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Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy

The article is dedicated to the comparative legal analysis of the material preconditions establishing Institute of impediment of the performance of obligation based on the uniform legal instruments of contract law, study of reformed legal order of mainly Anglo-American and continental law countries. The analysis of legal characteristics qualifying hardship to perform the obligation is done in correlation with the legal nature of the Force Majeure concept, by which the demonstration of essential distinctive marks of these two paradigms are reached with the purpose of determining framework of the collateral legal outcomes and responsibility, as well as scopes of contractual risk. The crucial part of the study also discussed scope of legitimate intervention of the Court and protection of autonomy of the will of parties, methods to be used while exercising judicial control, objective criteria to be considered in accordance with the level of gravity of the fulfillment in the process of adaptation or termination of the contract.

The actuality of the study is particularly increasing for purposes of determining scope of the fulfillment of contractual obligations complicated by the impact of Covid-19 pandemic and for establishing consistent Georgian judicial practice in this sphere.

Key words: *Hardship to perform the obligation, Force Majeure, impossibility of performance, awarding damages, adaptation of the contract, infringement of the obligation, judicial control, amended circumstances of the contract.*

1. Introduction

Pacta sunt servanda¹ is the cardinal² principle having foundational significance in all legal orders of the world, which imperatively establishes obligation of fulfillment of the contract terms for

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¹ *Surhone L. M., Timpledon M. T., Marseken S. F.*, Pacta Sunt Servanda: Brocard, Civil Law, Contract, Clause, Law, Good Faith, Peremptory Norm, Clausula Rebus Sic Stantibus, Betascript Publishers, 2010; *Houtte H. V.*, Changed Circumstances and Pacta Sunt Servanda: *Gaillard (ed.)*, Transnational Rules in International Commercial Arbitration, ICC Publ. Nr. 480, 4, Paris, 1993, <<http://tldb.uni-koeln.de/TLDB.html>> [10.10.2021]; *Zimmermann R.*, The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, 576-581; *Sharp M. P.*, Pacta Sunt Servanda, Columbia Law Review, Vol. 41, 1941, <http://heinonline.org/HOL/Page?handle=hein.journals/clr41&div=55&g_sent=1&collection=journals> [10.10.2021].

² *Candelhard R.*, Actual Performance or Compensation for Damages: International Consensus? Anniversary Collection “Sergo Jorbenadze – 70”, Tbilisi, 1996, 103 (in Georgian).

ensuring contractual equilibrium, stability of civil circulation and legal certainty.³ It is considered as transnational principle of private law⁴ and milestone of the international trade law.⁵

It is impossible to imagine existence of such a legal system, which does not recognize mutually agreed contractual terms as an individual law acting for parties. The mutual agreement reached lawfully takes place of the law for the parties creating it. For ensuring principle of contract legality out of the principle of non-infringement of the contract there are several exceptions, which are important to be protected as execution of the highest rule of *pacta sunt servanda*. The contract is legal document which has fundamental purpose to serve countries, nations, civilization, which is considered as vital basis for any society.⁶ Fulfillment of the precise contractual obligation must not contradict with this most general aim of contract law, which may cause danger to the private legal value of bona fide implementation of the rights and obligations between participants of civil circulation. In case of dilemma, contradiction between individual contractual interest and function ensuring protective, legal order of civil law, the court is entitled with the power to legitimately interfere into contractual relation.

In contractual relations the emergence of modified terms is a collateral risk of modern civil circulation, in case of which the application of unlimited principle of supremacy of contract results in collapse of principles of contractual equilibrium, fairness, reasonableness, equality and good faith,⁷ therefore the principle of *Pacta sunt servanda* exists along with doctrine of *clausula rebus sic standibus*, which provides preservation of binding power in the circumstances of unchanged contract terms.

In the law science it is recognized that modified terms establish two fundamental, basic concepts of force majeure (*vis major* in Roman law) and difficulty to perform (*Hardship*) with the collateral legal outcomes.⁸ In particular, hardship to perform entails extreme aggravation of performance of objectively enforceable obligation, which impartially does not exclude possibility of performance and in case of which the first mean of legal protection is adjusting contract to amended

³ *Puelinckxin A. H.*, Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances, 3 *Journal of International Arbitration*, №2, 1986, 47, <<http://tldb.uni-koeln.de/TLDB.html>> [10.10.2021].

