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**Master's Thesis**

# WAR AS FORCE MAJEURE IN BUSINESS CONTRACTS

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## ABSTRACT

In a world marked by geopolitical uncertainties and rapid changes, this thesis explores the intricate dynamics of international business transactions, focusing on the inclusion of force majeure clauses and their relevance in the context of armed conflicts. The ongoing war in Ukraine serves as a challenging backdrop, prompting businesses to grapple with safeguarding contractual obligations amidst disruptions.

The research emphasizes the critical need for clear and comprehensive force majeure clauses, specifically addressing the unique challenges posed by the Ukrainian war. With a focus on European civil and common law perspectives, the study aims to investigate the legal nature of force majeure, analyse the implications of including "war" as a force majeure event, and explore international legal frameworks governing war and force majeure. The thesis underscores the underexplored facet of war as a force majeure event, offering insights into its practical application in business contracts, particularly in conflict-prone regions. The research objectives encompass tasks such as drawing differentiations between force majeure and related categories, analysing historical case studies, and emphasizing the importance of well-drafted force majeure clauses.

The methodology employs legal analysis, case studies, and a comparative approach to highlight differences in handling war as a force majeure event in business contracts across various legal systems and jurisdictions. This study contributes significantly to understanding and managing force majeure events, particularly concerning the legal treatment of war in business contracts.

**Keywords**: force majeure, war, business contracts, legal implications, international law, Ukraine, civil law, common law, comparative analysis.

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# INTRODUCTION

In a world marked by geopolitical uncertainties and rapid changes, the dynamics of international business transactions have become increasingly complex. The inclusion of force majeure clauses in contracts, allowing parties to be excused from their obligations in exceptional circumstances, has gained substantial significance. This thesis delves into a particularly challenging aspect of force majeure – "war" – and its implications for business contracts.

The ongoing war in Ukraine has presented a complex and challenging backdrop for international business transactions. The region's volatile political climate and security concerns have raised significant questions about the inclusion of "war" as a force majeure event in business contracts. Companies operating in or with interests in Ukraine have grappled with the need to safeguard their contractual obligations in the face of armed conflict. As a result, the legal treatment of war as a force majeure event takes on heightened importance in this context.

The application of force majeure in Ukraine is not only a matter of legal interpretation but also a practical necessity. The war has caused disruptions, making it imperative for businesses to understand the extent to which their contractual obligations can be excused in times of war. Furthermore, the interaction between contract law and international legal frameworks adds layers of complexity to the force majeure analysis. This has prompted a critical need for businesses to draft clear and comprehensive force majeure clauses in their contracts, addressing the unique challenges posed by the Ukrainian war. As a result, the legal interpretation and practical implications of war as a force majeure event in Ukraine remain a crucial subject for study and analysis.

The motivation behind this research is rooted in the evolving landscape of global commerce. Businesses, whether operating on a domestic or international scale, encounter the potential risks and disruptions that war and armed conflicts can pose to their contractual obligations. The choice of this topic arises from the recognition that as the world grapples with political and security challenges, understanding the legal implications of war as a force majeure event is of paramount importance for businesses, legal practitioners, and policymakers.

The object of this thesis encompasses a comprehensive examination of the legal nature of force majeure in business contracts from European civil and common law perspectives in times of war. It explores the demarcation of force majeure from related categories, considers the legal implications within contract law, and closely scrutinizes the inclusion of "war" as a force majeure event in business contracts. The international legal framework governing war and force majeure, along with its impact on contractual interpretation, is a central focus.

This research is highly relevant as it addresses an underexplored facet of force majeure in contract law. The legal treatment of war as a force majeure event carries immense practical implications for businesses, particularly in conflict-prone regions. The novelty of this thesis lies in its in-depth analysis of war as a force majeure event, a subject that has not received the attention it deserves, especially concerning its practical application in business contracts. With the ever-present backdrop of geopolitical tensions and the urgency of addressing war-related contractual issues, this thesis seeks to contribute significantly to the understanding and management of force majeure events in business contracts.

The aim of this research is to shed light on the intricate relationship between war and force majeure in business contracts. To achieve this aim, the following tasks will be pursued:

1. Investigate the legal nature of force majeure in European private law.
2. Examine the inclusion of "war" as a force majeure event, assessing its legal implications in business contracts.
3. Draw differentiation between force majeure and related categories.
4. Explore international legal frameworks relevant to war and force majeure, highlighting their influence on contractual interpretations.
5. Analyse historical case studies and contemporary examples, with a specific focus on ongoing war in Ukraine, to provide insights into the practical challenges and resolutions related to war as a force majeure event in business contracts.
6. Emphasize the importance of well-drafted force majeure clauses that specifically address war in contracts.

The research will employ a combination of methods, including legal analysis, case studies, comparative analysis, and an exploration of historical and contemporary examples, with a specific emphasis on the situation in Ukraine. The comparative analysis component of the methodology involves assessing how other legal systems and jurisdictions (namely England, Germany, France, and the Netherlands) handle war as a force majeure event in business contracts. These jurisdictions represent key approaches of European countries in this regard and have deep history of the relevant concepts. Moreover, by contrasting civil and common law contract law, the research can highlight differences in approach and jurisprudence. This analysis will provide a broader perspective on the treatment of war in force majeure clauses, shedding light on potential best practices and lessons learned from other jurisdictions.

In this master's thesis, we heavily relied on key literature to investigate the concepts of frustration and force majeure in contractual obligations. Notably, McKendrick's "Force Majeure and Frustration of Contract" (1995) and the collaborative effort of Von Bar et al. in "Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference

(DCFR)" (2009) provided foundational insights. These works, alongside Symons and Dalby's "Force Majeure and Frustration in Commercial Contracts" (2022), shaped our theoretical framework and offered practical perspectives.

Additionally, Melnyk's dissertation, "Contractual clause on force majeure under the civil legislation of Ukraine" (2018), was crucial for understanding force majeure under Ukrainian civil legislation, contributing a localized perspective to the comparative analysis. Together, these sources enriched my research, providing a comprehensive examination of frustration and force majeure from both international and Ukrainian legal standpoints.

Beyond these key texts, a myriad of other sources contributed to the comprehensive exploration of frustration and force majeure, ensuring a well-rounded analysis that considered various European and Ukrainian legal perspectives.

# PART I. GENERAL CONCEPT OF FORCE-MAJEURE

## 1.1. The legal nature of force-majeure in European private law

*General review*

Force majeure is a concept recognized in European contract law that addresses unforeseen and uncontrollable events that can disrupt the performance of contractual obligations (McKendrick, 1995, p.24).

Force majeure is generally defined as an event or circumstance that is beyond the control of the affected party, could not have been reasonably foreseen at the time of contract formation, and whose effects cannot be mitigated by taking reasonable measures. These criteria, including exteriority (beyond control), unforeseeability, and irresistibility, are common elements across European jurisdictions. The legal basis for force majeure can be found in statutory law, as well as court decisions and legal principles. In some European countries, it may be codified in the civil code, while in others, it relies on judicial precedents and legal principles (Treitel, 2015, par.19-002 - 19-008).

Force majeure serves as a means to excuse non-performance when the breach of contract cannot be attributed to the party affected by the event. It offers a legal framework for parties to avoid liability when unforeseeable and uncontrollable events hinder the fulfilment of their contractual obligations. The recognition of force majeure depends on the fulfilment of certain criteria. The affected party must demonstrate that the event was unforeseeable, beyond their control, and that they could not reasonably have prevented the event or its consequences (Treitel, 2015, par.19-032 - 19-041).

We will now examine the functioning of this doctrine in Germany, France, and the Netherlands, as well as at the level of the Draft Common Frame of Reference (DCFR).

*Germany*

Under German statutory law, there are no specific provisions that directly address force majeure events. Instead, such events fall under the purview of statutory provisions dealing with the impossibility of performance (Section 275 of the German Civil Code, or BGB) and circumstances that interfere with the basis of a transaction (Section 313 of the German Civil Code) (Markesinis, 2006, p.152).

Section 275 of the German Civil Code outlines that the obligation to perform under a contract is excluded to the extent that it becomes impossible for the obligor or any other person to fulfil these obligations. The obligor can also refuse to perform if the required efforts and expenses are disproportionately high, considering the nature of the obligation and the principles of good faith. This refusal can be based on whether the obligor is responsible for the obstacle to

performance. In addition, if the obligor is expected to perform in person and it is unreasonable to do so considering the interests of the obligee, performance may be refused. The rights of the obligee in such cases are governed by specific sections of the German Civil Code (Markesinis, 2006, p.153).

Section 313 of the German Civil Code deals with circumstances that interfere with the basis of a contract. If the circumstances that formed the basis of the contract have significantly changed since the contract was formed and the parties would not have entered into the contract, or would have done so with different terms had they anticipated these changes, an adjustment to the contract may be sought. The extent of the adaptation depends on various factors, including the distribution of risk between the parties. If an adaptation is not possible or reasonable, the disadvantaged party may have the right to terminate the contract, particularly in the case of ongoing obligations (Markesinis, 2006, p.154).

Furthermore, if a breach of contract is caused by a force majeure event, such as a delay in delivery, the party seeking relief based on force majeure must demonstrate that they have taken all necessary and reasonable steps to mitigate the effects of the event (Markesinis, 2006, p.155).

*France*

The concept of force majeure has been recognized by French courts for a long time, but it was formally introduced into French statutory law in 2016 as part of a significant contract law reform. In today's legal framework, force majeure is defined in Article 1218 of the French Civil Code as an event that is beyond the control of the party affected by it, an event that could not reasonably have been anticipated at the time the contract was entered into, and an event whose effects cannot be mitigated by taking appropriate measures (Cartwright, 2017, p.216).

Unless the contracting parties have specifically agreed otherwise, for an event to qualify as force majeure under French law, three conditions must be met:

1) Exteriority (extériorité). This means that the event must be entirely beyond the control of the party affected by it. In other words, the event should not be a result of the affected party's actions or be attributable to anything or anyone for which the affected party could be held responsible, such as their employees.
2) Unforeseeability (imprévisibilité). The event should not have been reasonably foreseeable at the time the contract was concluded. It should be an event that could not have been anticipated with due diligence.
3) Irresistibility (irrésistibilité). This is the crucial requirement for force majeure. It involves assessing whether the effects of the event could be avoided by taking appropriate measures. French courts evaluate this requirement objectively, considering whether an average person in similar circumstances could still have been able to

perform their obligations. If performance remains possible, even if it may appear very costly for the affected party, the event may not qualify as force majeure (Cartwright, 2017, p.218).

In summary, under French law, force majeure is a legal concept with specific criteria that must be met for an event to be considered as such. These criteria include exteriority, unforeseeability, and irresistibility, with irresistibility being the central and defining element of force majeure.

*Netherlands*

Under Dutch law, the default principle is that a party to a contract is responsible for all damages resulting from a breach of that contract, unless the breach cannot be attributed to them (as per Article 6:74 of the Dutch Civil Code). Article 6:75 of the Dutch Civil Code stipulates that a breach cannot be attributed if the party in question is not at fault, as determined by law, legal agreements, or commonly accepted principles (Hartkamp, 2017, p.56).

Article 6:75 of the Dutch Civil Code outlines two key conditions for non-attribution of non-performance: 1) the party should not be at fault. They cannot be blamed for the breach if they could not have reasonably prevented the event that led to non-performance and avoided its consequences; 2) the non-performance should not fall within the party's sphere of risk. The question of whether a party is to blame hinges on their ability to reasonably prevent the event causing non-performance and its consequences.

The next aspect is whether the non-performance can be attributed to the party, meaning whether they were responsible for it. There are three grounds for attributing non-performance under Dutch law, as provided in Article 6:75:

1) Specific statutory provisions can establish liability, such as liability for actions of third parties or events.
2) Legal agreements, like contractual arrangements, can also lead to attribution. Parties can define in their contracts who bears the consequences of non-performance. Liability can be expanded through contract terms that ensure performance or can be restricted or entirely waived through limitation of liability clauses.
3) There are circumstances where a party may be held accountable based on common opinion, such as in cases of financial incapacity, incompetence, or inexperience (Hartkamp, 2017, p.58).

*DCFR*

The DCFR does not recognise “force-majeure” as a separate category. Nonetheless, it contains article III.–3:104 “Excuse due to an impediment”, in commentary to which the authors state that it has all features of the typical “force-majeure” clause (von Bar, 2009, p.808).

