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THE DOCTRINE OF HARDSHIP IN CONTRACT LAW: COMPARATIVE STUDY

Проведено порівняльне дослідження доктрини істотної зміни обставин у договірному праві України, Франції, Німеччини, Англії. Проаналізовано підстави зміни або розірвання договору у зв'язку зі значною зміною обставин. Здійснено компаративістський аналіз повноважень суду щодо зміни договору у зв'язку з істотною зміною обставин.

У французькому цивільному праві доктрина l'imprévision охоплює усі випадки неможливості виконання договірних зобов'язань боржником у результаті настання непередбачуваної події після укладення договору.

Поняття «істотної зміни обставин» було введено до Цивільного кодексу України у 2004 р. з метою надання можливості сторонам договору подолати негативний вплив зміни обставин, які були непередбачуваними на момент укладення договору та зумовили обтяжливість виконання зобов'язання для однієї з них. Такий правовий інститут має на меті, з одного боку, відновити баланс інтересів у договірних відносинах та зменшити ризики, а з іншого – зберегти договірні відносини, надавши перевагу його майбутній модифікації над розірванням.

В англійській правовій системі доктрину істотної зміни обставин сформульовано поняттям frustration, відповідно до якої єдиним правовим засобом виступає розірвання договору, з неможливістю часткової або тимчасової зміни договірного зобов'язання.

У Німецькому договірному праві доктрина істотної зміни обставин концептуалізована у таких аспектах: сторони не уклали б договір, якщо вони знали би про настання такої зміни, і для однієї сторони було б несправедливим відмовляти іншій стороні в будь-якій зміні договору. Німецький підхід був прийнятий у багатьох проектах гармонізації договірного права на міжнародному рівні, зокрема в Принципах європейського договірного права, Проекті загальної системи координат (DCFR), Принципах міжнародних комерційних договорів УНІДРУА.

У французькому, англійському та німецькому цивільному законодавстві встановлено три різні підходи до випадків неможливості виконання договірного зобов'язання як виняток із засади pacta sunt servanda: сторони не звільняються від обов'язку виконати зобов'язання, якщо воно не стало неможливим; як виняток через неможливість у деяких випадках; або як окремий виняток.

Основною проблемою сьогодення є відсутність визначення поняття «істотна зміна обставин» в українському законодавстві та судовій практиці, що посилює правову невизначеність. З огляду на нечіткість її критеріїв у більшості випадків суди не визнають зміну обставин, на які посилається сторона, істотною.

Законодавство багатьох держав і міжнародне м'яке право надають судам повноваження змінювати або розривати договір у разі істотної зміни обставин.

Ключові слова: *істотна зміна обставин, зміна договору, розірвання договору, договір, цивільне право.*

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The doctrine of hardship in contract law: comparative study
The article analyzes the doctrine of hardship in the contract law of Ukraine, France, Germany, England.

The grounds for modifying or terminating the contract due to a hardship are analyzed. A comparative analysis of the court's powers to modify the contract in connection with a hardship is carried out. In French civil law the doctrine of l'imprévision covers all situations in which a party's contractual obligations have become harder and more onerous to perform because of an unforeseen event posterior to the conclusion of the contract. The conception of hardship was introduced to Ukrainian Civil Code in 2004 for provide the contractual parties to overcome the negative impact of a change of circumstances that was unforeseeable at the time of the conclusion of the contract and renders performance excessively onerous for one of them. This provision is aimed, on the one hand, to restore the balance of interests in contractual relations and to reduce risks, and on the other hand, to keep the contract, as far as possible, preference given to the adaptation of the contract over its termination. Unfortunately, the case law indicates difficulty in implementing the provision of hardship.

In English law doctrine is formed the concept of frustration. The only remedy for frustration in common law is termination of the contract; and termination is permanent – English law does not recognize partial frustration nor temporary frustration.

German doctrine of hardship has been conceptualized into three aspects requiring a change of circumstances, the parties would not have concluded the contract if they had been aware of this change, and it would not be equitable for one party to deny the other party any amendment of the contract. German approach has been adopted in many harmonization projects and international instruments of contract law, in particular Principles on European Contract Law, Draft Common Frame of Reference, UNIDROIT Principles of International Commercial Contracts.