⁴ *Goldman B.*, The Applicable Law: General Principles of Law – the Lex Mercatoria: Lew ed., *Contemporary Problems in International Arbitration*, London, 1986, 125, <<http://tldb.uni-koeln.de/TLDB.html>> [10.10.2021].

⁵ *Chengwei L.*, *Changed Contract Circumstances*, 2nd ed., 2005, <<http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>> [10.10.2021].

⁶ *Josserand L.*, *Le Contrat Dirige*, *Recueil Hebdomadaire Dalloz*, Paris, 1933, 138, referred in: *Ciongaru E.*, *Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice*, *Procedia – Social and Behavioral Sciences*, 149, 2014, 175.

⁷ *Barauskas E., Zapolskis P.*, The Effect of Change in Circumstances on the Performance of Contract, *Mykolas Romeris University*, 4 (118), 2009, 198, <<https://ojs.mruni.eu/ojs/jurisprudence/article/download/1531/1470>> [10.10.2021].

⁸ *Lando O.*, Salient Features of the Principles of European Contract Law: A Comparison with the UCC, *Pace International Law Review*, Vol. 13, Issue 2, 2001, 27, <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1214&context=pilr>> [10.10.2021]; *Horn N.*, Changes in Circumstances and the Revision of Contracts in some European Laws and International Law, in: *Horn N. (ed.)*, *Adaptation and Renegotiation of Contracts in International Trade and Finance*, Antwerp, Boston, London, Frankfurt a.M. 1985, 16, <http://www.trans-lex.org/create_pdf.php?docid=113700> [10.10.2021].

circumstances. Force majeure is established by the different legal prerequisites, which considers liberation from the performance of obligation as a collateral outcome.⁹

Widening usage of categories of the hardship of performance and force majeure is caused by social-economic changes¹⁰ and globalization or *deglobalization* tendencies of international trade area. Legal categories of hardship and force majeure are enacted after the legal balance defined, determined by the will of parties at the stage of contract stipulation is infringed by unexpected emergence of unpredictable circumstances.¹¹ Therefore, any legal system provides grounds for excluding liability of debtor with particular features. Force majeure and hardship as ground of temporary or permanent liberation from performing the obligation for the obstacle, which emerged outside the scope of control and risk of debtor, unites and generalizes particularities characteristic to various legal systems, based on which it implies in its concept the necessary systemized catalogue of prerequisites, and therefore, it is considered as **the most general legal principle of contract law**.¹²

The general principle of contract law is used with the meaning of principles of commercial contracts universally recognized on international level. They are considered as an effective mean for interpreting faulted and open norms of national law, as well as terms of the contract and for filling the gap. The abovementioned is clearly confirmed by numerous foreign court decisions.¹³

⁹ *Rösler H.*, Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, №4, 2007, 483, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

¹⁰ *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 174.

¹¹ Ibid.

¹² *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 109, With reference: *Magnus U.*, Force Majeure and the CISG, In The International Sale of Goods Revisited, Edited by Sarcevic and Volken, The Hague, 2001, 8; *Kessedjian C.*, Competing Approaches to Force Majeure and Hardship, International Review of Law and Economics, Vol. 25, 2005, 430, <www.cisg.law.pace.edu/cisg/biblio/kessedjian.html> [10.10.2021];

Barry N., Force Majeure and Frustration, American Journal of Comparative Law, Vol. 27, 1979, 231, <<http://www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp27&collection=journals§ion=22&id=245&print=section§ioncount=1&ext=.pdf>> [10.10.2021].

