sanctions must be suspended. The other party is also released from the fulfillment of reciprocal obligations. Since it is not yet possible to predict the duration of sanctions, these events can be qualified as permanent force majeure circumstances, which means that they can become grounds for termination. Any agreement entered into after the sanctions whose object is a prohibited transaction, will be null and void.

After all, the war in Ukraine also affected the supply chain, where it is almost impossible to prove the existence of force majeure circumstances. If the supplier is not directly affected by the war, for example, his business is not located either in the territory of russia or in the territory of Ukraine, but the party does not receive supplies, for instance, due to a grain failure, or the price of the final product increases (caused by significant electricity costs), we cannot apply force majeure; in the first case, the supplier is obliged to purchase a replacement (Eggers, 2022). In such circumstances we may apply hardship or in other words *clausula rebus sic stantibus* doctrine on the grounds that the balance between the parties has been substantially altered, they would not have entered into the contract on such terms knowing current events. However, it is worth noting that the courts will apply fairly strict standards if the circumstances have changed so significantly and unpredictably that the parties can no longer reasonably expect to comply with the terms. That is, it is possible to adjust, for example, the price only under very strict conditions.

Regarding those contracts that were concluded after the beginning of the russian invasion, which means already with the understanding of the geopolitical situation by the parties, it is very difficult to prove the characteristic of unpredictability both for the use of force

majeure and for the use of hardship. In each specific case, it is necessary to determine whether, even after the beginning of the invasion, the parties could and should have foreseen the lack of materials or the impossibility of transportation and the like. Sometimes, even despite the measures taken by the parties, the impact of the crisis can be significant and in exceptional cases, also be the basis for the applying of force majeure or hardship.

We cannot fail to mention also other possibilities of contractual protection for the parties in addition to force majeure and hardship. Some contracts may contain price adjustment clauses to prevent the contract from becoming too financially burdensome for one party due to changing market conditions. For example, as a result of the war in Ukraine, prices for raw materials, energy, and transportation have increased. If the contract contains such provisions, their application will depend on the language of the contract itself: whether the specified factors have arisen to initiate the price adjustment process, whether the prescribed mechanism for activating the provisions has been followed, and whether the counterparty has a veto on such an adjustment. Another type of protection is a material adverse event (MAE) clause. However, again, the possibility of its application will depend on how it is spelled out in the contract, whether the contractually-obligatory process is adhered to, or measures are taken to mitigate the consequences of negative events (Dibbell, Ferguson, 2022).

Therefore, it is not enough to abstractly assert that the start of the war and the connection of the counterparties with Ukraine or russia, resources, enterprises on the territory of the two states gives the parties the right not to fulfill their obligations due to the application of the doctrine of force majeure. As a rule, it is necessary to assess the impact of military actions on a specific contract, what factors directly affect the obligations and prevent them from being fulfilled, whether all necessary measures were taken to prevent them, when the contract was concluded, whether the parties could have foreseen this, whether the parties provided for clauses in the contract and on under what conditions it can be applied. In the event that performance is still possible, but one of the parties is put in an extremely disadvantageous position as a result of the change of circumstances, then the party can refer to the application of the *clausula rebus sic stantibus*. However, too little time has passed to talk about a unified approach and judicial practice on this issue. The practice that arose during the pandemic can be instructive for the parties to the contract that the following business and legal considerations must be taken into account: the terms of the force majeure clause, which governing law is the main one (the parties must assess which potentially applicable law provides the greatest

protection during a crisis situation), consideration of alternative methods of execution, ways to minimize the delay, provision of a notice provision in the contract, if the contract does not provide for a force majeure provision, then the parties must provide for alternative methods, such as notification of price adjustments or significant adverse consequences.