In French, English and Germany law is established three different approaches to cases of contractual impossibility as an exception to pacta sunt servanda: contractual parties are not discharge unless performance has become impossible; as exception for impossibility to some cases; or as separate exception.

The main problem nowadays is the lack of definition of "significant change of circumstances" in Ukrainian legislation and case law. Such a rule seems to increase legal uncertainty as the criteria of its implementation are vague and have not yet been firmly and precisely defined by case law. In most cases, the courts do not recognize the change of circumstances referred to by the party as significant.

Ukrainian civil law doctrine defines "significant change of circumstances" as change of circumstances that did not depend on the will of parties and was the result of certain actions from the outside; and contains four features: was unforeseeable at the time of the conclusion of the contract, its duration and inevitability, arise without fault of the parties.

The law of many states and international soft law gives courts power to modify or terminate the contract in case of change in circumstances. French Civil Code not contains certain grounds in the event of change in circumstances to modify or terminate the contract. They are the same as in case of contract modification or termination by parties. In contrast, Ukrainian legislator decreases significantly judicial intervention in contractual relations. The power of Ukrainian courts to modify the contract is based on the general principles of contractual freedom, if parties in contractual terms lay down modification the contract in case of change in circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party.

Keywords: *hardship, modify of contract, termination of contract, contract, civil law.*

Formulation of the problem. The doctrine of hardship in Ukrainian and foreign civil laws constitutes an exception to the general principle of contract law *pacta sunt servanda*. It covers situations harder and onerous to perform contractual obligations by the party owing to an unforeseen event posterior to the conclusion of the contract. The legal consequences for hardship, the court's powers to modify and terminate the contract in different legal systems in the word are divers. The comparative analyses the doctrine of hardship in the contract law of Ukraine, France, Germany, England allows to find them and to improve contract law in this area.

Analysis of resent research and publications. In the article authors are taking into account the works of E. Boursican, B. Fauvarque-Cosson, G. Wicker, A. Downe, T. Lutzi, R. Cabrillac, J. Dewez, R. Momberg, E. McKendrick, H. Rösler, J. C. Dastis, D. Philippe, V. Honcharenko, T. O. Rodoman, V. Prymak, Ph. Ridder, M.-Ph. Weller, and others.

The purpose of the article is to comparative study of the doctrine of hardship in Ukraine and French, Germany, England contract law.

Presentation of the main research material. The doctrine of *l'imprévision* as exception to the principle *pacta sunt servanda,* well known for French administrative law was introduced in French civil law by the new article 1195 French Civil Code. It is one of the main innovations of the Ordinance o. 2016-131 on the reform of contract law, the general regime and the proof of obligations [1], which allows the renegotiation or termination of a private-law contract in case of hardship. In the absence of legal provisions, judicial case-law had up until now rejected this principle [2, p.75; 3, p.33]. *L'imprévision* is usually seen as encompassing all situations in which

a party's contractual obligations have become harder and more onerous to perform – although not impossible – because of an unforeseen event posterior to the conclusion of the contract [4, p.53]. Reforming this area of law required the French legislator to strike a new balance between, on the one hand, the principle of *pacta sunt servanda* and the legal certainty that is usually ascribed to it and, on the other hand, the idea of contractual solidarity and fairness that lies at the foundation of every exception for *imprévision* admitted elsewhere [5, p.90]. The conception of hardship is new for Ukraine civil law too. It was introduced in legislation in 2004 by Ukrainian Civil Code to provide the contractual parties to overcome the negative impact of a change of circumstances that was unforeseeable at the time of the conclusion of the contract and renders performance excessively onerous for one of them. This provision is aimed, on the one hand, to restore the balance of interests in contractual relations and to reduce risks, and on the other hand, to keep the contract, as far as possible, preference given to the adaptation of the contract over its termination. Unfortunately, the court practice in Ukraine indicates difficulty in implementing the provision of hardship. Practically, cases about adaptation or termination the contract by the court in the event of change of circumstances are absent.