¹³ For instance, UNIDROIT principles of contract was used by International Chamber of Commerce (ICC) for interpreting Dutch law. See Award in ICC Case №8486 (original preserved in German) J.D.I., 1998, 1047-1049, English Translation in Y. B. Com. Arb. 1999, 162-173, UNILEX For English translation see: <http://www.trans-lex.org/create_pdf.php?docid=208486UNILEX> [10.10.2021]; *Berger K. P.*, International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts, American Journal of Comparative Law, Vol. 46, 1998, 140, <www.heinonline.org/HOL/Page?handle=hein.journals/amcomp46&id=1&size=2&collection=journals&index=journals/amcomp#150> [10.10.2021]. With regard to using as a mean for interpretation of national law on general contract principles, see: *Moscow D.*, Hardship and Force Majeure, The American Journal of Comparative Law, Vol. 40, 1992, 657, 665, <<http://www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp40&collection=journals§ion=36&id=667&print=section§ioncount=1&ext=.pdf>> [10.10.2021]; *Berger C. P.*, International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts, The American Journal of Comparative Law, Vol. 46, 1998, 129, 139-140,

Force majeure and hardship of performance apply with different terminological or paradigmatic varieties in legal orders of almost all countries having large legal tradition. Based on the concepts of liability and liberation therefrom, force majeure and hardship were developed as the general contractual principles, which have synthesized in their essence those crucial features and prerequisites, that were considered as major, generalized characteristics for these concepts by the legal systems. Establishment of material legal generalized prerequisites of force majeure and hardship was achieved by unification of the law.¹⁴

2. Actuality of the Issue for the Judiciary in the View of Global Pandemic

The covid-19 pandemic has been recognized as the darkest period in the existence of mankind, after the second world war.¹⁵ Considering unprecedented negative effect on world economy, national and international, especially long-term contracts,¹⁶ it revived two classical paradigms of the contract law – force majeure and hardship.¹⁷ Both concepts provides such legal regime of performing obligation or excluding performance, which regulates negative outcomes caused by emergence of unpredictable circumstances, especially in the long-term contractual relation.¹⁸ Taking into account its global and unprecedented scales, strict negative impact on international contracts, during the following years or decades Covid-19 will make these two concepts as central issues of judiciary.

In the modern legal area, Covid-19 is considered in the contractual relation as an event causing fracture of economic equilibrium.¹⁹ Therefore numerous countries declared Covid-19 pandemic as force majeure.²⁰ In February 2020 the Ministry of Economy of France recognized Covid-19 pandemic

<www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp46&collection=journals§ion=11&id=139&print=section§ioncount=1&ext=.pdf> [10.10.2021].

¹⁴ For instance, CISG, UNIDROIT Principles, PECL.

¹⁵ Kristalina Georgieva's Participation in the World Health Organization Press Briefing, 3 April 2020, International Monetary Fund, <<https://www.imf.org/en/News/Articles/2020/04/03/tr040320-transcript-kristalina-georgieva-participation-world-health-organization-press-briefing>> [10.10.2021].

¹⁶ *Marchioro I.*, European Contracts in the COVID 19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <<http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation/>> [10.10.2021].

¹⁷ *Weller M. P. et al.*, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung, Neue Juristische Wochenschrift, 2020, 1022.

¹⁸ *Lorfin P. A.*, La Renégociation des Contrats Internationaux (Bruxelles: Bruylant, 2011), 28ff [Accaoui Lorfin “La renégociation des contrats internationaux”]; *Harmathy A.*, “Hardship” in UNIDROIT, ed., Eppur si muove: The Age of Uniform Law – Essays in Honour of Michael Joachim Bonell to Celebrate his 70th birthday, Vol. II, Rome, 2016, 1039.

¹⁹ *Weller M.P. et al.*, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1021.

²⁰ Chinese firms use obscure legal tactics to stem virus losses”, The Economist (22 February 2020), <<https://www.economist.com/business/2020/02/22/chinese-firms-use-obscure-legal-tactics-to-stem-virus-losses>> [10.10.2021]; CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts (10 April 2020), China Council for the Promotion of International Trade, <http://en.ccpit.org/info/info_40288117668b3d9b017163990e5a082a.html> [10.10.2021]; *Christie K., Han M., Shmatenko L.*, LNG Contract Adjustments in Difficult Times: The Interplay between Force Majeure,

as force majeure event and established that the respective fines would not have been applied to the cases of delay in contractual relations concerning state procurement.²¹ Similar statements have been made in other countries.²² In May 2020 the government of the United Kingdom has called the contract parties to act fairly and responsibly while performing contractual obligations, especially in disputable relations connected to force majeure and hardship, frustration of purpose of the contract.²³ The “Guideline principles on responsible contractual activity in the process of performing or executing those obligations, which were materially affected by the emergency state of Covid-19”, defines that the responsible and fair action entails proportionate and rational activities in the context of performance of the obligation or dispute resolution with relation to enforcement, as well as activities which are oriented on protecting health, public and national interests.²⁴