5. CONCLUSIONS

1. From the time of Roman law, the principle of *pacta sunt servanda* was officially preferred. The fact that the doctrine of the *clasula rebus sic stantibus* began to form actually from the beginning of the formation of Roman law itself only proves that it is an integral element of contract law, without which it cannot exist. In the germs of the doctrine, philosophers sought justification for the need to limit the "golden rule" of *pacta sunt servanda* by the tacit rule, the *ratio*, the intentions of the parties, justice and other means. Hugo Grotius and Augustin Leyser, even at that time, understood that the balance between two antagonistic principles must be sought not only in the will of the parties, but also by limiting objective criteria. Since the Middle Ages, ramifications of the single doctrine of the *clasula rebus sic stantibus* have been developing in different states, which at its root remained unchanged, but acquired its forms under the influence of different national realities.

2. Among the great powers of that time, Germany most willingly accepted the doctrine and it was even adopted by the legislator in one of the first German codes. Although later it lost popularity for almost two centuries. The world wars played an important role in accelerating the emergence of the doctrine in one form or another in the judicial decisions of states, so they tried to cope with the huge flood of legal cases that arose from one of the most unpredictable events that can be imagined for humans. The artificial, not always successful, broad application of the doctrine of impossibility ("Unmöglichkeit") forced the legislator to codify the theory of "Wegfall der Geschäfstgrundlage" in new German Code. In Great Britain, textbooks for illustrating the doctrine of frustration of purpose are Taylor v. Caldwell, and Krell v. Henry cases, however, as we can see from later practice, British courts have been reluctant to apply it and can find examples that contradict the approach of these two decisions. The legal tradition of Great Britain differs from other countries in the world in that it does not recognize hardship in its classical sense and financial loss or other inconvenience cannot be the basis for applying frustration of purpose. France, which has long rejected the doctrine of the *clausula* and shown less strictness only in administrative matters, nevertheless decided to make such radical changes to its Code in 2016, confirming the need for the existence of the doctrine. The tradition that existed since the Canal de Crapone was radically changed.

3. All three instruments of regulation of international contract law contain essentially the same characteristics of the doctrine of change of circumstances, (PICC uses the term "hardship"), although the formulation of the characteristics is slightly different. The DSFR is

the most extensive and modern in its approach to the doctrine of change of circumstances. Although defining the first criterion for changing the fair position of the parties, PICC and PESL followed a more reasonable path, since they did not force the courts to subjectively search for the definition of the concept of fairness, avoiding the need to take into account a huge list of circumstances of the parties, but only in order to judge that the contract has become too burdensome taking the specific contract into account. There is no mathematical, numerical way of determining when we can say that a change of circumstances has affected the contract; adding some monetary or percentage element of extreme disadvantage to the characteristics does not seem possible. For this purpose, I propose using the question to determine equality: would each of the parties agree to enter into a contract on the same terms under such a new state of affairs? The approach of PICC in regard of the second criteria concerning the fact that the event occurred before the conclusion of the contract but became known after it should be adopted by PECL and DSFR as well. Although the number of such situations is quite small and atypical, it provides additional protection for contractual parties.

4. The third criterion of unforeseeability is a logical continuation from the time of Roman law of the desire to limit the subjectivity of the parties to the contract. a mere statement by the parties that these were unforeseeable events is not sufficient, they must be objectively unforeseeable - that is, any reasonable person in the place of the contracting party could not have foreseen such an Event. PICC and PECL should be supplemented to adopt a broader DSFR approach to the extent of such changes (i.e. their magnitude or intensity). In my opinion, the obligation to re-negotiate should not be included in the list of criterias for defining change of circumstances, but should rather remain a separate item, as is done in the PICC and PECL, because the behavior of a party already after the occurrence of certain unforeseen circumstances cannot, according to the laws of logic, affect the qualification of a certain situation as grounds for applying the doctrine of change of circumstances. The necessity of the existence of the doctrine due to the principle of *favor contractus* is again confirmed.