According to article III.–3:104, a debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences. Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred. Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

As we can see, Article III-3:104 of the document addresses the concept of excuse due to an impediment in contractual obligations. It outlines the conditions under which a debtor's non-performance of an obligation is excused. This article addresses the legal implications when a debtor is unable to fulfil their obligation due to circumstances beyond their control. It generally aligns with the legal principles found in the laws of various Member States, albeit with some variations in conceptual structure (von Bar, 2009, p.809).

The rules outlined in this article are not mandatory, allowing contracting parties to modify the allocation of risk related to the impossibility of performance. This flexibility extends to both general risk allocation and specific impediments. Furthermore, established practices within certain industries, such as maritime shipping, may have a similar effect on risk allocation.

The scope of this provision is broad, encompassing any type of obligation, including financial obligations. While insolvency is typically not regarded as an impediment due to being within the debtor's control, exceptions may apply, particularly in cases involving government actions preventing owed sums from being transferred.

The term "impediment" encompasses a wide range of events, spanning from natural occurrences to governmental actions and actions by third parties. It is even conceivable that an impediment exists without the parties' knowledge at the time of contract formation. For example, if parties sign a charter for a ship that has already sunk, this situation is not directly addressed by the article but may be subject to rules on mistake (von Bar, 2009, p.810).

In scenarios where an obligation revolves around making reasonable efforts to achieve a certain outcome, the need for excused non-performance is reduced. If unforeseen impediments, beyond the debtor's control, prevent the debtor from making reasonable efforts, the article may come into play.

The circumstances surrounding the impediment adhere to traditional force majeure requirements, expressed in general terms to accommodate a variety of situations. It falls upon the party invoking this provision to demonstrate that the requirements are met. The central requirement is that the impediment must be outside the debtor's control. The breakdown of a machine, even if

unforeseeable and unpreventable, does not qualify as an impediment if it is under the debtor's control. Actions of individuals for whom the debtor is responsible, including those responsible for performance, are also taken into consideration. A subcontractor's default can be claimed as an impediment only if it was beyond the debtor's control (von Bar, 2009, p.811).

Illustrative examples can be provided to clarify the application of these principles, emphasizing that not all unforeseeable events qualify as impediments:

1) An unexpected strike at a state-owned gas company forces a ceramics manufacturer, reliant on gas for its furnaces, to halt production. The ceramics manufacturer is not liable if other Article conditions are met. Non-performance is due to external factors.
2) Employees of a company go on strike to pressure management into buying foreign machines for better working conditions. However, acquiring these machines is currently not possible. In this case, the company cannot use the strike as an excuse because it is within their control.
3) A French bank, "A" fails to transfer money to a bank in country "X" by July 15 as instructed by company "B." Money transfers between France and "X" are suspended by July 18. Bank A cannot claim an excuse because the transfer could have been completed within the contractually allowed timeframe (von Bar, 2009, p.812).

Though the approach can be different in the mentioned above countries, we support conclusions of prof. von Bar in relation to the cases discussed, as it provides the most balanced option to resolve the issue with force-majeure. Moreover, the DCFR per se is an instrument of balancing and weighting of multiple European approaches, so the proposed solutions can cause some confusion within lawyers of the respective countries.

In cases of obligations arising from contracts or other juridical acts, the impediment must be one that the debtor could not have reasonably foreseen at the time of obligation inception. These concepts do not apply to obligations that arise by operation of law. The foreseeability test considers whether a normal person in the same situation could reasonably anticipate the impediment without excessive optimism or pessimism. It is also essential to assess whether the event itself, as well as its timing, was foreseeable. An event may be foreseeable in certain circumstances but excusable if the specific timing was unforeseeable (von Bar, 2009, p.814).

So to claim an excuse, both conditions must be met – the impediment must be insurmountable, and the debtor must be unable to avoid it or its consequences. The feasibility of avoiding the event or overcoming its effects depends on the factual context. Expecting the debtor to take disproportionate precautions or resort to illegal means to circumvent the risk is unreasonable.

*Provisional remarks*

Based on the mentioned above regarding the treatment of force majeure in European contract law, several preliminary conclusions can be drawn:

1. Force majeure is directly recognized as a legal concept in various European jurisdictions, including France and the Netherlands. While it has long been recognized by courts, it was formally introduced into statutory law, as seen in the French Civil Code in 2016. In turn, in Germany and in DCFR this concept is not established as a separate doctrine and operates within wider categories.
2. The key principle in many European legal systems is that a contracting party is liable for damages resulting from a breach of contract, unless the breach cannot be attributed to them. Attribution depends on whether the party is at fault and whether the non-performance falls within their sphere of risk.
3. European legal systems typically define force majeure as an event beyond the control of the affected party, not reasonably foreseeable at the time of contract formation, and whose effects cannot be mitigated by appropriate measures. The criteria commonly include exteriority, unforeseeability, and irresistibility.
4. Attribution of non-performance may be based on specific statutory provisions, legal agreements, or commonly accepted principles. Parties can stipulate in their contracts who bears the consequences of non-performance, which may extend or limit liability.
5. Force majeure comes into play when liability for a breach cannot be attributed to the contracting party. It provides a legal basis for excusing non-performance in cases where the breach is beyond the control of the affected party and could not reasonably have been foreseen.

In summary, the status of force majeure in European contract law is recognized but may be subject to variations in specific requirements and application within individual jurisdictions. While the core principles of force majeure are relatively consistent across European countries, the specific rules and nuances may differ.

### 1.2. Demarcation of force-majeure with related categories

*Force-majeure vs frustration of contracts*

In common law, contracts can be discharged or invalidated due to frustration when an unforeseen event makes it physically or commercially impossible to fulfil the contract. Unlike force majeure, which must be explicitly included in a contract, frustration can be invoked by any party and does not need to be mentioned in the contract itself. However, if a contract includes a force majeure clause, it takes precedence over frustration for events covered by the clause.

Frustration can still be argued for events outside the force majeure clause, but they cannot apply simultaneously to the same event (Treitel, 2015, par.19-076).

The threshold for invoking frustration is high, which is why force majeure clauses are commonly used to customize the threshold and other elements. Frustration occurs when a supervening event meets specific criteria:

1) It occurs after the contract is formed.
2) The contract does not account for this event.
3) It is not the fault of either party, self-induced, or foreseeable.
4) It substantially changes the nature of the contractual rights and obligations in ways such as impossibility of performance, altering the contract's fundamental terms, rendering the performance substantially different from what was intended, or affecting the nature and purpose of the contract (Treitel, 2015, par.19-008).

The differences resulting from the event are permanent, not temporary or merely inconvenient. When frustration is established, both parties are released from further obligations under the contract.

A finding of frustration under common law results in the complete discharge of all parties from their contract obligations, returning them to their pre-contractual positions. However, reasonable adjustments can be made, allowing for compensation for partial performance or payment that contributes to the final price (Treitel, 2015, par.19-120).

Overall, compared to force majeure clauses, frustration is less flexible because it cannot be selectively applied to specific parts or durations of a contract, making it less suitable for maintaining an ongoing business relationship.

*Force-majeure vs hardship*

Economic hardship pertains to unforeseen circumstances that significantly disrupt a contract, making it much more burdensome for one party to fulfil. In law of England and Wales, economic hardship is not a recognized general concept, and parties have often tried to rely on frustration or force majeure to mitigate its impact, with limited success (Symons, 2022, p.77).

The English courts have been reluctant to invoke frustration for economic hardship, emphasizing that hardship, inconvenience, or financial loss itself is not sufficient grounds for frustration. They have similarly rejected attempts to apply force majeure clauses to economic hardship situations, even if the contract becomes substantially more expensive to perform (Symons, 2022, p.78).

Despite these challenges, parties in English law contracts have started including specific economic hardship provisions to address this issue. These clauses typically allow parties affected by economic hardship resulting from unforeseen and significant changes in market conditions to

jointly consider adjusting the contract terms. If no agreement is reached, the affected party can terminate the contract or seek resolution through an independent third party (Symons, 2022, p.79).

English courts will uphold these contractually incorporated hardship clauses as long as they are sufficiently clear and precise. They must effectively capture the nature and impact of the economic hardship they intend to address. The definition of hardship in these clauses varies, from general references to hardship to more specific criteria, such as financial thresholds (Symons, 2022, p.80).

A significant case, Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co. Ltd. v. British Gas Corporation, considered the interpretation of a typical hardship clause. It clarified that "substantial hardship" should refer to a serious and lasting impact, not a temporary or short-lived issue. The relief provided should aim to offset or alleviate the entire substantial hardship suffered (Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co. Ltd. v. British Gas Corporation, 1982, par. 262, 264–265).

These hardship clauses should also establish a mechanism for referring disputes about price adjustments to an independent third party, ensuring enforceability. Objective criteria for determining necessary adjustments are essential. In Associated British Ports v. Tata Steel UK Limited, the parties had a clause allowing for renegotiation in the event of major changes in circumstances. The court upheld the clause, rejecting arguments of uncertainty. The arbitrator could determine reasonable amendments within defined parameters, making the clause legally binding (Associated British Ports v. Tata Steel UK Limited, 2017, par.55-60).

The question remains whether economic hardship should be assessed at the contract level only or in the context of the affected party's overall financial health. While the Superior Overseas case focused on party-level hardship due to price fluctuations, it is possible that judges may interpret hardship more flexibly, considering it at the contract level. The decision in Superior Overseas did not set a rigid standard, leaving room for a more adaptable approach.

*Force-majeure vs supervening impossibility/illegality*

The doctrine of supervening impossibility of performance is a well-established principle that typically extinguishes or suspends contractual obligations when performance becomes impossible through no fault of the party involved. However, this doctrine is not an absolute defence and may not always be available to parties, as demonstrated in the case between Freestone Property Proprietary Limited and Remake Consultants CC (Freestone Property Proprietary Limited and Remake Consultants CC, 2021, par.23-98).

In this case, Freestone Property (the lessor) and Remake Consultants (the lessee) had entered into two lease agreements for commercial premises. The COVID-19 pandemic led to the declaration of a National State of Disaster on 15 March 2020. Although the "hard lockdown" ended

on 30 April 2020, Remake Consultants only resumed trading in June or August 2020. In November 2020, Freestone Property terminated the lease agreements due to non-payment of rent and other charges.

Remake Consultants' primary defence was based on the assertion that the parties' obligations were suspended from March to June 2020, and their respective obligations became impossible to perform due to supervening impossibility resulting from the state of disaster declaration, which rendered it unlawful for both the lessor and the lessee to fulfil their obligations.

The court had to determine the impact of the state of disaster declaration and its associated regulations on the lease agreements within the context of the doctrine of supervening impossibility of performance. The court emphasized that the assessment of this defence should consider its effects on both parties' ability to perform their obligations.

Applying this approach, the court made the following findings:

1) Impossibility of performance should be assessed from a broader perspective, taking into account the specific facts, nature of performance, and the party's business.
2) Supervening impossibility can only be invoked when it was objectively and totally impossible to perform, such as during the "hard lockdown". The principle of reciprocity ensures that lessees receive relief in rental payments when lessors cannot provide vacant possession.
3) "Vis major" or an unforeseeable event must be the direct and immediate cause of the lessee's inability to use the leased premises.
4) Economic hardship or a reduced commercial appeal for a party's payment obligations does not constitute "impossibility" (Freestone Property Proprietary Limited and Remake Consultants CC, 2021, par.23-98).

Based on this, defence was dismissed.

Nonetheless, parties can contractually regulate the position in cases of supervening impossibility of performance, and the doctrine will not apply if the contract provides otherwise.

*Force-majeure vs Act of God*

The key distinction between "Act of God" and "Force Majeure" lies in their scope. "Act of God" typically pertains only to natural events, whereas "Force Majeure" encompasses both natural occurrences and events caused by human intervention. Despite this difference, both concepts lead to similar legal outcomes (Symons, 2022, p.54).

For example, a shipping contract may include a Force Majeure provision that accounts for natural disasters like tsunamis. Events such as war, riots, natural disasters (Acts of God), labour strikes, the implementation of new government policies leading to a ban, boycotts, the outbreak of pandemics, and more are commonly listed under Force Majeure.