In March 2020 the German Bundestag has adopted the act aiming at reducing negative effects of Covid-19 pandemic for the civil, bankruptcy and criminal law proceedings (so called corona package), which was adopted by the Bundestag on 27 March and it entered into force immediately.²⁵ According to the mentioned act the requirement to refuse the performance of the contract or its adjustment is still evaluated based on contract limitation clauses (namely prior contractual limitation clauses related to force majeure and hardship) or legislative norms. As a rule, pandemic is considered as force majeure circumstance, however if limitation clauses of the contract do not cover all elements of the existing force majeure situation, then the legislative norms are used for interpreting the limitation clauses of the contract.

The Covid package adopted by Germany underlines the condition that even if there is no special preferential package adopted by the state for the subjects of civil relations and no special regulation introduced with regard to the amended terms in contractual relations and issue of inability to perform,

Change of Circumstances, Hardship, and Price Review Clauses, 18:3 OGEL, Oil, Gas & Energy Law, 2020, 12, www.ogel.org/article.asp?key=3889 [10.10.2021]; (CCPIT Certificates, the China National Offshore Oil Corporation (CNOOC) and the China National Petroleum Corp (CNPC).

²¹ Déclaration de M. Bruno Le Maire, ministre de l'économie et des finances, sur l'impact économique de l'épidémie de COVID 19, à Paris le 28 février 2020 (28 February 2020), <<https://www.vie-publique.fr/discours/273763-bruno-le-maire-28022020-coronavirus>> [10.10.2021]; Mesures d'accompagnement des entreprises impactées par le coronavirus (COVID-19), (28 March 2020), Direction générale de la concurrence, de la consommation et de la répression des fraudes, <<https://www.economie.gouv.fr/dgccrf/mesures-daccompagnement-des-entreprises-impactees-par-le-coronavirus-COVID-19>> [10.10.2021].

²² Iraq's Crisis Cell extends curfew, announces additional measures to contain COVID-19 (22 March 2020), Government of Iraq <<https://gds.gov.iq/iraqs-crisis-cell-extends-curfew-announces-additional-measures-to-contain-COVID-19/>> [10.10.2021] (the Iraqi government issued a similar declaration, qualifying the period of the COVID-19 crisis a force majeure event for all projects and contracts effective from February 20, 2020); Iraq declares COVID-19 a force majeure for all contracts (1 April 2020), Offshore Technology <<https://www.offshore-technology.com/comment/iraq-COVID-19-force-majeure-contracts/>> [10.10.2021] (The declaration affected projects worth approximately 291 billion USD).

²³ UK Cabinet Office, Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the COVID-19 Emergency (7 May 2020) at para 15 (c), GOV.UK, <<https://www.gov.uk/guidance/responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency>> [10.10.2021].

²⁴ Ibid.

²⁵ <<https://www.klgates.com/COVID-19-German-Act-to-Mitigate-the-Consequences-of-the-Pandemic-03-30-2020>> [10.10.2021].

the protective mechanisms for parties is still available and is based on respective normative categories of the German Civil Code (hereinafter – BGB) in the framework of legal regimes of inability to perform and adjust the contract (BGB paragraphs 274 and 313).

