"FORCE MAJEURE" AS A BASIS FOR EXEMPTION FROM CONTRACTUAL LIABILITY IN EUROPEAN UNION LEGISLATION

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Summary

The article is devoted to the analysis of the legislative regulation of the "force majeure" category as a basis for exemption from contractual liability in the countries of the European Union. The legislative norms of such countries as Italy, France, Germany were developed and analyzed; conclusions were made regarding the peculiarities of the regulation of the "force majeure" category in contractual relations; the issue of the autonomy of the parties to the contract in the identification of such circumstances is studied. Considerable attention is paid to the relevant judicial practice, the decisions of the Courts of Cassation regarding their interpretation of "force majeure circumstances" and the characteristics by which the circumstances can be classified as force majeure. It has been established that the exemption of a party to a contractual relationship from civil liability is possible, according to the legislation of most countries, provided that the circumstances that have arisen meet two characteristics: emergency and unpredictability, that is, only external events that cannot be predicted and controlled. The author emphasizes variability circumstances that may fall under the features of "force majeure" and, accordingly, be basis for exemption from contractual liability. The role of the courts in regulating the contractual relations of the parties in the event of force majeure and the scope of their powers regarding the possibility of regulating contractual legal relations are investigated.

Key words: exemption from contractual liability, "force majeure", legislation of the European Union, doctrine of frustration.

DOI https://doi.org/10.23856/6614

1. Introduction

Events such as the COVID-19 pandemic, military conflicts (in particular, military aggression against Ukraine), natural disasters and economic crises lead to situations where the parties cannot fulfill their contractual obligations. The use of force majeure in such cases is extremely important. Force majeure is an important legal category in the context of contract law in the European Union (EU). All EU countries follow certain standards governing the use of force majeure as a basis for exemption from contractual liability. Given the fact that the EU has its own specific legal framework, which includes the regulation of contractual liability, the study of the specified issue is necessary in the context of the harmonization of domestic legislation with the legislation of the European Union.

The study of force majeure in the aspect of EU legislation allows for an in-depth understanding of the mechanisms of protection of parties in contractual relations and contributes to the effective regulation of legal aspects of commercial transactions in crisis situations. The results of this study will serve as a basis for a comparative analysis of Ukrainian and EU

legislation; borrow of positive trends of foreign law enforcement in the area of exemption from contractual liability for their implementation in the civil legislation of Ukraine.

The research methodology consists of the analysis of scientific works and studies of foreign scientists, which reveal the topic of force majeure and its interpretation in the legislation of different countries; analysis of civil legislation of countries such as Italy, France and Germany; a comparison was made in the approach of the legislator of the specified countries regarding the regulation of force majeure circumstances and their application to contractual obligations; the practice of the Courts of Cassation regarding the classification of circumstances into the category of "force majeure" was studied; generalization of the main characteristics of the legal regulation of the institution of exemption from contractual liability of the leading EU countries.

2. "Force Majeure" as a basis for exemption from contractual liability

Professor Rene David noted that the true object of the doctrine of frustration, as distinct from the doctrine of impossibility of performance, is to deal with the following situation; a contract has been made, and circumstances supervene, the effect of which is to upset the very foundations of this contract, in such a way that the contract which could eventually be performed would be in fact different from the contract originally contemplated by the parties *(René David, 1946: 11)*. Accordingly the doctrine of frustration of contract is that a party can be released from liability if it proves that the occurrence of an unforeseen circumstance after the conclusion of the contract resulted in the "destruction" of the purpose for which the contract was concluded.

In his works, Professor Aghim Nihui summarized the positions of his colleagues regarding exemption from contractual liability and stated that a force majeure is an external event that is not foreseen or cannot be accurately predicted when it will happen, and which cannot be afforded or avoided. In all cases when it is necessary to prove the presence of force majeure, first of all, it is necessary to prove its quality as external under which is not foreseen, and then it should be distinguished as a category of actions that are natural phenomena, such as earthquakes, floods, etc. These are external and unpredictable, but, despite this, in practice they cannot be controlled. It is important that specific actions that can be qualified as a major force are characterized as an unforeseen, unavoidable external event. Therefore, only events that cannot be predicted and controlled can be considered as force majeure *(Nuhiu, 2020:71-72)*.

3. The practice of applying force majeure in the countries of the European Union on the example of several countries

Italy. Exemption from contractual liability is a key component of Italian contract law, as it allows parties to avoid liability for non-performance or improper performance of contractual obligations due to circumstances beyond their control. An analysis of the Italian civil legislation indicates a lack of unity in the understanding of the definition of "unexpected circumstances" (forza maggiore), but given the description of these circumstances in the legislation and practice of the Courts of Cassation, such circumstances are reduced to factors that do not depend on the will of a person.