*"Excuse due to an impediment" under DCFR*

The authors of the DCFR took a much wider approach in relation to some events, which are beyond the control of the parties. In the commentary to the DCFR, it is stated that the concept of impossibility in contract law has evolved to encompass various forms of impossibility. Apart from factual impossibility, which arises when, for example, a painting to be delivered is destroyed by fire, and practical impossibility, such as delivering a ring that has sunk to the bottom of the ocean, the legal framework also recognizes moral impossibility. An example of moral impossibility is when an actor refuses to perform because they need to attend to their dying spouse. Additionally, there are situations where the debtor can only fulfil their obligation by violating a legal prohibition, like exporting currency, which is closely related to the doctrines of illegality and public policy. These legal principles can render the entire contract invalid (von Bar, 2009, p.815).

In the context of modern contract law, Article III-3:104 of the DCFR reflects the contemporary understanding of contractual excuses. It outlines a general rule for excuses, which are defined as impediments to performance that are beyond the debtor's control and could not have been reasonably avoided or overcome. This article can be seen as a redefinition of the overarching requirement for attributing impediments. Notably, it places a particular focus on impossibility, as it provides specific regulations for both temporary and permanent impediments.

In practice, parties entering into contracts have the flexibility to define which causes are or are not legally attributable to the debtor through the inclusion of a force majeure clause. Such a clause simplifies the determination of whether an impediment constitutes a valid excuse and enables parties to allocate contractual risks as they see fit, allowing for more precise contractual arrangements.

In situations where one party in a contract fails to fulfil their obligations, it is typically a legal requirement for the other party, known as the creditor, to inform the non-performing party, or debtor, of this non-performance. This notification serves several important purposes. Firstly, it acts as a warning to the debtor, who might not even be aware of the non-performance, for instance, if a package they were expecting has not been delivered. Secondly, it allows the debtor an opportunity to rectify the non-performance. Additionally, this notification enables the debtor to make the argument that the non-performance was caused by circumstances beyond their control, which legally constitute force majeure (von Bar, 2009, p.816).

During this process of communication and potential dispute resolution, the creditor has the option to withhold their own performance. Essentially, this means that they deliberately refrain from fulfilling their own counterobligation in order to assert their right to the unfulfilled obligation. This practice is in line with Article III-3:401 of the DCFR (Draft Common Frame of Reference) and aligns with the principles of modern codifications.

*Provisional remarks*

The differences between Force Majeure, Frustration, Supervening Impossibility, Hardship, "Act of God", and "Excuse due to an impediment" under the DCFR can be summarized as follows:

1. Force Majeure:

1) Force majeure is a contractual clause that allows parties to a contract to be excused from their obligations in case of unforeseen and uncontrollable events.
2) It must be explicitly included in the contract or exist in a legislation.
3) It provides a predefined mechanism for handling unforeseen events and often includes a list of specific events that qualify.
4) Force majeure clauses can be more flexible and adaptable as they are negotiated and agreed upon by the parties.

2. Frustration:

1) Frustration is a common law doctrine that allows a contract to be discharged if an unforeseen event renders it impossible or radically different from what the parties intended.
2) It does not need to be explicitly mentioned in the contract and can be invoked in the absence of a force majeure clause.
3) Frustration relies on common law principles and is less predictable, often requiring a legal assessment of the specific circumstances.

3. Supervening impossibility/illegality:

1) Supervening impossibility/illegality is a legal doctrine that applies when the performance of a contract becomes impossible due to no fault of the party.
2) It can lead to the suspension or discharge of contractual obligations.
3) Like frustration, it is not based on a contractual provision and is assessed under legal principles.

4. Hardship:

1) Hardship refers to a situation where unforeseen circumstances make a contract significantly more burdensome for one party, but not impossible.
2) It is not a ground for contract discharge, but it may lead to contract modification.
3) Parties can address hardship through contract clauses, such as economic hardship provisions.

5. "Act of God" specifically pertains to natural occurrences, while "Force Majeure" encompasses both natural events and exceptional situations resulting from human actions. Illustrations of Force Majeure comprise instances such as the outbreak of a contagious disease, government-imposed lockdowns, or wartime conditions.

6. "Excuse due to an impediment" under the DCFR:

1) The DCFR provides a legal framework that excuses a party from performing a contract when an impediment beyond their control prevents performance.
2) This concept is based on civil law principles and aligns with the broader European legal framework.
3) It is more structured and relies on a clear legal framework, similar to the force majeure clause in common law jurisdictions.

In our opinion, there is no necessity to have all these terms in one legal system because it just created more confusion. Using a broad term like "Excuse due to an impediment" simplifies contractual language by providing a general and inclusive mechanism for addressing unforeseen events. This simplicity makes the contract more accessible to a broader audience, as parties do not need to navigate specific legal jargon associated with detailed lists or doctrines. The term's flexibility allows parties to apply it to a range of situations without being restricted by predefined categories or conditions. This adaptability is particularly advantageous in dynamic business environments where the nature of potential impediments may vary widely.

### 1.3. Legal implications of force-majeure in contract law

*General suggestions*

The implications for a contract in the case of force majeure can vary depending on the specific terms of the contract and the applicable laws. The most common implications for contracts when a force majeure event occurs:

1. Temporary Suspension of Obligations. One of the primary implications of a force majeure event is the temporary suspension of contractual obligations for the affected party. This means that the party unable to perform due to the force majeure event is excused from its obligations until the event subsides or is no longer an impediment (Rowan, 2012, p.112).
2. No Liability for Non-Performance. The affected party is not held liable for non-performance during the force majeure event. This typically includes a suspension of obligations such as delivery, payment, or other contractual duties (Cartwright, 2016, p.57).
3. Notice Requirements. Many contracts with force majeure clauses require the affected party to provide notice to the other party regarding the occurrence of the force majeure event and its impact on performance. Failure to provide timely notice may affect the affected party's ability to rely on the clause (McKendrick, 2023, p.315).

4. Mitigation. While the affected party is excused from performing its obligations during the force majeure event, it may still have a duty to mitigate its losses or make reasonable efforts to perform if possible. Parties cannot simply stop performing without justification (McKendrick, 2023, p.316).
5. Extension of Deadlines. Force majeure events may lead to an automatic or negotiated extension of deadlines or timeframes specified in the contract. This extension allows parties to complete their obligations once the force majeure event subsides (Kötz, 1997, p.279).
6. Termination of the Contract. In some cases, a protracted force majeure event may give either party the right to terminate the contract if performance becomes impossible or impracticable due to the event. The contract or force majeure clause should outline the conditions for termination (Farnsworth, 2012, p.13).
7. Price Adjustments. Depending on the nature of the contract, price adjustments may be necessary due to the force majeure event. For example, in long-term supply contracts, a force majeure clause might allow for price adjustments based on increased costs incurred as a result of the event (McKendrick, 2023, p.316).
8. Duty to Provide Evidence. The party invoking the force majeure clause often bears the burden of proving that the event satisfies the clause's requirements, such as demonstrating the causal link between the event and non-performance (McKendrick, 2023, p.318).
9. Force Majeure Termination. Once the force majeure event ends, the affected party typically resumes its contractual obligations. However, the duration of suspension may affect the parties' overall performance timeline (Beale, 2019, p.158).

Interesting approach is taken in France. Article 1351 of the French Civil Code states that when impossibility of performance is due to force majeure and is definitive, the debtor is released from their obligations unless they have agreed to perform or have received prior notice of default. Article 1351-1 of the Civil Code adds that if the impossibility of performance results from the loss of the subject matter of the obligation and the debtor has been put in default, they can still be discharged if they can prove that the loss would have occurred in the same way even if the obligation had been performed. However, the debtor must assign the rights and actions related to the subject matter to the creditor (Cartwright, 2017, p.316).

It is the responsibility of the contractor invoking force majeure to demonstrate that the conditions of force majeure are met. This includes showing the impossibility of implementing measures that would allow them to fulfil their obligations and establishing a causal link between

an event and their inability to perform their obligations, subject to any additional terms specified in the particular contract.

*DCFR's approach*

When a temporary impediment to performance aligns with the previously outlined requirements, it relieves the debtor from liability for as long as it persists. Consequently, the creditor cannot demand specific performance or claim damages for non-performance during this period. However, the creditor can withhold the fulfilment of reciprocal obligations or reduce the payable price, or in cases of fundamental non-performance resulting from the impediment, terminate the contract (von Bar, 2009, p.816).

For instance, if party A has leased a warehouse to party B, and the warehouse is partially destroyed by fire (creating a temporary impediment), party B can terminate the lease if full occupancy of the premises was a crucial part of the agreement. Without serving a termination notice, party B cannot seek damages for the loss of occupation, but the rent can be proportionately reduced.

A temporary impediment includes not only the circumstances leading to the obstacle but also their ensuing consequences, which might last longer. The excuse applies throughout the period in which the debtor cannot perform. However, there might be situations where delayed performance is of no benefit to the creditor. Therefore, the creditor has the right to terminate if the delay is fundamentally significant.

For instance, if an impresario in Hamburg has contracted a famous English tenor to sing at the Hamburg Opera from October 1 to 31, and the tenor falls ill (constituting an impediment), informing the impresario that they cannot come before October 10. If the tenor's presence for the entire month is deemed essential, the impresario can terminate due to fundamental non-performance. If not, both parties' obligations remain in effect for the remaining period, but the tenor's fees are proportionately reduced (von Bar, 2009, p.818).

In cases of a temporary excuse, the creditor can serve a notice specifying an additional performance period with a termination right if no performance occurs within that period. If the excusing impediment is permanent, the obligation is extinguished. Automatic termination is provided in this scenario to avoid the requirement of termination by notice, which would be unnecessary and impractical. Automatic termination applies to both the obligation in question and any reciprocal obligation. Restitutionary effects and specific rules on risk passing also play a role in determining whether an obligation is extinguished or the reciprocal obligation remains due, for instance, in the case of transferring ownership of goods (von Bar, 2009, p.820).

Determining whether an impediment is temporary or permanent depends on the nature of the obligation. In some cases, even if the cause of the impediment is not permanent, late

performance may effectively render it impossible, regardless of the creditor's stance on the delay. In such instances, the impediment may permanently prevent the obligation's performance.

For example, in the previous illustration, the tenor is injured in a car crash and confined to a hospital bed for at least six weeks, two days before the opera's first night. He immediately notifies the impresario. Despite the hopeful expectation that his condition is not permanent, there is a permanent impediment to the performance obligation (von Bar, 2009, p.820).

When the debtor's obligation is extinguished, any reciprocal obligation of the creditor is also extinguished. In cases where one of the debtor's obligations is extinguished, and the creditor has to pay a price for the performance of all of them, the remedy of price reduction may come into play. For instance, a company is obligated to plant trees on three islands for a landowner. One of the islands disappears due to a geological event, and the landowner had a reciprocal obligation to pay for the work. If the obligation was to pay a separate sum for planting on each island, then the obligation to pay for the planting on the sunken island is entirely extinguished. If the obligation was to pay a lump sum for the entire work, but the landowner is willing to accept performance on the two remaining islands, then the landowner can reduce the price (von Bar, 2009, p.821).

In some cases, the extinguished obligation of the debtor is just one of several obligations under a contract, and the performance of the remaining obligations has become valueless to the creditor due to the extinguished one. In such instances, the creditor may choose to terminate the entire contractual relationship for fundamental non-performance (von Bar, 2009, p.822).

Another reason for providing for the extinction of the obligation, rather than allowing it to continue in limbo, is that extinction triggers the provisions of the restitutionary effects of prematurely ended obligations. When an obligation affected by a permanent impediment is excused from further performance entirely and permanently, one party may have supplied something to the other. In such cases, requiring restitution of the benefit or payment of its value is a fair solution (von Bar, 2009, p.822).

*Provisional remarks*

Implications for contracts in case of force majeure in Europe, including under the DCFR, typically involve temporary suspension of contractual obligations, no liability for the affected party during the event, notice requirements, a duty to mitigate losses and make reasonable efforts to perform if possible, possible extension of deadlines, termination rights in prolonged or extreme events, price adjustments in long-term contracts, determination of governing law and jurisdiction, burden of proof on the party invoking force majeure, resumption of obligations after the event, and dispute resolution procedures.

The DCFR provides a unified framework for handling force majeure situations in European contract law, but specific implications may still vary based on contract terms and applicable national laws.