5. Legal acts are not strictly separated from each other, they are interconnected, because the entire legal system is united. Analyzing the opinions of scholars as well as the recent judicial practice of Belgium, taking into account the principles of justice and f*avor contractus*, I came to the conclusion that the PICC can be used as one of the sources for the supplement of the CISG and the application of Article 79 also in cases of hardship. Many decades have passed since the creation of the convention; times are changing; our main goal should be to satisfy the

interests of the parties as best as possible. After all, otherwise, in order to settle an issue not regulated by the convention, subcontractors from different states will have to apply national legislation which interprets the issue of changed circumstances in different ways, which means it will lead to inaccuracies and conflicts.

6. The existence of so-called "safe clauses" appears to be a good alternative for the parties to the contract to take care of possible changes in circumstances themselves, without expecting that the court will be inclined to apply the doctrine of change of circumstances, given that the case law of different countries is ambiguous and, as we have found, only a change of cost can rarely be the basis for suing for change of circumstances.

7. On the example of the law of Belgium, we see that when there are no special provisions on the change of circumstances, courts resolve it either by applying the principle of prohibition of abuse of rights or by more flexible interpretation of the doctrine of impossibility and force majeure, which leads to inaccuracies. The tendency is to include provisions of change of circumstances in national legislation.

8. Since the impossibility due to the pandemic Covid-19 was not permanent, the application of the doctrine of impossibility to contracts was quite limited. This became a certain revival of the relevance of the doctrine of change of circumstances. Mainly, the judicial practice of different countries concerns commercial contracts. The primary standard for the application of the doctrine in the period of Covid-19 is the issue of the unforeseeability of the event. It was easier to prove that there was an opportunity to apply the hardship doctrine if the contract was concluded before the pandemic. An important lesson of this period was that the specific purpose of use is important in the contract, and in this case it will be the lessor's duty to ensure the specific purpose. Courts have applied fairly strict standards if circumstances have changed so significantly and unforeseeably that the parties can no longer reasonably expect to fulfill the terms. That is, adjusting, for example, prices only under very strict conditions.

9. In general, judicial practice regarding the application of the doctrine of change of circumstances to contracts related to the war in Ukraine has not yet been fully formed. The main role in this matter will still be given to force majeure, although in matters other than the complete impossibility of fulfilling the contract, such as the violation of the usual supply chain, the doctrine of change of circumstances can be applied, but it will still be important for the judges to determine how much the full-scale invasion of Russia affected for the performance of a specific contract, whether it could have been performed by other alternative methods, in

which period the contract was concluded, which means whether the parties could reasonably foresee such consequences.

LIST OF REFERENCES

1. Legal acts

United Nations Convention on Contracts for the International Sale of Goods. *United Nations Commission on International Trade Law*. 1980, E.10.V.14

Belgian Civil Code (2022). *State news*, 33-1014.

French Civil Code (2016). *Official Journal of 11 February 2016.* 2016-131. (Ordinance No. 2016-131 of 10 February 2016 reforming the Law of Contracts, Evidence and Obligations, Official Journal of 11 February 2016, Text 26 of 113).

French Civil Code (1804). 1804-02-07. Version en vigueur du 21 mars 1804 au 01 octobre 2016

German Civil Code (BGB) (2002). *Federal Law Gazette.* BGBl. I p. 42 , re. p. 2909, re. 2003 I p. 738.

2. Special literature

Alciatus, A. (2004). *Tractatus de Praesumptionibus, praesumptio 16, n. 5 and 6* in *Commentarii in aliquot Iuris civiles et Pontificii titulus.* Frankfurt/Main.

Baranauskas, E. and Zapolskis, P. (2009). The Effect of change in circumstances on the performance of contract. *Jurisprudencija*, Nr. 4 (118), 197-216.

Beale, H. and Dugdale, T. (1975). Contracts between Businessmen: Planning and the Use of Contractual Remedies. *British Journal of Law and Society*, 2(1), 45-60.

Beale, H. (2002). *Cases, Materials and Text on Contract Law*. Oregon: Hart Publishing.

Bell, J., Boyron, S. and Whittaker, S. (1998). *Principles of French Law*. Oxford: Oxford University Press.