In the Italian Civil Code (Codice Civile), there are several articles that regulate exemption from contractual liability, in particular, according to the content of Article 1256 of the Italian Civil Code, the obligation is extinguished when, for a cause not attributable to the debtor, the performance becomes impossible. If the impossibility is only temporary, the debtor, as long

as it lasts, is not responsible for the delay in performance. However, the obligation is terminated if the impossibility persists regarding the purpose of the obligation or the nature of the object, the debtor can no longer be considered obligated to perform or the creditor is no longer interested in receiving it *(Art. 1256 of the Italian Civil Code, 1942).*

According to article 1467 of the Italian Civil Code, in contracts with continuous or periodic performance or deferred performance, if performance by one of the parties is to become excessively burdensome due to the occurrence of extraordinary and unforeseeable events, the party obliged to perform such performance may request the termination of the contract with following consequences from Art. 1458. It is not possible to demand termination, if it takes place burden falls under the normal risk of the contract. The party against whom the resolution is sought can avoid it by offering to fairly change the terms of the contract *(Art. 1467 of the Italian Civil Code, 1942).* In this way, the circumstances of force majeure in order to classify them as grounds for exemption from contractual liability according to Italian law must comply with two characteristics: extraordinary nature and unpredictability.

The Italian Court of Cassation provided a precise description of both terms in case No. 22396 dated 19.10.2006, which defines "extraordinary and unforeseeable facts" referred to in Art. 1467 of the Italian Civil Code. Thus, an extraordinary claim, according to the Supreme Court, is objective in the sense that it must be an abnormal event that can be measured and quantified based on elements such as its intensity and size. Contingency, on the other hand, is subjective in nature as it relates to the cognitive capacity and diligence of the contracting party. However, the assessment of this characteristic should be done completely objectively, taking as a model the behavior of an average person in the same conditions. The Supreme Court of Italy in this case also ruled that since the doctrine of frustration does not refer to the subject matter, nor to the economic and social function of the contract, nor to the purpose for which the parties concluded it, it must refer to an external factor which, although not specifically stated as a contractual condition – constitutes for both counterparties (or only for one of them, provided that the other counterparty recognizes this) a specific and objective condition on which the continuation of the contract depends, giving the counterparties the right (who relied on it) to terminate the contract if he will go wrong. (*Supreme Court judgment n.22396 of 2006:5*).

The Supreme Court in decision No. 965 dated February 28, 1997 established that only such an event that prevents the normal performance of the contract, as well as renders any actions of the debtor aimed at its elimination ineffective, can be considered as a situation belonging to the category irresistible force. It also notes that the preventing event should not depend on direct or indirect actions or inaction of the debtor (*Supreme Court judgment n.965 of 2006)*.

Consequently the cited law-applicable practice of the Supreme Court of Italy allows us to summarize the following: attributing a circumstance that can exempt from contractual responsibility is possible if two conditions are met: extraordinary nature and unpredictability; the consequence of the occurrence of such circumstances is the impossibility of fulfilling the obligation; the priority of the interests of the parties to the contract in the event of force majeure; lack of fault of the contracting party in the occurrence of such circumstances; provision of several ways of changing the binding legal relationship either by amending the contract or terminating it.

Court practice in decisions No. 2316 dated 05.02.2016, No. 3670 dated 17.02.2014, No. 10133 dated 14.05.2005 deserves attention, in which the Court repeatedly noted that the discovery of archaeological finds underground (the so-called "archaeological surprise") is the cause of force majeure in accordance with Presidential Decree No. 1063 of 1962, Art. 30, paragraph 1, which prevents the continuation of work in violation of the obligations imposed by

law and without any discretion on the part of the client *(Supreme Court judgment n.2316 of 2016, n. 3670 of 2014, n.10133 of 2005:9).* Therefore the above judicial precedents indicate a divergence from the traditional understanding of the concept of "force majeure" and allow us to conclude about their variability, provided that they meet two characteristics: extraordinary nature and unpredictability.

France. Exemption from contractual liability in French law, or "force majeure", is a critical aspect of contract law. French law on "force majeure" covers a range of circumstances, such as natural disasters, wars, acts of terrorism, strikes, as well as governmental actions or changes in legislation that make performance of the contract impossible. It is important to note that the event must be insurmountable and unforeseeable for both parties to the contract.