Legal systems that already allow an exception to *pacta sunt servanda* for cases of impossibility may take one of three different approaches to cases of *imprévision:* they may not discharge the parties unless performance has become actually impossible; they may extend the existing exception for impossibility to (some of) these cases; or they may develop of separate exception. These different approaches have been taken in French, English and Germany law, respectively [5, p.94; 6, p.326; 7, p.287; 8, p.197].

The rules of English law governing changes of circumstances during the lifetime of the contract are in some respects more limited than those in many civil law systems. In consequence, parties are generally advised to make specific provisions in their contract for possible future events which might affect the balance of the bargain – often under the name of «*force majeure*» or «hardship» clauses – and negotiated commercial contract to very commonly contain such provisions in order to avoid the operation of the general legal rules. However, there can be some difficulties with the operation of such clauses. From the second half of the nineteenth century the courts developed the doctrine of '*frustration*' [9, p.252]. English doctrine of frustration was developed in a case involving impossibility, English judges did not see much of a problem to extend it to cases where performance had not become literally impossible but would not serve the intended purpose or otherwise be something entirely different from what the parties had in mind when concluding the contract. Based on that reasoning, the English courts have applied the doctrine of frustration where supervening circumstance had rendered performance more burdensome to a degree that it would be fundamentally different from what was originally agreed [5, p.98].

Under English common law, the term frustration of contract includes at least three different situations: the case where performance has become physically or legally impossible, the case where performance has become impracticable (i.e. extremely onerous or difficult), and the case where a counter-performance has lost its value to the creditor (frustration of purpose) [10, p.123]. Frustration operates automatically irrespective of the wishes of the parties [11, p.38], and must be outside the parties' control: it must have occurred «without default of either party» [12, p.256]. Otherwise, in particular change of circumstances that was foreseeable at the time of the conclusion of the contract or if change of circumstances was caused by one of the parties, it will mean as a breach of contract by that party, and not as frustration.

The only remedy for frustration in common law is termination of the contract [13, p.158]; and termination is permanent – English law does not recognize partial frustration (termination of any part of the contract) nor temporary frustration (suspension, rather than permanent termination). The court has no power to adjust the terms of the contract to reflect the changed circumstances [14, p.506]; and, unless it is possible to resolve the difficulties which arise following the changed circumstances by interpretation of the contract or by implication of a term on the facts, the court can give no relief where there is a change of circumstances which falls short of frustration [12, p.259]. Frustration terminates the contract which effect from the time of the frustrating event: if a contract is frustrated, each party is released from any further obligation to perform [15, p.487; 16, p.81-83]. Rather, the parties will often negotiate a new contract with different terms and conditions [17, p.191].

The German approach to *l'imprévision* is based on a doctrine of disappearance of the basis of the transaction which is entirely separate from the doctrine of impossibility. German courts had started to regularly apply this doctrine and after the reform of German law of obligation in 2002 it was codified and introduced into BGB (§ 313). Although they were aware of the concept of the *clausula rebus sic stantibus*, the legislator of the BGB decided not to incorporate a general provision dealing with charging circumstances in an effort not to undermine the principle of *pacta sunt servanda* [5, p.99-100]. The principle of good faith was the basis for the

case law on change of circumstances [18, p.98; 14, p.489-491] before its codification into BGB after the reform of German law of obligations.

German doctrine of hardship has been conceptualized into a three-prong test, requiring a factual element (i.e. a change of circumstances), a hypothetical element (i.e. the parties would not have concluded the contract if they had been aware of this change), and an equitable element (i.e. it would not be equitable for one party to deny the other party any amendment of the contract). When these elements had been established, one party could demand from the other what the parties would have agreed if they had been aware of the risk and the contract had been amendment accordingly; (only) if the other party refused this or an amendment where not possible, the party for which performance had become more onerous could terminate the contract [5, p.101-102]. German approach has been adopted in many harmonization projects and international instruments of contract law. Art.6:111 PECL, III.-1:110 DCFR, 6.2.3. UNIDROIT Principles all allow the courts to amend or terminate a contract if performance become so onerous because of an expectation change of circumstances that it would be manifestly unjust to hold the debtor to the obligation with preference given towards the amendment of the contract [19]. Yet, unlike the German case law, they all require an attempt to renegotiate the contract before the courts may intervene [5, p.103]. The UN Convention on Contracts for the International Sale of Goods (hereafter CISG) does not include a provision for a change of circumstances or the adjustment of contracts. But art.79 (1) CISG provides a narrow exception to the no-fault principle of the CISG [20, p.293-337].