Berger, K. P. and Behn, D. (2020), Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study (April 20, 2020). *6 McGill Journal of Dispute Resolution* (2019/2020) 4, 79-130.

Bonell, M. (1995). The UNIDROIT principles of international commercial contracts: Why? What? How? *Tulane Law Review* 69 (5), 1121.

Bonell, M. (2005). *An international restatement of contract law,* 3rd Edition. New York: Transnational Pub Inc.

Brunner, C. (2009). *Force majeure and hardship under general contract principles: exemption for non-performance in international arbitration*. Alphen an den Rijn: Kluwer Law International.

Čobeljić, Đ. (1972). Promenjene okolnosti u privrednom i građanskom pravu (Clausula rebus sic stantibus). Beograd: Savremena administracij.

Christie K., Han M., and Shmatenko L. (2020). LNG Contract Adjustments in Difficult Times: The Interplay between Force Majeure, Change of Circumstances, Hardship, and Price Review Clauses. *Oil, Gas & Energy Law Intelligence*. [interactive]. Available at: https://www.researchgate.net/publication/340298877_LNG_Contract_Adjustments_in_Difficult_Times_The_Interplay_between_Force_Majeure_Change_of_Circumstances_Hardship_and_Price_Review_Clauses [accessed 2023 November 3].

Fontaine M. and Brill F. (2009). *Drafting International Contracts*. Boston: Martinus Nijhoff Publishers.

Grotius, H. (1625). *De iure belli ac pacis* cited in Hondius, E. and Grigoleit, C. (Eds.). (2011). *Unexpected Circumstances in European Contract Law (The Common Core of European Private Law)*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511763335

Halpern, S. W. (1987). Application of the Doctrine of Commercial Impracticability: Searching for 'The Wisdom of Solomon''. 135 *University of Pennsylvania Law Review*, 1123-1178.

Harries, J. (2006). *Cicero and the jurists: from citizen's law to the lawful state*. London: Duckworth, 2006. ISBN 0-7156-3432-1/978-0-7156-3432-5.

Harris, D. and Tallon, D. (1989). *Contract Law Today: Anglo-French Comparisons*. Oxford: Clarendon Press.

Hondius, E. and Grigoleit, C. (Eds.) (2011). *Unexpected Circumstances in European Contract Law (The Common Core of European Private Law)*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511763335.

Honnold, J. and Flechtner, H. (2009). *Uniform law for international sales under the 1980 United Nations Convention*. Alphen aan den Rijn: Kluwer Law International.

Hillman, R. (1987). Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law. *Duke Law Journal* (1), 1-33.

Hutchison, A. (2009). Change of circumstances in contract law: The clausula rebus sic stantibus. *Journal of Contemporary Roman Dutch Law*, 72 (1), 60-73.

Inwood, B. (2005). *Stoic Philosophy in Rome*. Oxford/New York: Clarendon Press. DOI:10.2307/40232294.

Jansen, N. (2010). *The making of legal authority: non-legislative codifications in historical and comparative perspective*. Oxford: Oxford University Press.

Karampatzos A. (2005). Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo American, German, French and Greek Law. 13, *European Review of Private Law* 2, 105-147. Available at: https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/13.2/ERPL2005009 [accessed 2023 September 28].

Kleinheisterkamp, J. (2009). *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*. Oxford: Oxford University Press.

Kornet, N. (2011). Evolving General Principles of International Commercial Contracts: The Unidroit Principles and Favor Contractus. *European Private Law Institute Working Paper,* 2011/07, 1-20. Available at: http://dx.doi.org/10.2139/ssrn.1756751 [accessed 2023 November 12].

Leyser, A. (2011). *Meditationes ad Pandectas*. New York: New York Public Library.

Lindström, N. (2006). Changed Circumstances and Hardship in the International Sale of Goods. 1 *Nordic Journal of Commercial Law* 2, p. 1-29 [interactive]. Available at: https://journals.aau.dk/index.php/NJCL/article/view/3045/2572 [accessed 2023 October 10].