Before the 2016 reform took effect, the doctrine of the French Court of Cassation provided that any unforeseeable and irresistible event could be considered as force majeure (*Plenary session of the Court of Cassation of 14.04.2006).* In February 2016, certain norms of French civil law were reformed, which also affected the institution of force majeure. As a result of the reformation of Article 1218 of the French Civil Code, the triptych of force majeure requirements has been restored, which is thus an obstacle to performance caused by an event that is 1) "outside the control of the debtor", 2) "reasonably unforeseeable at the time of the conclusion of the contract" and 3) "the consequences of which cannot be avoided by appropriate measures." That is, compliance with the circumstances that have arisen with three key features: external, unpredictability and irresistibility.

Article 1218 of the French Civil Code regulates that in contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1. (*Art. 1218 of French Civil Code, 2016)*. In summary, force majeure under French law is an unavoidable event that cannot be overcome and makes the performance of the contract impossible, and therefore the contract will subsequently be voided under French law and the party is not liable for such party's failure to perform their obligations under the contract. However, Article 1218 is not a mandatory rule, but rather a default rule from which the parties can deviate, so the parties are free to define force majeure at their own discretion to include or exclude events as force majeure in their contractual relations. However, the parties cannot completely exclude the use of force majeure from their contract, as this "must be negotiated, formed and performed in good faith" provided for in Article 1104 of the Code (*Art. 1104 of French Civil Code, 2016)*. It should be noted that it is not a French court will not readily accept a non- performance defence based on force majeure, as there is a strong belief in the strict application of pacta sunt servanda (contracts must be performed) to contractual obligations. Therefore only in exceptional circumstances is force majeure accepted as an excuse for non-performance *(Hossein, 2012:166-167).*

Succinctly, the application of force majeure in the aspect of French judicial practice shows that natural disasters and meteorological phenomena are quite often recognized by the courts as unforeseen circumstances that make it impossible to properly fulfill an obligation. Thus, an unusually strong hurricane can be considered a case of force majeure (Cass. Civ. 1st, May 11, 1994, Bull. Civ. III, n. 94), as can a volcanic eruption (Cass. Civ. 1st, March 8, 2012,

No. 10-25.913). Conversely, a late freeze, even classified as an "agricultural disaster," is not an unforeseen event (Cass. Soc., Oct. 25, 1995, No. 95-40866). Similarly, a state of natural disaster declared by the administration does not allow for the conclusion that the event is necessarily a force majeure (Cass. Civ 3rd, March 24, 1993, №91-13.541). However, not only natural disasters belong to the specified category, taking into account the practice of French courts. The debtor is released from liability in case of non-fulfillment of contractual obligations due to an illness that personally affected the debtor (Cass., Ass. Plén., April 14, 2006, №02-11.168; Cass. civ. 1, February 10, 1998, №96-13.316). This position of the courts corresponds to the reform of the law of obligations, which requires that the event be external and "beyond the control of the debtor, because the disease is an exogenous pathological condition and its development cannot be controlled".

On the contrary, the nature of the event is not of great importance and in itself cannot be considered a case of force majeure. Moreover, the same event can constitute force majeure in one situation, but not in others. An episode of exceptional drought and heat wave that occurred in France in 2003, classified as a natural disaster, was a force majeure event where an insurer's guarantee was used to reconstruct a building (Cass. Civ 2nd, March 29, 2018 №17 -15017); however, this event alone could not absolve Monsanto of responsibility for the supply of heat-tolerant tomato seeds (CA Aix-en-Provence, 22 April 2015, №12/19468) *(Glaser, Pinto, 2020)*.

In essence the legal doctrine of "force majeure" has deep roots in French law and provides an important mechanism to protect parties from the unfair burden of fulfilling obligations in the event of unforeseen circumstances. Excuse for non-performance based on the force majeure defence is granted only if the aggrieved party proves the following four requirements: 1. Externality: Occurrence of an external event for which the obligor has not assumed the risk; 2. Unavoidability/Irresistability: The occurrence of the external event was beyond the obligor's (typical) sphere of control/the ordinary organization of his business and was absolute; 3. Unforseeability: The event and its consequences, i.e. the adverse impact on the obligor's ability to perform, could not reasonably have been avoided or overcome by the obligor, e.g. by alternative and commercially reasonable (measured against the risk-distribution in the contract) modes of performance, procurement or transportation, or other safety measures. External events are typically unforseeable; 4. Causation ("conditio sine qua non", "but for"-test): The obligor's non-performance was, as a "matter of commercial reality" caused by the external event and not by the obligor's own fault (e.g. self-inflicted production problems, defective goods or packaging or the aggrieved party would not have performed in any event for other reasons unrelated to the force majeure event). If the triptych is applied to the circumstances that have arisen (Externality – Unavoidability – Unforseeability), the contractual party may be exempted from responsibility for non-fulfillment of the contract. According to the doctrine of force majeure in French law, the contract will be terminated and the party will not be liable for failure to perform its obligations under the contract if the courts are satisfied that the performance of the contract has become impossible due to an event that the parties could not have reasonably foreseen at the time concluding a contract.