The traditional French approach to *imprévision* is notorious for its uncompromising adherence to *pacta sunt servanda.* It is perfectly illustrated by the *Cour de cassation's* leading decision in *Canal de Craponne,* where the owner of a channel asked the courts to increase the charges that where due to them by the adjoining owners in exchange for their obligation to maintain the channel under contracts concluded in 1560 and 1567, which had become entirely derisory in 1876. While the lower courts allowed the claim and modified the contract, expressly admitting an exception to the principle of *pacta sunt servanda* for contracts that are executed over a certain period of time, the *Cour de cassation* overruled the decision, pointing out that Article 1134 reproduced a general and *absolute* principle that applies to *all* contracts, including those entered into before the *Code civil* was enacted. Thus, it was not the task of the courts, however fair they thought their decision to be, to modify a contract and replace freely negotiated terms [5, p.94-95; 21].

French courts based on the general principle of good faith [14, p.501; 5, p.108] imposed in case of *l'imprévision* to renegotiate contracts to rebalance disproportionate contractual duties where both parties had agreed on it, or termination of the contract. The concept of *l'imprévision* applies if new circumstances that are beyond the control of the parties and that were unforeseeable arise, rendering the contract substantially more burdensome or substantially altering the economic balance between the obligations. The same approach is in the Belgian legal discourse [22, p.101; 10, p.123].

The application of hardship is strictly restricted as in French Civil Code as in Ukrainian Civil Code. According to art.1195 French Civil Code it involves the presence of four conditions:

1) change of circumstances;

2) that was unforeseeable at the time of the conclusion of the contract;

3) which renders performance excessively onerous for one party of a contract;

4) such party had not accepted the risk of change of circumstances.

Only the combination of all these conditions give party right to ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

Ukrainian Civil Code also gives preference for parties independently solve to modify or terminate the contract in the event of a significant change of circumstances which the parties were guided at the conclusion of contract. Such variant of parties' behavior rooted in the principle of good faith, and allows solving the problems associated with change of circumstance by parties agree. It means as special way to protect property interest of the party violated not by another contractual party, but due to unforeseeable change of circumstances [23, p.313; 24, p.118].

The main problem nowadays is the lack of definition of 'significant change of circumstances' in legislation and case law. Such a rule seems to increase legal uncertainty as the criteria of its implementation are vague and have not yet been firmly and precisely defined by case law. In most cases, the courts do not recognize the change of circumstances referred to by the party as significant. Juridical practice in Ukraine shows that such change of circumstances as global financial crisis [25, p.28; 26, p.65], effect of drop in value of currency, business failure, business (commercial) risks, termination of marital relations means by the court as not significant. The notion of 'significant change of circumstances' is an evaluative category [27; 28, p.101; 29; 30, p.46]. Article 652 (1) lays

down rule to determine the significant change of circumstances as circumstances have changed so much that if the parties could provide it, they would not have concluded the contract or have concluded the contract on other terms. Civil law doctrine defines 'significant change of circumstances' as change of circumstances that did not depend on the will of parties and was the result of certain actions from the outside [31, p.706-716]; and contains four features: was unforeseeable at the time of the conclusion of the contract, its duration and inevitability, arise without fault of the parties [32, p.46].

Sometimes one equates hardship to impossibility [33, p.564-565], intrinsically these clauses tend to deal with similar situations [34, p.456], but the difference between them lies in diverse consequences, in particular legal and factual. The hardship suggests that the performances of contract may still be possible, although excessively onerous for the debtor, whereas in the situation covered by impossibility the circumstance has caused an insurmountable obstacle to performance. The consequences of impossibility will stress suspension of the obligations lead to the end of the contract and relief the defaulter of liability (art.617 Ukrainian Civil Code). The hardship clauses will be focused on re-negotiation, gives to court the choice of revising the terms regulating the obligation or put an end to it.