McKendrick, E. (1994). Frustration and Force Majeure - Their Relationship and Comparative Assessment. *International & Comparative Law Quarterly,* 43 (1), 235-236.

Markesinis, B., Unberath, H. and Johnston, A. (2006). *The German Law of Contract: A Comparative Treatise. Second edition.* Oxford and Portland, Oregon: Hart Publishing.

Mikelėnas, V. (1996). *Sutarčių teisė. Bendrieji sutarčių teisės klausimai: lyginamoji studija.* [Mikelenas, V. Contract law. General Questions on Contract Law: a Comparative Study]. Vilnius: Justitia.

Momberg R. (2011). Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR. *Vindobona Journal of International Commercial Law and Arbitration*, 15 (2), 233-266.

Oertmann, P. (1921). *Die Geschäftsgrundlage: ein neuer Rechtsbegriff*, USA, Princeton University: Scholl.

Rea, S. (1982). Inflation and the Law of Contracts and Torts. *Ottawa Law Review*, 14 (1), 465-479.

Strohbach, H. (1984). Force majeure and hardship clauses in international commercial contracts and arbitration. The East-German approach. 1 *Journal of international arbitration*, 41, 39-51.

Trakman, L. (1985). Winner Take Some: Loss Sharing and Commercial Impracticability. *Minnesota Law Review, 69*, 471-519.

Treitel, G. (2014). *Frustration and force majeure*. London: Sweet & Maxwell.

Veneziano A. (2010). UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court. *Uniform Law Review*, 1, 137–149. https://doi.org/10.1093/ulr/15.1.137.

Windscheid, B. (1850). *Die Lehre des römischen Rechts von der Voraussetzung.* Düsseldorf: Verlagshandlung von Julius Buddeus.

Windscheid, B. (1892). Die Voraussetzung. *Archiv für die civilistische Praxis*, 78. Bd., H. 2, 161-202.

Zasius, U. (1966). *Opera omnia*. Lyon: 1550, repr. Aalen.

Zimmermann, R. (1996). *The law of obligations: Roman foundations of the civilian tradition.* Oxford: Oxford University Press.

Zürcher Mietgerichtspraxis (2021). *Decisions of the Special Court fortenancy matters and the Conciliation Authority of the Zurich District*, 2021 (31).

3. Electronic publications

A major innovation in contract law in 2023: the doctrine of hardship Seeds of Law (formerly Peeters Law). [online] (modified 2022). Available at: https://www.lexology.com/library/detail.aspx?g=e6a59daa-b76d-4a5c-bcf1-cdf33c330811 [Accessed 27 October 2023].

Brohez A., Bellinck L. and Vazzano O. (2023). Hardship in book 5 of the new Belgian Civil Code. [blog] 9 Feb. Available at:

https://www.lexology.com/library/detail.aspx?g=c92a434d-49d1-4dce-b7f3-6c5109059735. [accessed 2023 October 26].

Crepy, S., Kersey, L. and Nacinovic, V. (2016). Historic Reforms to the French Civil Code: Ordinance No. 2016-131 and Forthcoming Changes to French Contract Law [blog] 27 May. Available at: https://www.paulhastings.com/insights/client-alerts/historic-reforms-to-the-french-civil-code-ordinance-no-2016-131-and-forthcoming-changes-to-french-contract-law [accessed 2023 October 18].

Chinese firms use obscure legal tactics to stem virus losses, *The Economist* [online] (modified 2020). Available at: https://www.economist.com/business/2020/02/22/chinese-firms-use- obscure-legal-tactics-to-stem-virus-losses [Accessed 16 October 2023].

Dibbell, J., Ferguson, J. (2022). Contract Disputes Arising from the Ukraine Conflict: Issues, Defenses and Lessons for the Future [blog] 4 Aug. Available at: https://www.mayerbrown.com/en/perspectives-events/podcasts/2022/08/contract-disputes-arising-from-the-ukraine-conflict-issues-defenses-and-lessons-for-the-future [2023 October 21].