# PART II. FORCE-MAJEURE AND WAR

## 2.1. Acts of War as force-majeure

*General concept of war*

The concept of war is defined as organized collective violence that affects relations between societies or power dynamics within a society. It is governed by international humanitarian law, a set of rules and principles aimed at regulating the conduct of armed conflicts. This legal framework has deep historical roots and is present in various cultures, religions, and traditions. Throughout history, leaders have established rules and taboos to differentiate between permissible and prohibited actions in warfare, with the goal of maintaining control, discipline, and efficiency within military forces and mitigating the physical and mental harm to combatants. These rules also facilitate the reintegration of combatants into society after the conflict concludes (Reydams, 2006, p.733)

Early laws of war were regionally specific and depended on cultural similarities between opposing parties. However, the concept of "just wars" or "holy wars" highlighted the complexity of this phenomenon, gradually shifting from justifying the war itself to regulating the means used in warfare. European legal scholars converted moral principles into legal rules, laying the foundation for contemporary universal codification. Modern international law incorporates these traditions, granting them a universal character and restricting the conditions under which a state can resort to force. It also limits the means and methods of warfare, irrespective of the objectives pursued (Coverdale, 2004, p.229-242).

International humanitarian law has adapted to the changing nature of warfare. Initially focused on interstate conflicts with well-defined armies, it has extended its scope to provide greater protection for civilians and to establish rules applicable to internal conflicts. The law of international armed conflict has evolved over centuries, with many rules now considered customary and binding even on states or belligerents that have not formally accepted them (Gaggioli, 2013, p.4-5).

The roots of positive international law are traceable to the nineteenth century when the laws were primarily written by states to regulate interstate wars and protect the rights of soldiers. The evolving nature of conflicts in the past fifty years, including guerrilla warfare and asymmetrical conflicts, has led humanitarian law to adapt and enhance the protection of civilians and the rules governing internal armed conflicts (Gaggioli, 2013, p.7).

This evolution is notably reflected in the Fourth Geneva Convention of 1949 and the two 1977 Additional Protocols, which emphasize the importance of customary practices in shaping humanitarian law. The term "war" is no longer commonly used in international law, with

"international armed conflict" referring to wars between states and "non-international armed conflict" to civil wars. A certain level of violence is required to qualify a situation as an armed conflict, with lower-intensity situations being labelled as "internal disturbances" or "tensions" (Gaggioli, 2013, p.2).

The determination of the existence of an armed conflict is governed by specific legal conditions, with distinct criteria for non-international armed conflicts compared to international armed conflicts. A non-international armed conflict occurs between a state and organized armed groups, or among such groups. Two essential legal requirements define a non-international armed conflict.

First, the level of violence must reach a certain intensity, as armed conflicts trigger the applicability of international humanitarian law, which allows for the use of force under circumstances different from international human rights law. The distinction between non-international armed conflicts and other forms of internal disturbances hinges on this intensity requirement. Second, non-state actors involved in the non-international armed conflict must demonstrate an organized armed force capability, including organizational and command structures and the capacity to use military force (Gaggioli, 2013, p.18-19).

The problem with correct applying of these criteria can be seen in relation to situation in Ukraine from 2014 to 24th February 2022, when formally Russia did not declared its participation in the occupation of Crimea and eastern region of Donbas. Thus, even in Ukraine it was problematic to apply force-majeure clauses because of acts of war (Nikolov, 2022).

Notably, there is no requirement for a specific level of force intensity to classify a situation as an international armed conflict; the key criterion is the use of armed force. Therefore, even the mere crossing of a national border by armed forces can lead to an international armed conflict without actual combat. Reports of Russian tanks in rebel-controlled areas indicate Russia's direct involvement in hostilities, either through direct participation or logistical support. An international armed conflict can also arise from total or partial occupation, even in the absence of armed resistance, as seen in the case of Crimea's illegal annexation by Russia (Walker, 2023, p.14).

In conclusion, it is undeniable that the situation in Ukraine up to 24th February 2022 constitutes an armed conflict, but whether it is of international or non-international nature remains uncertain. While it is likely, it is challenging to confirm with absolute certainty the extent and form of Russian involvement to definitively categorize the conflict. Nevertheless, acknowledging the situation in Ukraine as a war sets legal boundaries for responses and sustainable solutions in addressing the conflict, including “activation” of force-majeure clauses.

*Historical examples*

Force majeure clauses in contracts serve to excuse or delay performance without incurring liability, and "acts of war" are often included in these clauses. However, the interpretation of "war" for force majeure purposes has evolved over time. Before World War II, it typically referred to formally declared wars between nations, with a distinction between acts of war and states of war (Symons, 2022, p.85).

The American experience is quite illustrative in this regard and can be applied by European countries. The attack on Pearl Harbour in 1941 marked a shift in this thinking. Courts began to interpret "war" more broadly, encompassing any type or kind of war involving human life. This change was reflected in legal decisions, recognizing that contractual parties did not specify a particular type of war in their agreements. Notably, in the case of New York Life Ins. Co. v. Bennion, the U.S. Court of Appeals for the Tenth Circuit clarified this shift, emphasizing the broad interpretation of "war" (New York Life Ins. Co. v. Bennion., 1946, par.262).

In more recent cases related to the Iraq war, courts excused non-performance when factors such as the withdrawal of UN inspectors, hostilities preventing required inspections, and the absence of reasonable substitute performance were present. One such case is Hilaturas Miel, S.L. v. Republic of Iraq, in which the Southern District of New York excused non-performance due to the impending Iraq war (Hilaturas Miel, S.L. v. Republic of Iraq, 2008).

These cases highlight the evolving understanding of force majeure in the context of armed conflicts. When evaluating whether the conflict in Ukraine triggers a force majeure clause or related defence, it involves a fact-specific analysis of contractual language, the relationship between the conflict and a party's performance or non-performance, and the foreseeability of the conflict. Additionally, differences in contract interpretation laws across jurisdictions can affect whether performance is excused.

As with all force-majeure clauses, to invoke acts of war as force majeure, the following conditions are typically necessary:

1. The contract must have a force majeure clause. The contract should explicitly include acts of war as qualifying events under the force majeure provision.
2. Unforeseeability and impossibility. The acts of war must be unforeseeable at the time of contract formation, and they should render the performance of the contract impossible or significantly more difficult.
3. Causation. There should be a direct link between the acts of war and the inability to fulfil the contract's obligations.
4. Notification. The party seeking to rely on force majeure is often required to provide timely notice to the other party about the event and its impact on the contract.

5. Mitigation. Parties may also be obligated to take reasonable steps to mitigate the effects of the force majeure event (Symons, 2022, p.81-115).

If these conditions are met, acts of war can serve as a valid reason for invoking force majeure, allowing the affected parties to temporarily suspend or modify their contractual obligations until the situation stabilizes. This legal concept provides a safety net for parties in contracts when unforeseen and uncontrollable events, like acts of war, disrupt their ability to perform their contractual duties.

We should also distinguish legal implications of war in relation to frustration, hardship, and supervening illegality.

In the midst of war, parties may find that the fundamental purpose of their contract is no longer achievable due to the conflict. For instance, supply chains may be disrupted, making it impossible to deliver goods, or governmental regulations related to the war may render the contractual obligations illegal. To successfully claim frustration, a party must demonstrate that the war has rendered the contract radically different from what was initially agreed upon, making performance impracticable or impossible. In this case, contract is automatically terminated – it is not a question of liability as in the case of force majeure.

War often brings economic challenges such as currency fluctuations, trade restrictions, and increased costs. Parties facing financial hardships due to the war may turn to hardship clauses if included in their contracts. These clauses allow for the renegotiation of terms to alleviate economic burdens. However, the exact conditions triggering hardship and the extent of relief can vary based on contractual provisions and applicable laws.

The outbreak of war may lead to changes in laws and regulations, making certain contractual obligations illegal or impracticable. Parties affected by these legal changes can invoke the doctrine of supervening illegality to be excused from fulfilling obligations that have become unlawful due to war-related legal developments. The application of this doctrine depends on the specific legal landscape and the nature of the contractual obligations. In this case, contract is automatically terminated – the same outcome as with frustration.

### 2.2. Sanctions and Supervening Illegality

*Common law*

Earlier in this thesis, it was mentioned that in contrast to force majeure, the concept of frustration is a legal doctrine that is implicitly applied to a contract. It comes into play when a contractual obligation becomes impossible to perform in a way that fundamentally changes what was originally agreed upon in the contract (Davis Contractors Ltd v Fareham UDC, 1956). When a contract is frustrated, the parties' obligations are completely discharged. If the contract accounts

for the frustrating event, such as through a force majeure clause, it is likely that the parties have already allocated the risk, which would typically exclude the application of frustration.

There have been instances where the outbreak of war has led to contract frustration, particularly when performance becomes unlawful due to government regulations related to wartime supply restrictions (Denny Mott & Dickson Ltd v James B Fraser & Co Ltd, 1944; Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd, 1943).

Supervening illegality of performance, such as due to trade sanctions, often leads to contract discharge. This is especially evident in English law contracts where the core contractual obligation is clearly prohibited by English sanctions, or when performance is illegal in the place where it should occur. The same principle typically applies when illegality arises under the laws of a third country, although challenges may arise when there is inconsistency between UK, European Union, and US sanctions rules. Nonetheless, illegality under a third country's laws often renders performance impossible or fundamentally different, justifying a claim for contract discharge due to frustration (Symons, 2022, p.101).

In cases where the decision not to perform is not a direct result of a supervening frustrating event but rather stems from broader changes affecting performance viability, different considerations come into play. This scenario may apply to businesses contemplating a temporary or long-term withdrawal from the affected market (for example, in Russia or Iran), and such situations require careful assessment on a case-by-case basis.

Circumstances of 'common law illegality' pertain to situations where the formation, purpose, or execution of a contract is illegal or violates public policy, justifying the denial of enforcement. This is evident in the case of Okedina v Chikale (Okedina v Chikale, 2019). Determining whether performance should be refused on grounds of common law illegality necessitates evaluating the public interest, considering factors like (a) the underlying purpose of the violated prohibition, (b) the impact on public policies, and (c) whether denying the claim is a proportionate response, as highlighted in Patel v Mirza (Patel v Mirza, 2016, par.15-85).

In an international context, English courts refrain from enforcing English law contracts when the performance is prohibited by the law of the place of performance, even if it aligns with English law. A precedent example is Ralli Bros v Compania Naviera Sota y Azmar, which illustrates how an English law freight contract was not enforced when it required the delivery of goods in Spain, and the freight charges exceeded legal limits in Spain (Ralli Bros v Compania Naviera Sota y Azmar, 1920).

Furthermore, laws from jurisdictions other than the place of performance can also come into play. In one instance, an English borrower was justified in refusing to make scheduled interest payments under an English law loan facility to a Russian-owned bank based in Cyprus, blocked

under U.S. secondary sanctions. The loan facility allowed the borrower not to be in default if amounts were not paid 'to comply with any mandatory provision of law. This scenario is exemplified by Lamesa Investments Ltd v Cynergy Bank Ltd (Lamesa Investments Ltd v Cynergy Bank Ltd, 2020).

Frustration hinges on whether complying with the explicit terms of the contract differs substantially from what the parties reasonably anticipated at the time of its formation. Various factors, such as the contract's terms, context, parties' expectations during formation, the nature of the intervening event, and reasonable calculations concerning future performance, are considered, as exemplified by National Carriers v Panalpina (National Carriers v Panalpina, 1981) and Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Storage) Ltd (The Sea Angel) (Edwinton Commercial Corporation v Tsavliris Russ, 2007).

Achieving success with a frustration claim in English courts is challenging. For instance, recent case law indicates that frustration does not apply when a contract remains legal, but its utility to a party is frustrated by intervening governmental actions, particularly if the aggrieved party assumed the relevant risk under the contract, as exemplified by Salam Air SAOC v Latam Airlines Groups SA, where English law aircraft leases were not frustrated due to COVID-related restrictions on air passenger flights in the lessee's home country, especially when the contract language allocated commercial risks to the lessee (Salam Air SAOC v Latam Airlines Groups SA, 2020).