Of course, there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult even if it may drive the debtor into bankruptcy. It is up to the court to decide which situation is before it [19].

Ukrainian Civil Code in art.652 (1) establishes two types of limits to modify or terminate the contract by parties in case of hardship. One of them is contractual terms. Parties can provide for those in the contract using hardship clauses. In the light of freedom of contract, their construction and application take precedence over codified objections dealing with impossibility and unforeseen circumstances [35, p.373-374]. There is a subjective limitation. Another, objective limitation is connected with certain type of contract and obligation. For instance, according to nature of insurance contract, occurrence of insurance events cannot be considered as bases for modification or termination the contract at the request of the insurer in hardship.

In the case of refusal or the failure of renegotiations or termination the contract Ukrainian law and French law move in the same direction. To both lawmakers allow the judge to either amend or terminate a contract if an unforeseeable change of circumstance has made performance considerably more onerous. However, the judge power in the case of hardship is not the same.

It should be noted that law of many states, in particular: Italian, Dutch codified power the court amend or terminate a contract; Australian and Swiss courts seem to apply a similar rule, without the legislators having codified it; German, Austrian, Greek, Portuguese, Italian, Danish, Finnish and Swedish courts have the power to modify the contract; and international soft law (PECL (art. 6:111), UNIDROIT Principles (art.6.2.1 to 6.2.3), DCFR (art. III.- 3:502)) gives courts power to modify or terminate the contract in case of change in circumstances. In Europe, it seems that only Belgium, Luxembourg, United Kingdom do not fully recognize the judicial power to modify or terminate the contract when there has been an exceptional change of circumstances [36, p.68; 37, p.74-75].

From analysis of art.652 (2) Ukrainian Civil Code and art.1195 French Civil Code follows that court have a power to revise the contract or put an end to it only if negotiations failed. In Ukrainian Civil Code same kind of provision conditioned by general rule that modify or terminate the contract can be allowed only by the parties' consent (art.651 (1) Ukrainian Civil Code) and binding force of contract for parties (art.629 Ukrainian Civil Code). In decision of Supreme Court of Ukraine speaks that court have a power to modify or terminate the contract only if negotiations failed [38]. This provision imposed an obligation on contracting parties to enter into negotiations with a view to modify the contract or its termination: damages could be awarded for loss caused by a refusal to negotiate or by breaking off negotiation's contrary to good faith and fair dealing. This technique, at first view, might seem as being undesirably complicated and heavy. Yet, this provision will protect the courts from excessive congestion.

French Civil Code not contains certain grounds in the event of change in circumstances to modify or terminate the contract. They are the same as in case of contract modification or termination by parties. In contrast, Ukrainian legislator decreases significantly judicial intervention in contractual relations. Moreover, courts modify the contract in strictly defined cases. We agree with *Andreeva* that priority of termination under modification of contract rooted in dispositive of civil law and the principle of contractual freedom [32; p.48]. Indeed, if the parties agreed to modify the contract, they would not have asked the court to set about contract adaptation. The modification of contractual terms by court necessitates to perform the obligations by parties, which have not been freely concerted.

The art.652 (2, 4) Ukrainian Civil Code places strict limits on the powers of the court to modify or terminate a contract owing to change of circumstances [39]. We dare to suggest that Ukrainian lawmaker proceeded on the bases that if the changes of circumstances are not strictly controlled, undermine fundamental principles of the law of contract and the stability of contractual relations.

According to art.652 (2) Ukrainian Civil Code court have a power to terminate the contract if plaintiff will prove the presence simultaneous the following conditions:

1) while concluding the contract parties thought that such change of circumstances would not occur;

2) change of circumstances is due to the conditions which the concerned party failed to remove after their emergence in spite of all its diligence and prudence;

3) performance of the contract would disturb the balance of the parties' property interests and would deprive the concerned party of everything it expected to get while concluding the contract;

4) the essence of the contract or customary business practices do not result in the risk of the circumstances' change to be rely by the concerned party.

There are few court decisions in favor of the plaintiff in court practice, seeing impossibility for party, whom ask court to determine the contract to prove all of the above.