Galiani, S. (2023). Yak viina v Ukraini zminiuie ekonomichnyi i biznesovyi landshafty krain, rehioniv ta svitu. Poiasniuie profesor ekonomiky Sebastian Galiani. [blog] 25 Aug. Available at: https://forbes.ua/money/velika-ekonomichna-perebudova-25082023-15642.

Goldenberg, A., Singer, H. (2023). Long-term supply agreements and high inflation — what businesses need to know [blog] 8 March. Available at: https://www.mccarthy.ca/en/insights/articles/long-term-supply-agreements-and-high-inflation-what-businesses-need-know [accessed 2023 October 15].

Eggers C. (2022). The Effects of the Military Conflict in Ukraine on Supply Contracts [blog] 22 March. Available at: //www.squirepattonboggs.com/-/media/files/insights/publications/2022/03/the-effects-of-the-military-conflict-in-ukraine-on-supply-contracts/the-effects-of-the-military-conflict-in-ukraine-on-supply-contracts.pdf [accessed 2023 October 21].

EU restrictive measures against Russia over Ukraine (since 2014). [online] (modified 2023-09-14). Available at: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/ [Accessed 21 October 2023].

ICC Force Majeure and Hardship Clauses. International Chamber of Commerce [online] (modified 2020). Available at: https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-and-hardship-clauses/ [Accessed 28 October 2023].

Impact of the Ukraine war on contract performance: force majeure? [online] (modified 2022-04-11). Available at: https://www.osborneclarke.com/insights/impact-ukraine-war-contract-performance-force-majeure [Accessed 29 October 2023].

Inside Arbitration: The war in Ukraine – implications for investments and contracts. [online] (modified 2022-07-11). Available at: https://www.herbertsmithfreehills.com/insights/2022-07/inside-arbitration-the-war-in-ukraine-%E2%80%93-implications-for-investments-and-contracts [Accessed 29 October 2023].

Kaps, F. (2020). The COVID-19 pandemic and commercial contracts. DLA Piper [blog] 12 Nov. Available at: https://www.lexology.com/library/detail.aspx?g=b852075d-dfcb-4809-9a2e-c0d84d9bb53e [accessed 2023 October 18].

Kulcsar, G. (2023). Contractual risk allocation in times of uncertainty [blog] 1 Feb. Available at: https://www.schoenherr.eu/content/contractual-risk-allocation-in-times-of-uncertainty/ [accessed 2023 October 18].

Lips, M. and Rickenbach, M. (2021). First court decision on rent reductions during covid-19 lockdown [blog] 3 Dec. Available at: https://www.lexology.com/library/detail.aspx?g=0e4719ec-9a44-4086-b21f-64934cfb9c5a [accessed 2023 October 16].

McKendrick, E. (2022). The impact of Covid-19: Frustration, Force Majeure, Hardship and Dealing with Uncertainty. [blog] 3 Dec. Available at: https://www.wardhadaway.com/wp-content/uploads/2020/09/Covid-19-frustration-and-force-majeure-handout-1.pdf accessed 2023 October 16].

Pravovi naslidky poshyrennia koronavirusu COVID-19 dlia vykonannia dohovoriv. [online] (modified 2020). Available at: https://sk.ua/uk/pravovi-naslidki-poshirennya-koronavi/ [Accessed 27 October 2023].

Rebus Sic Stantibus and Force Majeure Clause. *Litigation and Arbitration Newsletter by Andersen* [online] (modified 2022). Available at: https://pl.andersen.com/wp-content/uploads/2022/10/20221018-LA-newsletter-final.pdf [Accessed 13 October 2023].

The Ukraine conflict - force majeure and similar mechanisms. [online] (modified 2019-11-27). Available at: https://www.ashurst.com/en/insights/the-ukraine-conflict---force-majeure-and-similar-mechanisms/ [Accessed 25 October 2023].