Germany: Force majeure circumstances are not directly regulated by German law. However, the norms of the German Civil Code testify to the consolidation of provisions on "force majeure" in its other norms.

According to Article 275 of the German Civil Code, a claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person. The obligor may refuse performance to the extent that performance requires an expenditure of time and

effort that, taking into account the subject matter of the obligation and the requirement of acting in good faith, is grossly disproportionate to the obligee's interest in performance. In determining what efforts reasonably may be required of the obligor, it also is to be taken into account whether they are responsible for the impediment preventing performance. In addition, the obligor may refuse performance if they are to render the performance in person and, having weighed the impediment preventing performance by them against the obligee's interest in performance, performance cannot reasonably be required of the obligor. *(Art. 275 of the German Civil Code, 2002).* Consequently the specified provisions establish the doctrine of the impossibility of fulfilling the obligation ("Unmöglichkeit"), which provides that the obligor can refuse to fulfill the contract if the performance has become impossible both for himself and for any other person, and it is the obligor who bears the burden of proving impossibility and absence his fault in these cases.

Also, the occurrence of force majeure circumstances is traced in the concept of "change of circumstances". Article 313 of the German Civil Code provides that if the circumstances on which the contract was concluded have changed significantly, the contract may be modified (if possible) or terminated if one of the parties cannot reasonably be expected to perform the contract *(Art. 313 of the German Civil Code, 2002)*. The concept of "change of circumstances" means that both parties can request changes to the contract if compliance with the previous terms of the contract cannot reasonably be expected of one party. If a change to the contract is not possible or cannot reasonably be expected from one of the parties, the other party may withdraw from the contract (or terminate the contract depending on the nature of the contract). In addition, if a force majeure event causes a breach of contract, the other party cannot claim damages if the event and its consequences were beyond the debtor's reasonable control. The above shows that the party demanding the application of the consequences of force majeure to contractual relations must prove that it has taken all necessary and reasonable measures to avoid adverse consequences.

Also, after researching the legal regulation of certain types of contracts, it was established that the German legislator predicted the consequences of the occurrence of the relevant circumstances. Thus, in accordance with Part 3 of Art. 651h of the German Civil Code, which regulates travel contracts, provides that "... the organiser may not demand compensation if unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity significantly affect the performance of the package or the carriage of passengers to the destination. Circumstances are unavoidable and exceptional within the meaning of this Subtitle if they are not subject to the control of the party who invokes such a situation and if their consequences could not have been avoided even if all reasonable measures had been taken." *(P.3 art. 651h of the German Civil Code, 2002)*.

Therefore, the doctrine of "force majeure" is pivotal in German contractual law and aims to protect the parties to the contract from the consequences of unforeseen and insurmountable circumstances that make the performance of the contract impossible. The main characteristics of force majeure in German law can be distinguished: 1) unpredictability: the event must be unexpected and unplanned; 2) insurmountable: the circumstances must be so serious that they cannot be avoided or overcome; 3) influence on the performance of the contract: the event must directly affect the ability of the parties to fulfill their contractual obligations; 4) temporary or permanent nature: force majeure can be both temporary and permanent. In case of temporary force majeure, the performance of the contract may be suspended for a certain time until the circumstances change. If the circumstances continue for a long time, the contract can be terminated in a judicial and extrajudicial manner.

4. Conclusions

Force majeure is a necessary legal instrument that helps protect the interests of the parties to the contract in the event of unforeseen events which allows avoiding unjustified financial and other obligations that may arise as a result of such circumstances and ensuring the stability of contractual relations. According to the legislation and law enforcement practice of many countries, force majeure can be defined as an event or circumstance that occurs beyond the control of the parties to the contract and makes the performance of the contract impossible or significantly complicated. The main criteria for assigning circumstances that make it impossible to perform the contract, there is unpredictability and irresistibility of the event.

Analysis of the legislation of the specified countries in the context of "force majeure" makes it possible to succinctly formulate conclusions about their main characteristics. Thus, in Italy, force majeure allows the parties to the contract to refuse to fulfill their obligations without consequences for non-performance, if these circumstances really arose and affect the performance of the contract; French law rejects any modification or adjustment of contracts by the courts, and the debtor must fulfill his obligations in the most efficient way; German law allows the courts to adjust the parties' contract in cases of difficulties and impossibility of their implementation due to the failure of the parties to reach an agreement.

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