Another type of relevant cases are cases involving international banking and their relation to sanctions. An early example involves an English bank operating through its Jerusalem branch, facing difficulties in making payments to its account customer located in Arab-controlled territory after the cessation of the British mandate and the formation of the State of Israel in 1948. The court ruled that the account agreement, governed by English law, was not frustrated, and the plaintiff bank should seek recovery from the custodian under terms set in Israeli legislation (Arab Bank Ltd v Barclays Bank, 1954).

Another banking case arose from the U.S. sanctions against Libya in 1986, freezing Libyan property in the United States and possessions or control of U.S. persons, including overseas branches of U.S. banks. A U.S. bank operating through London and New York branches argued that making payments to its Libyan customer would constitute an illegal act in the United States. The court ruled that the account agreements were not frustrated, and the parties were not discharged; rather, the payment obligation was suspended (Arab Foreign Bank v Bankers Trust Co, 1989).

English courts do not grant frustration of contract where applicable sanctions allow affected parties to apply for derogations, and if no attempt has been made to request a derogation (Melli Bank plc v Holbud Ltd, 2013).

Additionally, English law does not favour entities subject to sanctions that claim supervening sanctions render the repayment of pre-existing debts illegal or discharged (DVB Bank SE and others v Shere Shipping Company Ltd and others, 2013). The court's stance is reflected in the view that the regulations' broad intent does not exempt large sums of money advanced before the regulations were established from repayment.

*Germany*

Under German law, contractual performance is subject to various legal considerations, including legality, feasibility, and practicality. German law makes a distinction between contracts that violate explicit legal prohibitions and other administrative regulations. The treatment of international sanctions is crucial within this framework, as is the differentiation between foreign laws that are deemed "overriding mandatory provisions" and those that are not (Markesinis, 2006, p.58).

German law takes a stringent approach to contracts that contravene legal prohibitions. If a contract is formed in direct violation of legal prohibitions, it is considered null and void (nichtig). This aligns with the policy considerations embedded in the concept of illegality, making a distinction between prohibitive laws (Verbotsgesetze) and other regulations (Ordnungsvorschriften) based on their purposes, with sanctions often categorized as prohibitive laws (Markesinis, 2006, p.59).

However, if a performance, initially permissible, subsequently becomes illegal due to intervening sanctions, the contract does not become void. Instead, a party may be entitled to refuse performance based on the principles of impossibility or impracticability (Markesinis, 2006, p.61).

The relevant provisions for refusing performance are outlined in §275 of the German Civil Code. These provisions address situations where performance is impossible for the obligor or where it would necessitate disproportionately high expenses and effort. When determining the obligor's obligations, various factors are taken into account, including the subject matter of the obligation, good faith, and the obligor's responsibility for the performance obstacle.

While a determination of impossibility (§275(1) BGB) primarily assesses the feasibility of performance, a determination of impracticability, both generally (§275(2) BGB) and for personal services contracts (§275(3) BGB), involves a more comprehensive evaluation of the relevant circumstances based on reasonableness and good faith. It is important to note that establishing impracticability has a high threshold, with performance excused only in exceptional cases where the cost of performance significantly outweighs the other party's interest. If a party refuses

performance, the other party may have the right to terminate the contract, and the non-performing party may be liable for damages if responsible for the circumstances leading to non-performance (Markesinis, 2006, p.63).

German law also considers the impact of foreign laws on contractual performance, particularly when conduct becomes unlawful under foreign laws. German law distinguishes between "overriding mandatory provisions" as defined in Article 9 of the EU's Rome I Regulation and other foreign laws.

Overriding mandatory provisions, defined in Article 9 of the Rome I Regulation, are rules considered essential for safeguarding a foreign country's public interests. The impact of these provisions is acknowledged if they apply at the place of performance and render performance unlawful. However, their application is carefully evaluated based on the nature, purpose, and consequences.

Foreign laws that do not qualify as overriding mandatory provisions are subject to a distinct analysis. The line between legal or practical impossibility, on one hand, and impracticability, on the other, is not always clearly defined.

To illustrate these legal principles, we can refer to various case law examples:

1. In a case involving currency regulations in a Soviet-occupied zone, German courts found that even if these regulations did not directly apply in West Germany, the practical impossibility of making payments due to currency restrictions justified non-performance (BGH Ia ZR 273/63, 1965).
2. There have been instances where German courts declined to excuse performance based on impossibility or impracticability. For instance, when the import of goods was impossible due to licensing requirements, the courts ruled that this did not excuse performance because the importation was not the primary object of the contract (BGH VIII ZR 77/82, 1983).
3. A Kuwaiti airline was permitted to refuse boarding to an Israeli passenger on a flight from Germany to Thailand. The airline justified its action by citing a Kuwaiti boycott law that prohibited the transportation of Israeli passengers, accompanied by severe penalties for non-compliance. Although the Kuwaiti law did not apply in Germany, the crucial factor was that the flight included a stopover in Kuwait, and the airline could potentially face penalties under its home state's laws. This circumstance was deemed sufficient to excuse the airline's performance (LG Frankfurt am Main, 2-24 O 37/17, 2017).
4. In a 2011 case, a situation arose where parties found themselves entangled in conflicting obligations due to the extraterritorial reach of sanctions. The case involved

a German bank, which was subject to both U.S. and EU sanctions related to Iran. This bank initiated a fund transfer on behalf of two German customers, with the recipient being a U.S. bank operating in Germany. The U.S. bank, however, processed the payment through its London branch, resulting in the funds being blocked. The EU sanctions stipulated that the funds should be released to the German Bundesbank for further handling, but the U.S. sanctions regulations required OFAC approval for such a release, which was not obtained. In this complex situation, the Frankfurt Higher District Court decided that the funds should be released to the Bundesbank. The court's reasoning was based on the belief that U.S. authorities were unlikely to impose penalties given the specific circumstances of the case (OLG Frankfurt am Main, 23 U 30/10, 2011).

These case law examples emphasize the nuanced and context-dependent nature of contractual performance issues concerning international sanctions within the German legal system. Decisions are typically made on a case-by-case basis, considering the specific circumstances and applicable legal principles.

*Provisional remarks*

Both English and German legal systems as key jurisdictions, which represent common law and continental approaches, have distinct vision when it comes to the impact of sanctions on contracts. Moreover, these jurisdictions have extensive amount of judicial practice in relation to imposition of sanctions and their contractual effect, especially in relation to contracts with Russia: most of the gas was transferred to Germany, and the relevant contracts were very often governed by English law. In English law, sanctions can render a contract unenforceable if performance becomes illegal under the law of the place of performance, even if it was permissible under English law. Furthermore, English law can excuse performance if it would expose a party to penalties under U.S. secondary sanctions.

In contrast, German law provides for more nuanced considerations. It distinguishes between conduct that contravenes German or EU sanctions and foreign laws, often addressing the latter under the concept of "overriding mandatory provisions". When performance is unlawful under German or EU sanctions, it can be considered legally impossible. However, performance obligations that become unlawful under foreign laws might not automatically render a contract void, allowing parties to consider principles of impossibility or impracticability. German law also considers the application of Rome I Regulation, which can incorporate foreign laws where they affect performance. German courts generally do not easily excuse performance, demanding a high threshold to establish impossibility or impracticability.

In summary, while both legal systems address the impact of sanctions on contracts, they approach the matter differently, with English law having a more straightforward stance on illegality, and German law adopting a more intricate analysis involving foreign laws and overriding mandatory provisions.

The evaluation of whether the English law approach or the German law approach is better in addressing the impact of sanctions on contracts depends on the context and the goals of the legal system.

On the other hand, German law adopts a more intricate analysis, considering not only its own laws but also foreign laws and overriding mandatory provisions. While this approach may seem more complex, it allows for a nuanced consideration of various legal factors. It acknowledges the interconnectedness of international legal systems and aims to ensure justice by taking into account a broader range of legal considerations.

In our opinion, the preference for one approach over the other depends on the desired balance between legal certainty and a comprehensive analysis of legal nuances. The English law's straightforward stance may be preferable in situations where simplicity and clarity are paramount. In contrast, the German law approach may be favored when a more nuanced understanding of the interplay between domestic and foreign laws is crucial for achieving equitable outcomes in complex, cross-border contractual scenarios.

## PART III. CASE STUDY: FORCE-MAJEURE AND WAR IN UKRAINE

### 3.1. General suggestions and legal challenges

The ongoing war in Ukraine has raised a plethora of legal issues, particularly with respect to force majeure clauses in contracts. The war in Ukraine can be divided into two distinct stages: from the early 2014 to February 24, 2022, and after. This division can be important when examining the legal implications of force majeure during this prolonged period of war.

The war in Ukraine from early 2014 to February 24, 2022, was characterized by the annexation of Crimea by Russia and the ongoing war in Eastern Ukraine, involving Ukrainian government forces and Russian-backed separatists. During this period, many businesses and individuals encountered difficulties as the region was fraught with instability, violence, and economic challenges (Kofman, 2017, p.55-59).

Force majeure clauses in contracts became highly relevant during this period. These clauses provide parties with a legal mechanism to suspend or terminate their contractual obligations when extraordinary and unforeseeable events occur, rendering performance impossible or impracticable. The conflict in Ukraine sometimes qualified as such an event. Companies doing business in Ukraine, as well as Ukrainian businesses themselves, invoked force majeure clauses to mitigate their contractual responsibilities in light of the turmoil (Proskurnya, 2016).

The conflict's second stage, post-February 24, 2022, introduces new dynamics into the legal landscape. On that date, Russia launched a full-scale invasion of Ukraine, leading to a significant intensification of the conflict. This escalation had profound implications for the application of force majeure clauses. The post-February 24, 2022, conflict is much more clear force majeure event because of the scale of warfare, the widespread destruction, and the loss of life make. Consequently, parties to contracts in Ukraine found it almost impossible to continue their obligations due to the constant threat to human life and property.

While the conflict's status as a force majeure event may be less debatable, new challenges arise regarding the determination of when this stage of the conflict began and when it might end. The legal consequences of the war evolving from a localized dispute into a full-scale invasion are complex. Businesses operating in Ukraine faced issues surrounding the classification and interpretation of this stage of the conflict under their force majeure clauses.

To comprehend the challenges associated with force majeure during this extended period of unrest, it is imperative to examine these factors in detail.

I. Geography and its impact

Geography plays a pivotal role in understanding the legal problems arising from the Ukrainian conflict.

The conflict's geography has created distinct challenges for different regions. Western Ukraine has been relatively less affected than Eastern Ukraine, particularly the Donbas region. This geographical variation has resulted in different interpretations of force majeure, with some businesses in the West potentially being less inclined to claim force majeure due to their geographical distance from the conflict zone (Slobodianyuk, 2020, p.250).

The question of whether businesses in Ukraine knowingly took the risk of operating in a conflict-affected area is a significant issue. Some entities may have entered contracts with full awareness of the situation, possibly altering the applicability of force majeure. Courts may need to determine whether businesses willingly assumed the risk and whether force majeure is a legitimate remedy under such circumstances.

II. Deoccupation Efforts and Transition

The process of deoccupation and returning to normal business activity is a multi-faceted challenge.

The timeline for deoccupation varies across regions and stages of the conflict. Some areas may witness a faster deoccupation process, while others may remain in a state of conflict for an extended period. This temporal discrepancy raises the question of how long a force majeure status should persist, and when businesses can reasonably be expected to return to normal operations.

The transition from a force majeure situation to regular business activity is fraught with legal ambiguities. Contracts may not provide clear guidance on when force majeure ends and when parties must resume their obligations. Establishing criteria for this transition is vital, especially in areas where the conflict is less intense or receding.

III. Effective Control in Conflict-Affected Areas

The issue of effective control in conflict-affected areas further complicates the application of force majeure.

A notable legal problem arises when assessing areas under occupation. While some regions may be “officially” occupied, there are instances where certain business activities, like online English lessons, nevertheless may technically continue. Courts may need to determine whether force majeure can be claimed when business operations are feasible, even in occupied areas.

Considering the current situation in Ukraine, when formulating the description of force majeure, it is necessary to:

1. Detail the definition of war as a force majeure circumstance. The traditional definition of war may not be sufficient, given today’s hybrid forms of aggression. For example, it should be noted that “war” is not only a state where war is officially proclaimed, but also the conduct of hostilities by irregular and unidentified military formations, invasion without a declaration of war, military operations, etc. (e.g., in the international

legal sense, even after the 24th of February, 2022 the war between Ukraine and Russia has not been declared, but there is the fact of invasion, hostilities and occupation).