The Impact of the War in Ukraine on Contracts under Belgian Law. [online] (modified 2020-03-01). Available at: https://liedekerke.com/en/insights/the-impact-of-the-war-in-ukraine-on-contracts-under-belgian-law [Accessed 23 October 2023].

West A. and (Aigbinode) Lange (Aigbinode) S. (2020). Timing is Everything: International Chamber of Commerce Updates Its Model Force Majeure and Hardship Clauses. [blog] 9 Apr. Available at: https://www.lexology.com/library/detail.aspx?g=5a7c72e0-c648-4989-ba48-16d008d6421b [accessed 2023 October 28].

4. Court practice

Compound fertiziler case [CIETAC], Nr. CISG/1996/05, [1996-05-02].

1863 of England and Wales High Court (Queen's Bench Division) Decisions 122 ER 309, 3 B & S 826, QB J1 (Taylor v. Caldwell).

1876 of the French Cour de Cassation March 6 ruling in case Arrêt du Canal de Craponne.

1903 of the Court of Appeal of England and Wales August 11 decision in case no. 2 KB 740 (Krell v. Henry or the “coronation case”).

1916 of the United Kingdom House of Lords July 24 ruling in case no. 2 AC 397, 406 (F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.) (per Lord Haldane).

1916 of Conseil d'État 30 March ruling in case no. 59928 (Gaz de Bordeaux case).

1953 of the Federal Court of Justice January 16 ruling in civil case no. BGH MDR 1953, 282 I.

2009 of the Belgian Supreme Court June 19 ruling in case no. C.07.0289.N. (Scafom International BV v. Lorraine Tubes S.A.S; Hof van Cassatie)

2013 of the United Kingdom House of Lords April 15 decision in case no. All ER 145, [1956] AC 696, [1956] UKHL 3.

2018 of the Supreme Court of Canada November 2 ruling in case no. 37238. (Churchill Falls (Labrador) Corp. v. Hydro-Québec).

5. Others

Bar von C., Cilve, E. and Schulte-Nölke, H. (eds.) (2009). *Draft Common Frame of Reference*. Outline Edition. Munich: European law publishers GmbH.

International Institute for the Unification of Private Law (2016). *Unidroit Principles of International Commercial Contracts* 2016, Rome.

Lando O., Beale H. (2002). *Principles of European Contract Law. Parts I, II and III*. Hague/London/Boston: Kluwer Law International.

SUMMARY

Change of Circumstances as Excuse for Contract Performance

Anna Shyliuk

This master's thesis provides analysis of the doctrine of change of circumstances, its main characteristics on the example of the legislation and judicial practice of Great Britain, France, Germany, Belgium, Switzerland, as well as on the basis of the analysis of international legal instruments of soft law - Principles of International Commercial Contracts, Principles of European Contract Law, Draft Common Frame of Reference. The origins of the doctrine of change of circumstances, starting from the Roman *clausula rebus sic stantibus*, and how the opinions of Roman philosophers and medieval scientists were reflected in modern doctrine are studied.

The author analyzes various terms used for the doctrine of change of circumstances: impartibility, hardship, doctrine of assumption, frustration of purpose, imprevision. A comparison of three main international instruments of contract law and their approaches to the qualification of grounds for applying the doctrine of change of circumstances is provided. The most successful formulations are highlighted in the comparative analysis. Taking into account the introduction of provisions on the change of circumstances into the Codes of France and Belgium, the extraordinary importance of the existence of the doctrine has been proven. By analyzing the opinions of scientists and case law, a conclusion is made about the possibility of using the PICC as a supplement to the CISG. Due to a detailed analysis of Covid-19 case law of Germany, Switzerland, and Belgium, the author distinguishes different periods and the necessary criterias of the application the doctrine for each of them. A general overview of the possible consequences of the full-scale invasion of Russia and the war in Ukraine for the use of force majeure and changed circumstances is made. The necessary characteristics that will be key for the courts in determining the possibility of applying the doctrine are highlighted.