In keeping with French and Ukraine law the court will not be limited to end the contract, but may also modify the contract at the request of one of the parties. The modification must be aimed at making the obligation reasonable and equitable in the new circumstances. Any modification must only be such, however, as will make the obligation reasonable and equitable in the new circumstances. It would not be reasonable and equitable if the effect of the court's order were to introduce a new hardship or injustice [19]. While, the French Civil Code not determined exceptions for court power to modify the contract, the Ukrainian Civil Code contains it. The modification of the contract by the court due to significant change of circumstances shall be allowed upon in unique cases when (1) termination the contract contradicts the public interests or (2) entails the parties' losses substantially exceeding the expenses for performance the contract under terms changed by the court. However, the question remains how to identify and agree on those terms even in court [40, p.117].

An interesting issue is a power of Ukrainian courts to modify the contract outside of the above cases. It appears to be based on the general principles of contractual freedom, if parties in contractual terms lay down modification the contract in case of change in circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party.

Based on the above the practical impact would be have issue of interpretation by courts the powers conferred upon French Civil Code in the case of refusal or the failure of renegotiations by parties in change of circumstances. The feasibility of assessment the French Civil Code new provision as rule increments significantly judicial intervention in contractual relations only time and case law will show.

The art. 652 (3) Ukrainian Civil Code sets out the exception of general rule upon consequences for contractual parties in the case of termination, according to which parties have no right to claim the return of what has been performed by them under an obligation prior to the moment of termination the contract. If the contract was terminated by the court due the significant change of circumstances the court upon the request of any party shall determine the consequences of the contractual termination based on the necessity to fairly distribute the expenses between the parties incurred in connection with performance of the contract.

Conclusions. Comparative study of the doctrine of hardship in French, English, Germany and Ukraine contract law allows to form the following conclusions. In French civil law the doctrine of *l'imprévision* covers all situations in which a party's contractual obligations have become harder and more onerous to perform because of an unforeseen event posterior to the conclusion of the contract. The conception of hardship was introduced to Ukrainian Civil Code in 2004 for provide the contractual parties to overcome the negative impact of a change of circumstances that was unforeseeable at the time of the conclusion of the contract and renders performance excessively onerous for one of them. This provision is aimed, on the one hand, to restore the balance of interests in contractual relations and to reduce risks, and on the other hand, to keep the contract, as far as possible, preference given to the adaptation of the contract over its termination. Unfortunately, the case law indicates difficulty in implementing the provision of hardship.

In English law doctrine is formed the concept of frustration. The only remedy for frustration in common law is termination of the contract; and termination is permanent – English law does not recognize partial frustration nor temporary frustration.

German doctrine of hardship has been conceptualized into three aspects requiring a change of circumstances, the parties would not have concluded the contract if they had been aware of this change, and it would not be

equitable for one party to deny the other party any amendment of the contract. German approach has been adopted in many harmonization projects and international instruments of contract law, in particular Principles on European Contract Law, Draft Common Frame of Reference, UNIDROIT Principles of International Commercial Contracts.

In French, English and Germany law is established three different approaches to cases of contractual impossibility as an exception to *pacta sunt servanda:* contractual parties are not discharge unless performance has become impossible; as exception for impossibility to some cases; or as separate exception.

The main problem nowadays is the lack of definition of 'significant change of circumstances' in legislation and case law. Such a rule seems to increase legal uncertainty as the criteria of its implementation are vague and have not yet been firmly and precisely defined by case law. In most cases, the courts do not recognize the change of circumstances referred to by the party as significant.

Civil law doctrine defines 'significant change of circumstances' as change of circumstances that did not depend on the will of parties and was the result of certain actions from the outside; and contains four features: was unforeseeable at the time of the conclusion of the contract, its duration and inevitability, arise without fault of the parties.

The law of many states and international soft law gives courts power to modify or terminate the contract in case of change in circumstances. French Civil Code not contains certain grounds in the event of change in circumstances to modify or terminate the contract. They are the same as in case of contract modification or termination by parties. In contrast, Ukrainian legislator decreases significantly judicial intervention in contractual relations. The power of Ukrainian courts to modify the contract is based on the general principles of contractual freedom, if parties in contractual terms lay down modification the contract in case of change in circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party.

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