2. To take into account the latest methods of warfare – cyberattacks, disinformation operations, and local acts of sabotage.
3. To specify that military actions will also be considered as force majeure if they materially affect the fulfilment of obligations in territories other than those of actual hostilities. In this case, the basic qualifying attribute should be the material impact of hostilities on the ability of the affected party to fulfil its obligations.
4. To exclude from the procedures of application of the force majeure clause any additional negotiations and agreements between the parties – this may be objectively impossible in conditions of war.
5. To simplify the channels of communication; the exchange of letters and confirmation of their receipt may be physically inaccessible to the parties in time of war.
6. To detail the list of force majeure circumstances arising as a result of war: sanctions, disruptions in settlement systems, trade restrictions etc.
7. Clearly define procedures for notification, postponement of performance, termination of obligations, and determination of compensation.

### 3.2. Ukrainian contract law approach

The legal definition of force majeure is contained in Part 2 of Art. 14-1 of the Law "On Chambers of Commerce and Industry in Ukraine" dated 02.12.1997 No. 671/97-VR. Thus, force majeure circumstances are extraordinary and unavoidable circumstances that objectively make it impossible to fulfil the obligations stipulated in the terms of the contract, obligations according to legislative and other regulatory acts.

In its practice, the Supreme Court singled out the following elements of force majeure circumstances: 1) they do not depend on the will of the participants in civil (economic) relations; 2) have an extraordinary character; 3) are unavoidable; and most importantly – 4) make it impossible to fulfil obligations under the given conditions of economic activity (Resolution of the Supreme Court of January 25, 2022 No.904/3886/21).

That is, force majeure is considered as a circumstance of irresistible force, which the obligated party is unable to prevent. Accordingly, the improper performance of the contract is not a consequence of the wrongful actions and excludes the presence of fault, which is a mandatory condition for incurring liability for breach of obligation, unless otherwise established by the contract or law. Such a legal definition protects a person from liability for violations without fault, and is one of the fundamentals in civil law (Kotsiuba, 2020, p.6-7).

The concept of force majeure has been already the subject of scientific controversy and was analysed by courts in cases regarding economic activity in the so-called ATO (anti-terrorist operation) zone, and later in cases regarding quarantine restrictions caused by COVID-19.

To begin with, in Ukraine force majeure exempts from liability for non-fulfilment of an obligation (in particular, from fines and compensation for damages), but not from the obligation itself (that is, from the obligation to fulfil the obligation in kind). Conventionally speaking, if due to force majeure circumstances the developer did not have time to complete the construction within the agreed terms, then he is only exempted from paying the penalty and compensation for damages, but not from the obligation to complete the construction, as well as other obligations to the investor (Melnyk, 2018, p.151).

For the application of the relevant provisions, there must be a number of the following mandatory conditions:

1) the force majeure circumstance was unforeseeable at the time of conclusion of the contract;
2) the occurrence of force majeure did not depend on the will of the parties to the contract (it was beyond the control of the parties to the contract);
3) the consequences or effects of the force majeure event cannot be avoided or resolved;
4) circumstances of force majeure must belong to force majeure circumstances according to the contract or legislation;
5) there must be a cause-and-effect relationship between the circumstances of force majeure and the impossibility of performing the contract;
6) there must be a specific obligation between the parties, the term of which has expired during the existence of circumstances of force majeure (Melnyk, 2018, p.153).

*Execution of a monetary obligation*

Currently, it is quite common among individuals to ask whether they can legally not pay regular payments due to the war. In general, the answer to this question is negative.

Thus, Part 1 of Article 625 of the Civil Code of Ukraine contains a rule according to which the debtor is not released from responsibility for the impossibility of fulfilling a monetary obligation. The logic of this rule consists, among other things, in the fact that the lack of funds in itself does not affect the debtor's obligation to fulfil his monetary obligation.

Moreover, from the current wording of part 1, 2 of article 625 of the Civil Code, it can be concluded that even the technical impossibility of fulfilling a monetary obligation (for example, in the case of a complete or partial stoppage of the functioning of the banking system, technical problems of the bank itself, the impossibility of buying currency through currency restrictions) are not grounds for exemption from liability.

Incidentally, it should be noted that exemption from the fulfilment of a monetary obligation can be established by special legislation (a classic example is part 4 and 6 of Article 762 of the Civil Code regarding exemption from rent in the case when the possibility of using the property has significantly decreased/ the property could not be used by the lessee due to circumstances for which he is not responsible).

*UCCI letter and specific commitment*

Referring to force majeure as a basis for exemption from liability, the interested party must prove how exactly the force majeure manifested itself in a specific obligation. A mere abstract reference to the presence of force majeure will definitely not be enough. In particular, the decision of the Supreme Court dated 25.01.2022 in case No. 904/3886/21 on this matter states: "…*Force majeure circumstances do not have a prejudicial (predetermined) nature. When they occur, the party that refers to force majeure must prove it. The party referring to specific circumstances must prove that they are force majeure, including, specifically for a specific case. Based on the signs of force majeure, it is also necessary to prove their emergency and inevitability. The fact that force majeure circumstances must be proven does not exclude the fact that the existence of force majeure circumstances can be certified by the relevant competent authority*...".

In view of this, the abstract and general letter of the Ukrainian Chamber of Commerce and Industry (UCCI) dated February 28, 2022 regarding the certification of force majeure circumstances (circumstances of force majeure) caused by the military aggression of the Russian Federation against Ukraine does not meet the requirements for specifying the impact of the relevant force majeure circumstance on a specific obligation (and proving a causal relationship in such a case is mandatory) (Nikolov, 2022).

In this regard, we also note that, in principle, the presence of force majeure circumstances can be confirmed by any evidence, which, in the opinion of the court, will be sufficient for establishing the relevant circumstance. Therefore, one cannot agree with the widespread opinion that force majeure is the exclusive "jurisdiction" of the UCCI (Perepelynska, 2014). After all, the existence of force majeure is, among other things, a question of fact, and the legislation does not contain any restrictions on what kind of evidence can be used to confirm its existence.

The same position was taken by the Supreme Court, which in paragraph 44 of the resolution dated July 21, 2021 in case No. 912/3323/20 stated: "…*Courts of previous instances considered that the only evidence of the existence of force majeure is a certificate from the Chamber of Commerce, however, this position is erroneous. The existence of force majeure circumstances regarding the violation/non-fulfilment of obligations that arose as a result of the conclusion of a lease agreement between residents of Ukraine can be proven by any evidence*...". Bases on this, the Supreme Court admitted documents produced by the defendant's expert.

*Force majeure and terms of the contract*

The question of whether it is possible on the level of a contract to settle the issue of propriety and sufficiency of evidence that would confirm force majeure is problematic. For example, the parties can establish that force majeure can be confirmed only by a specific regional Chamber of Commerce and Industry, and the party, in turn, received a certificate from the UCCI (Central). At the same time, the parties could directly state in the contract that other documents are not accepted at all.

There is no unity on this issue at the level of judicial practice. On the one hand, in the decision of the Supreme Court dated 26.05.2020 in case No. 918/289/19, the court refused to recognize as proper evidence the conclusion and certificate of the Rivne Chamber of Commerce and Industry and a number of other documents, because the parties agreed that force majeure should be confirmed by a certificate of the Chamber of Commerce and Industry of Ukraine.

On the other hand, in the already mentioned resolution of the Supreme Court dated 25.01.2022 in case No.904/3886/21, the court took a more "liberal" approach to the information provided by the party. Although it formally justified his position by reference to the principle of interpretation "contra proferentem", because the parties in the contract ambiguously defined the appropriate body of the Chamber of Commerce and Industry, which should issue the certificate.

Our position on this issue is that in this case the parties cannot settle procedural issues in the contract. After all, proving the presence of force majeure is, among other things, proving a fact, and the parties cannot limit the means of proof in the contractual manner.

Moreover, the parties cannot limit the court in evaluating the evidence. Otherwise, it would be possible to include in the contract any clause that contradicts the procedural codes, and in the future, the parties would refer to the fact that in this way they are simply implementing the principle of freedom of contract. At the same time, freedom of contract is impossible where there are direct imperative norms, which we consider the norms of the procedural codes regarding the evidentiary procedure.

*Operational sanctions*

Apparently, the most difficult issue is the impact of force majeure on the possibility of applying operational sanctions.

In accordance with Article 611 of the Civil Code, in case of breach of an obligation, among other things, there are legal consequences established by the contract or the law, namely the termination of the obligation due to a unilateral refusal of the obligation (if it is established by the contract or the law), or termination of the contract.

According to the terminology of the Civil Code, such a unilateral termination (refusal) is an operational sanction. Thus, in accordance with Part 1 of Article 236 of the Civil Code, in

business contracts, the parties, among other things, may provide for the use of the following types of operational-economic sanctions: unilateral refusal of the managed party to fulfil its obligation, with the release of its responsibility for this — in case of breach of obligation by the other party.

To understand the essence of the problem with operational and economic sanctions, let us simulate the situation. Due to force majeure, the developer delayed the fulfilment of the obligation by 3 (three) months (there is no provision in the contract stating that in case of force majeure for a certain period, the party can unilaterally terminate the contract). The investor, without waiting for the end of such circumstances, unilaterally terminates the contract, because such a right is provided by the contract in the event that the delay lasts more than two months.

It would seem that the developer is not to blame for the delay in fulfilling the obligation, but the contract with him was terminated. Was such a termination legal?

On the one hand, Article 236 of the Civil Code is included in Chapter V of the Civil Code "Liability for breaches in the sphere of business". Part 2 of Article 217 of the Civil Code contains provisions according to which the following types of economic sanctions are applied in the field of business: compensation for losses; fines; operational economic sanctions (in turn, the title of the article implies that economic sanctions are a legal means of responsibility in the field of economy).

In addition, according to the dominant practice of the Supreme Court (for example, the decision dated 10.02.2021 in case No.194/1414/15-ц), civil liability is the imposition on the wrongdoer of unfavourable legal consequences based on the law, which consist in depriving him of certain rights or in replacing the non-fulfilment of an obligation with a new one, or in adding a new additional obligation to the unfulfilled obligation. Therefore, if operational sanctions are a measure of responsibility, then the norms on force majeure must be fully in effect.

On the other hand, in accordance with Part 3 of Article 235 of the Civil Code, operational sanctions are applied regardless of the fault of the entity that violated the economic obligation. In this regard, the Supreme Court in paragraph 24 of the decision dated 31.10.2018 in case No.905/2319/17 briefly noted that the application of operational sanctions is the right of a party and such a right is granted regardless of the fault of the other party, which, in case of disagreement, does not limited by the right to challenge such sanctions in court.

Similarly, in the decision of the Supreme Court dated March 27, 2018 in case No.916/1385/17, it is stated "*…clause 3 of Article 235 of the Civil Code establishes that operational sanctions are applied regardless of the fault of the entity that violated the economic obligation. The very fact of discovering a violation of the Rules by the plaintiff is the basis for applying to him an operative sanction on the basis of the Methodology, regardless of the consumer's fault in committing such a violation…*".

In general, this approach of the Supreme Court should be recognized as correct. First, the Commercial Code of Ukraine directly establishes that the application of operational sanctions is possible without fault. Secondly, the Civil Code of Ukraine also unequivocally opposes unilateral refusal of an obligation to liability measures (for example, in accordance with part 2 of Article 615 of the Civil Code, a unilateral refusal of an obligation does not exempt the guilty party from responsibility for breach of obligation). Thirdly, in the theory of civil and economic law, there is also a dominant (although not unequivocal) opinion that measures of operational response (protection) differ in their legal nature from measures of responsibility (Kotsiuba, 2020, p.130).

After all, de lege lata (from the point of view of current law) unilateral withdrawal from the contract does not depend on force majeure. However, de lege ferenda (from the point of view of “ideal” law), this approach, at least under martial law, may be worth reconsidering.

It is also interesting to notice that in the period from March 1 to August 1, 2022, Ukrainian courts issued 62 (sixty-two) decisions in business cases related to force majeure in wartime. At the same time, in only one court decision, the court recognized the war as force majeure. This is reported by Opendatabot, a platform for working with open data, referring to the data of its own research using the "Babusya" court decision search service (Pryshchepa, 2022).

As it turned out, in most cases the refusal was based on the following reasons:

1) the party cannot prove the direct influence of the war on the non-fulfilment of obligations, the emergency and the inevitability of the situation (the Supreme Court in the decision in case No.904/3886/21);
2) one party did not notify the other of the occurrence of force majeure in the manner stipulated by the contract (decision in case case No.912/507/22);
3) absence of a certificate of force majeure from the Chamber of Commerce and Industry. There is an official letter on the website of the Chamber of Commerce and Industry confirming that martial law is a force majeure circumstance, but according to the criteria of the law, it does not meet the requirements for force majeure certificates (decision in case No. 914/675/22);
4) in cases where the litigant tries to refuse to pay fines received even before the war (decision in case No. 910/3982/22).

*Final remarks*

It must be stated that the letter of the UCCI regarding the certification of force majeure circumstances of the aggression of the Russian Federation against Ukraine did not facilitate the legal procedure of certification of force majeure circumstances for the parties to the agreements. Moreover, this letter misleads the guilty party to the contract regarding the procedure for certifying force majeure circumstances and proving its position in court. The UCCI letter is only one of the

documents necessary to prove force majeure and release from responsibility for unfulfilled obligations during the force majeure circumstances. It is not an automatic and indisputable basis for releasing the guilty party of the contract from responsibility for its non-fulfilment.

In general, the judicial practice on the issue of force majeure has not changed since the beginning of the full-scale military aggression, and as of August 2022, only in 1 (one) case, the court recognized the war as a force majeure circumstance.

Now we should answer the following question: what can be implemented in Ukraine from discussed European experience and DCFR?

In terms of German experience, Germany's legal system, rooted in civil law, places a strong emphasis on legal principles. The German approach to force majeure typically involves a thorough legal assessment of circumstances leading to impossibility of performance. Ukrainian businesses can benefit from this structured approach, emphasizing clear legal criteria and principles in defining force majeure events.

English law, being a common law system, often relies on the explicit terms of the contract, including force majeure clauses. The English experience emphasizes the importance of clearly drafted contractual provisions, which provide parties with predictability and flexibility. Ukrainian contracts can benefit from adopting well-drafted force majeure clauses to ensure effective application in unforeseen events.

French law, also based on civil law principles, has a well-established legal framework for force majeure. The French approach focuses on unforeseeability and irresistibility. Ukrainian businesses may find value in aligning with the French practice by considering these factors when defining force majeure events in contracts.

The DCFR, while not yet adopted as a binding legal instrument, represents a harmonized framework for European contract law. Ukrainian businesses can draw on the DCFR's structured and comprehensive approach to force majeure, aligning their contracts with the principles outlined in this framework. The clarity provided by the DCFR can contribute to a more standardized understanding of force majeure events across European jurisdictions.

Leveraging experiences from Germany, England, France, and the DCFR allows Ukrainian businesses to adopt best practices that suit the country's legal context. This involves carefully drafting force majeure clauses that align with both international standards and Ukraine's legal system. Additionally, the experiences highlight the importance of considering both common law and civil law principles in developing a robust force majeure framework.

Understanding how these legal systems operate in practice provides practical insights for Ukrainian businesses. For instance, the German emphasis on legal assessment, the English reliance on contract terms, the French criteria of unforeseeability and irresistibility, and the DCFR's

comprehensive framework all contribute to a nuanced understanding of force majeure implementation.

By incorporating these relevant experiences, Ukrainian businesses can develop contracts that are not only legally sound but also reflective of European best practices. The goal is to create a flexible and predictable legal framework that effectively addresses force majeure events, contributing to the resilience of contractual relationships in the face of unforeseen circumstances.

In light of the current situation in Ukraine, the formulation of force majeure should consider and parties are recommended to:

1) Broad Definition of War. Expand the definition of war to encompass hybrid forms of aggression, including irregular military activities, invasion without formal declaration, and other unconventional hostilities.
2) Include Modern Warfare Methods. Acknowledge contemporary warfare methods such as cyberattacks, disinformation operations, and local acts of sabotage.
3) Clarify Territorial Impact. Specify that military actions will be deemed force majeure if they materially affect obligations in territories beyond those directly involved in hostilities. The key criterion is the substantial impact on the party's ability to fulfil obligations.
4) Exclude Additional Negotiations. Exclude additional negotiations and agreements between parties from force majeure procedures, recognizing their impracticality during wartime.
5) Simplified Communication. Streamline communication channels, considering that traditional methods like letter exchange may be physically inaccessible during wartime.
6) Expanded Force Majeure Circumstances. Detail force majeure circumstances arising from war, including sanctions, disruptions in settlement systems, and trade restrictions.
7) Clear Procedures. Clearly define procedures for notification, performance postponement, obligation termination, and compensation determination.

### 3.3. English contract law perspective

As was mentioned earlier in this work, in English law, Force Majeure is a concept that exists solely within the realm of contracts and will not be implied by the courts. While it does not have to be explicitly labeled as "force majeure" in a contract to excuse performance, many contracts do include Force Majeure clauses that allow for non-performance without incurring liability. "Acts of war" is a common event listed in such clauses. Even if the war in Ukraine is not expressly mentioned in a contract, it is likely to meet the criteria for many Force Majeure

provisions. However, meeting this threshold alone may not be sufficient to excuse non-performance (Treitel, 2015, par.19-116).

Under English law, to rely on a Force Majeure clause, a party must demonstrate that the relevant events are the primary cause of the non-performance (Symons, 2022, p.112). This is more likely in contracts directly linked to Ukraine, where the conflict's impact on performance is more direct. Nevertheless, it ultimately depends on the cause-and-effect relationship between the events and the obligations in question.

To understand how Force Majeure clauses can be applied in relation to the war in Ukraine under English law, we have to delve into the history of this and related concepts in common law. In the context of common law, historically, the treatment of breaches of contractual obligations was very strict, leading to damages for any breach of promises made in a contract. This principle dates back to the 1647 case of Paradine v. Jane, where it was established that a promisor who commits to perform an act under a contract is obligated to do so, without any defence of having tried their best but facing difficulties in fulfilling the obligation. This strict approach was the norm for contractual obligations (Symons, 2022, p.82).

On the other hand, in cases involving tortious liability, the plaintiff had to demonstrate that the defendant was responsible for causing harm to them to succeed. In tort cases, the defendant had a duty to take reasonable steps to avoid causing harm to the plaintiff. However, in contractual matters where the free will of the parties is involved, contractual liabilities were assumed to be absolute as outlined in the contract, unless the promisor chose to limit their liabilities under the contract. This meant that a promisor could be penalized for failing to perform an impossible act under the contract, as long as the contractual promises were seen as a commitment to bear the risk of a promised event not happening, rather than a simple promise to perform (Reimann, 2006, p.952).

Some scholars emphasized this point by stating that a promise in a contract, even if it involves a third party painting a picture or predicting the weather, is just as binding as a promise to deliver a specific quantity of goods. The law does not consider the extent to which the promised event is under the control of the promisor. Under a legally binding contract, the assumption is that the promisor accepts the risk of that promised event occurring or not, just as if they promised to deliver a specific quantity of goods (McKendrick, 2023, p.318).

The fundamental principle in forming a contract is the ability to allocate risks among the parties, providing them with the freedom to plan their future actions with the assurance that the promised actions will be carried out according to the contract terms. It is generally expected that the promisor will only commit to acts within their control and not those beyond their control. For actions beyond their control, they might include a "force majeure" clause in the contract. This

clause stipulates that the promisor will not be liable for losses resulting from events like acts of God (e.g., floods, earthquakes), or man-made events (e.g., lockouts, strikes, governmental actions). The interpretation of this clause depends on the specific contract, as each contract may have its own provision for handling force majeure events (McKendrick, 2023, p.321).

Since the time of Paradine v. Jane, common law has evolved to relieve promisors from non-performance of promises under a contract under the category of the Doctrine of Frustration of Contracts. As was described earlier, this doctrine is based on the principle that a contractual obligation becomes impossible to perform due to significantly changed circumstances at the time of non-performance, different from what was promised when the contract was entered into. However, this principle created the problem of shifting the risk of non-performance to the promisee, which goes against the idea of risk allocation in a contractual framework and the forward-looking nature of contracts. Consequently, courts were initially reluctant to declare contracts frustrated (McKendrick, 1995, p.55).

The Doctrine of Frustration, as it existed in early English Common Law, did not apply in cases involving personal promises by a promisor under a contract or instances of incapacity or supervening illegality. This doctrine laid down the principle of discharging contracts when certain unforeseen events occurred. An important case that shaped this doctrine was the Krell v. Henry case, where a contract for renting a flat to view the procession of King Edward II was frustrated due to the cancellation of the procession caused by the King's illness. It was established that frustration was not limited to physical impossibility but extended to cases where the event leading to non-performance was the cessation or absence of an express condition in the contract itself, affecting the very essence of the contract without which it could not exist (Krell v. Henry, 1903).

In the subsequent case of British Movietonews Ltd. v. London and District Cinemas, the argument that unforeseen events alone could be a ground for contract cessation did not find favour with the House of Lords. The courts considered factors such as the sanctity of the absolute nature of contractual obligations, the absence of hardship on the promisors, and the doctrine not being used to escape improperly concluded contracts with unfavourable terms when applying the Doctrine of Frustration. It was also emphasized that the Doctrine of Frustration should not be applied lightly. Unexpected price fluctuations, currency depreciation, or unforeseen obstacles to the contract were not considered valid grounds for frustration (British Movietonews Ltd. v. London and District Cinemas, 1951).

In the case of National Carriers v. Panalpina (Northern), it was held that a party unable to perform their obligations due to a temporary event could not use it as a ground for frustration. Following the Movietonews case, the courts narrowed down the scope of the doctrine, becoming cautious in applying it, particularly when parties attempted to use it as an excuse to avoid their

contractual obligations. This caution was due to various reasons, including the potential misuse of the doctrine to escape unfavourable contracts and the challenge of defining the boundary between absolute contractual liabilities and parties creating their "own way out of contractual obligations" within their contracts (National Carriers v Panalpina, 1981).

There were also cases arising from the Suez crisis in 1956 that sought to claim frustration but were overruled. English courts applied the doctrine when parties were genuinely prevented from performing their obligations (Symons, 2022, p.211). In the aftermath of the Iran-Iraq clashes in the 1980s, several charter party cases involved ships being stranded for an extended period due to the conflict between the two countries, rendering contract performance impossible and leading to contract cessation (Symons, 2022, p.212). However, the Doctrine of Frustration was not invoked when contractual obligations became more burdensome for the party claiming frustration.

The Doctrine of Frustration had practical difficulties in common law. For instance, it was challenging to declare a contract as ended rather than enforcing it. Some compromises were made in cases like Coronation seat contracts, where it was provided that if the event was cancelled, the promisee could use the same ticket on the rescheduled days when the event took place. In post-1956 Suez Canal cases, parties began to specify in their contracts which party should be liable in the event of Suez Canal closure. Earlier, the absence of specific contract provisions prevented common law courts from granting relief by discharging contracts (Symons, 2022, p.215).

Overall, the application of the principle of Force Majeure has been shaped by various rules established by the courts over time:

1. A general rule is that Force Majeure is applicable only when the event that triggers it is beyond the control of the parties and cannot be prevented or mitigated through reasonable actions. For example, in the case of Bulman & Dickson v. Fenwick & Co., a delay in a Charterparty was caused by a strike in loading and unloading. The court determined that the strike, in general, could not be considered a valid reason to delay taking delivery of goods upon the vessel's arrival. However, in this specific case, it was found that even with reasonable efforts, taking delivery was not possible, so the delay due to the strike fell within the exception clause. Subsequent cases also applied the test of reasonable efforts taken by the party invoking Force Majeure (Bulman & Dickson v. Fenwick & Co, 1894).
2. When a Force Majeure clause includes the term 'prevention of contractual obligation' as a triggering event, the court will only consider it valid if the prevention is due to legal or physical factors, not economic reasons such as loss of profit, commercial impossibility, or changes in market conditions affecting the contract's viability. For instance, a contract for the sale of nuts allowed the seller to terminate the contract in

the event of non-delivery caused by crop failure. However, when poor crop output occurred, the court did not agree with the seller's attempt to avoid the contract, as there was no actual crop failure, and the seller was not willing to pay a higher market price to receive the delivery (Taylor v. Caldwell, 1863).

3. If the Force Majeure clause provides an alternative way to perform the contract, then the relief of Force Majeure will not be available. The party cannot simply claim that they intended to perform in a specific manner or timeframe but were prevented by a supervening event. They must also demonstrate that there was no way to perform through an alternative method or time (Symons, 2022, p.77).
4. In cases where an event was not reasonably foreseeable, even if it is mentioned in the Force Majeure clause, it may not trigger Force Majeure but instead frustrate the contract itself. For example, in a building contract where a reservoir was to be constructed within six years, the contract allowed for extensions in case of difficulties or impediments. However, when the work was halted due to a governmental directive, the party invoked Force Majeure, claiming it was covered under the extension of time provision. The House of Lords ruled that the contract was frustrated because the general language did not anticipate an indefinite legislative delay (Farnon v. Cole, 1968).
5. Relief under Force Majeure may not be available if the event causing it was a result of the party's negligence seeking such relief (National Carriers v Panalpina, 1981).
6. If the Force Majeure clause requires a party to give notice as a condition precedent, failure to provide notice may result in the party not receiving relief (McKendrick, 1995, p.57).

In our opinion, under English law the war in Ukraine can have the following implications on contracts in terms of Force Majeure and Frustration and their interaction:

1. Contracts that have Force Majeure clauses may be impacted in the following ways:

- Triggering Force Majeure. The war in Ukraine can be considered an event that triggers a Force Majeure clause if the clause includes "acts of war" or similar events as a specified Force Majeure event. In such cases, the parties may be excused from their contractual obligations without incurring liability.
- Causal Connection. To rely on a Force Majeure clause, the party seeking relief will need to demonstrate a causal connection between the war in Ukraine and their inability to perform. If the conflict directly affects the performance of the contract, it is more likely that Force Majeure can be invoked. However, this causal relationship will be specific to each contract.

- Impact on Obligations. The degree of impact the war has on the obligations outlined in the contract will also be a significant factor. If performance is rendered impossible or excessively difficult due to the conflict, it strengthens the case for invoking Force Majeure.
- Notice and Communication. Parties seeking relief under a Force Majeure clause should adhere to any notice or communication requirements specified in the contract. Failure to do so may affect their ability to rely on the clause.

2. In the absence of a Force Majeure clause, the doctrine of frustration may come into play:

- Impossibility of Performance. If the war in Ukraine renders the performance of a contract entirely impossible, the doctrine of frustration may be invoked. Frustration arises when an unforeseen event makes it radically different or impossible to perform the contract, and war can be such an event.
- Direct Nexus. Contracts directly linked to Ukraine or with obligations that are directly affected by the war are more likely to be considered frustrated. If, for example, a contract involves the import or export of goods through Ukraine and the war disrupts these routes, frustration may be applicable.
- Legal Impediments. If the war in Ukraine leads to legal restrictions or changes that make contract performance illegal or impracticable, frustration could be considered.

In considering whether Ukraine should adopt the English approach to frustration of contract, it is essential to evaluate both its potential benefits and drawbacks.

The English approach offers legal clarity by providing a well-established framework with defined criteria and principles. This could enhance predictability and contribute to more straightforward dispute resolution. Additionally, the flexibility inherent in frustration allows parties to adapt to unforeseen circumstances, fostering commercial adaptability.

However, drawbacks exist. The subjective nature of interpreting frustration may introduce uncertainty and lead to disputes over what qualifies as an unforeseen and radical change. The absence of comprehensive legislative guidance in English law could pose challenges, potentially relying heavily on judicial decisions.

There is also a risk of misuse, as the flexibility of frustration might tempt parties to invoke it opportunistically, leading to increased litigation. Furthermore, the transplanting of a common law doctrine into Ukraine's civil law tradition could encounter compatibility issues.

In summary, while the English approach offers advantages in legal clarity and commercial adaptability, potential drawbacks include subjectivity in interpretation, limited legislative guidance, a risk of misuse, and compatibility concerns with Ukraine's civil law traditions.

## CONCLUSIONS AND PROPOSALS

1. A fundamental principle in many European legal systems holds that a contracting party is liable for damages resulting from a breach of contract unless the breach cannot be attributed to them. Attribution depends on fault and whether the non-performance falls within the party's sphere of risk. Specific statutory provisions, legal agreements, or commonly accepted principles may be the basis for attributing non-performance, allowing parties to stipulate consequences in contracts. Force majeure becomes relevant when liability for a breach cannot be attributed to the contracting party, providing a legal basis for excusing non-performance in situations beyond their control and not reasonably foreseeable. Force majeure is legally recognized in several European jurisdictions, such as the Netherlands and France, where it was formally integrated into statutory law in 2016 through the French Civil Code. However, in England, Germany and under the Draft Common Frame of Reference, force majeure is not established as a distinct doctrine but operates within broader legal categories.

2. In distinguishing between Force Majeure, Frustration, Supervening Impossibility, Hardship, "Act of God," and "Excuse due to an impediment" under the DCFR, nuanced differences emerge:

1) Force Majeure, embedded as a contractual clause, allows parties to be relieved from liability in the face of unforeseen and uncontrollable events. Its explicit inclusion in the contract provides a predefined mechanism, offering flexibility through negotiations.
2) Frustration, a common law doctrine, steps in when unforeseen events render a contract impossible or radically different from the parties' intentions. Unlike Force Majeure, it does not necessitate explicit contract mention, relying on common law principles and requiring a legal assessment of specific circumstances.
3) Supervening Impossibility/Illegality, akin to frustration, operates as a legal doctrine but triggers when contract performance becomes impossible through no fault of the party. Its assessment, however, rests on legal principles rather than a contractual provision.
4) Hardship, distinct from the above, arises when unforeseen circumstances make a contract significantly more burdensome for one party without rendering it impossible. Unlike Force Majeure and Frustration, it does not lead to contract discharge but may prompt modification through clauses like economic hardship provisions.
5) The term "Act of God" specifically pertains to natural occurrences, while "Force Majeure" encompasses both natural events and exceptional situations arising from human actions, such as contagious disease outbreaks, government-imposed lockdowns, or wartime conditions.

6) Within the DCFR, "Excuse due to an impediment" constitutes a structured legal framework excusing a party from contract performance when an uncontrollable impediment prevents it. Aligning with civil law principles and the broader European legal framework, this concept operates with clarity, akin to a force majeure clause in common law jurisdictions.

3. Navigating force majeure challenges in the ongoing Ukrainian conflict involves examining crucial factors:

1) Geography and Regional Disparities. Geographical nuances play a significant role, with Western Ukraine facing fewer impacts than the more affected Eastern regions, influencing varied interpretations of force majeure.
2) Risk and Force Majeure. The awareness of businesses operating in conflict zones and their willingness to accept associated risks are key considerations, impacting the legitimacy of force majeure claims.
3) Deoccupation Efforts and Transition. The varying timelines for deoccupation across regions raise questions about the duration of force majeure status and the transition to normal business operations.
4) Effective Control in Conflict-Affected Areas. Distinguishing between military occupation and ongoing business activities adds complexity, particularly in areas with shifting conflict dynamics.

4. Ukrainian courts are very careful in applying force-majeure clauses even after 24$^{th}$ February 2022. In numerous instances, the rejection of force majeure claims in the context of the Ukrainian conflict was based on specific grounds: 1) lack of proof of war's direct influence; 2) absence of UCCI certificate; 3) litigants attempting to evade pre-war fines faced challenges in justifying force majeure claims.

The letter from the UCCI on universal existence of force-majeure after the full-scale invasion did not significantly aid the certification process for force majeure circumstances. The judicial practice surrounding force majeure in the face of military aggression remained consistent, with only one case recognizing war as a force majeure circumstance. The UCCI letter, while a document of importance, was not an automatic and indisputable basis for absolving the guilty party from contractual responsibility.

5. The experiences gleaned from Germany, England, France, and the Draft Common Frame of Reference (DCFR) offer valuable insights for refining force majeure provisions in Ukrainian contracts. Integrating best practices from these legal systems allows Ukrainian businesses to craft contracts that harmonize with international standards and the nation's legal context. Practical lessons from Germany's emphasis on legal assessment, England's reliance on well-drafted contract

terms, France's consideration of unforeseeability and irresistibility, and the comprehensive framework of the DCFR contribute to a nuanced grasp of force majeure implementation.

Considering the current situation in Ukraine, specific recommendations for formulating force majeure clauses involve:

1) Broad Definition of War

Expanding the definition of war to cover hybrid forms of aggression, including irregular military activities, invasion without formal declaration, and unconventional hostilities.

2) Include Modern Warfare Method

Acknowledging contemporary warfare methods such as cyberattacks, disinformation operations, and local acts of sabotage as qualifying force majeure events.

3) Clarify Territorial Impact

Specifying that military actions are deemed force majeure if they materially affect obligations in territories beyond those directly involved in hostilities, highlighting the substantial impact on the party's ability to fulfill obligations.

4) Exclude Additional Negotiations

Eliminating additional negotiations and agreements between parties from force majeure procedures, recognizing their impracticality during wartime.

5) Simplified Communication

Streamlining communication channels, recognizing that traditional methods like letter exchange may be physically inaccessible during wartime.

6) Expanded Force Majeure Circumstances

Detailing force majeure circumstances arising from war, encompassing sanctions, disruptions in settlement systems, and trade restrictions.

7) Clear Procedures

Clearly defining procedures for notification, performance postponement, obligation termination, and compensation determination in the event of force majeure triggered by war.

Incorporating these recommendations fortifies Ukrainian businesses, enhancing the resilience of contractual relationships in unforeseen circumstances, especially during periods of conflict. This adaptable and predictable legal framework aligns with European best practices, contributing to the overall efficacy of force majeure provisions in Ukrainian contracts.

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## SUMMARY


**OLEKSII KUSHNIRENKO. WAR AS FORCE MAJEURE IN BUSINESS CONTRACTS**

This research, delving into the intersection of war and force majeure in European business contracts, yields several key findings and recommendations. European legal systems, rooted in principles of liability, attribute damages for contract breaches unless beyond the party's control. Force majeure, legally recognized in jurisdictions like the Netherlands and France, provides a mechanism for excusing non-performance in unforeseeable and uncontrollable situations. Criteria for force majeure commonly include exteriority, unforeseeability, and irresistibility.

Distinct legal doctrines, such as Force Majeure, Frustration, and Supervening Impossibility, exhibit nuanced differences. Force majeure, as a contractual clause, allows parties relief from unforeseen events. Frustration, a common law doctrine, applies when events render a contract impossible. The DCFR introduces "Excuse due to an impediment," aligning with civil law principles.

Implications of force majeure in Europe involve temporary suspension of obligations, no liability during the event, notice requirements, duty to mitigate losses, and more. Determining armed conflict existence, especially in Ukraine, poses challenges, given varying criteria for non-international and international conflicts.

English and German legal systems handle economic sanctions differently, with English law potentially invalidating contracts if performance becomes illegal at the place of performance. German law distinguishes between violations of German or EU sanctions and foreign laws.

Force majeure challenges in the ongoing Ukrainian conflict involve geographical nuances, risk acceptance by businesses, deoccupation timelines, and distinguishing military occupation from ongoing business activities.

Ukrainian courts, post-February 24, 2022, cautiously apply force majeure clauses, often rejecting claims based on lack of proof or absence of UCCI certificates. The UCCI letter, while significant, doesn't guarantee automatic absolution from contractual responsibility.

Under English law, force majeure clauses may be activated due to the war in Ukraine, requiring a direct causal link between the war and non-performance. Frustration doctrine applies if the war makes performance entirely impossible or legally restricted.

Recommendations for formulating force majeure include broadening the definition of war, acknowledging modern warfare methods, clarifying territorial impact, excluding additional negotiations, simplifying communication channels, expanding force majeure circumstances

related to war, and defining clear procedures for notification, performance postponement, termination, and compensation determination.

In summary, this research provides a comprehensive understanding of the legal intricacies of force majeure in the context of war, offering practical insights for businesses, legal practitioners, and policymakers. The nuanced examination of legal doctrines and jurisdictional approaches ensures that the study contributes valuable insights to navigating force majeure challenges in the ongoing Ukrainian war and beyond.