The boundary qualifying hardship to perform from the force majeure²⁶ mainly is displayed by the resource of feasibility with the modified content of performance.²⁷ In case of hardship the contract may still have resource to be performed in extra term, despite the fundamental, uncontrollable swings, which are faced by contractual relation with amended conditions.²⁸

Establishing qualifying boundary for concepts of inability or hardship to perform because of the Covid-19 depends on whether there is an objective, reasonable possibility, even in the modified content, to save contractual relation.²⁹ In the conditions of Covid-19 it appeared to be more flexible to use the hardship clauses³⁰ or the standard of protection envisaged by the law regarding, to use the legal regime.³¹ The category of absolute inability prescribed under the Roman law, in the view of practical application, was restricted and the purpose to rescue contract on the basis of hardship acquired higher importance.³²

Both legal mechanisms of hardship and force majeure regulate legal outcomes of modified circumstances, however in certain legal systems the peculiarity of establishment of these categories and frames of their application depend on the scale of exemption from the principle of sanctity of contracts determined by each legal order. Even though Covid-19, in most cases, finds legal category of force majeure, but considering ability to perform the contract, it is possible that the objective possibility for saving contract is still available. Inability to consider in advance the modified conditions and avoid them (inability to decrease or eradicate the event, as well as outcomes), as a common qualifying feature for hardship and force majeure, must be discussed in the view of uniqueness and gravity of Covid-19 crisis. Despite the general forecasts made years ago based on

²⁶ Tsakiroglou & Co. Ltd. v. Noblee Thörl GmbH [1962] A.C. 93.

²⁷ Pascale Accaoui Lorring, “L’article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé” (2018), 5 IBLJ, 450.

²⁸ Tsakiroglou & Co. Ltd. v. Noblee Thörl GmbH [1962] A.C. 9; *Joskow P. L.*, Commercial Impossibility, The Uranium Market and the Westinghouse Case, 6 J. Legal Stud., 1977, 119.

²⁹ *Marc-Philippe Weller et al*, Virulente Leistungsstörungen — Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1022, cited in: *Berger K. P. Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 115.

³⁰ International Chamber of Commerce (ICC) has changed the Force Majeure and a Hardship Clauses adopted in 2003 in March 2020, for adaptation to COVID-19, <<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>> [10.10.2021].

³¹ *Marchioro I.*, European Contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <<http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation/>> [10.10.2021].

³² *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, 2008, 39 VUWLR, 724. For comparative analysis of hardship see: *Zweigert K., Kötz H.*, II Introduction to Comparative Law, 1977, 13-14.

medical examinations, such catastrophic scenario, which caused the “world viral crisis”,³³ appeared to be unpredictable occasion even for cautious entrepreneurs. If years ago, the legal protection mechanisms of hardship and force majeure were considered as protection mechanisms to be used exclusively, nowadays they will become regular means to be used for the purpose to ensure fair distribution among parties of negative outcomes resulting from impacts of pandemic on the global economy.³⁴

3. Scale of Recognition of the Hardship Doctrine in the Continental and Anglo-American Legal Order

In the continental legal systems application of the hardship concept has developed in two directions.³⁵ According to one approach, the category of hardship emerges in case when fulfillment of the obligation becomes economically distressing [the contractual balance is demolished in the economical aspect]³⁶ by virtue of changed circumstances. In such legal orders, in case of uniform laws, the hardship is also referred as “economic force majeure”.³⁷ According to second, broader approach, for hardship it is necessary to have in place the interference with the basis of the contract or its essential change to the extent in case of which performance of obligation with the primary content is unjustified, unreasonable and contradicting to the principles of contract law.³⁸ Mostly hardship in an economic, financial event, which causes increase of the cost of performance for one of the parties,³⁹ but the area of the hardship is not framed only by economic distress in legal orders of second category. The hardship is used as a ground for temporary or permanent, complete or partial exclusion of fulfillment the obligation pursuant to the primary terms.

Jurisdictions of continental law, such as: systems of Germany, France, Greece, Austria, Italy, Poland, Hungary, Portugal, Netherlands, Switzerland, Russia, Argentina, Brazil, Peru, Colombia, Japan and Egypt, have regulated the issue of hardship by normative act, or, at least, have developed in the framework of judiciary.⁴⁰

³³ *Marc-Philippe Weller et al*, Virulente Leistungsstörungen — Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) *Neue Juristische Wochenschrift*, 1022.

³⁴ *Berger K. P., Daniel Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 130.

³⁵ *Fontaine M.*, The Evolution of the Rules on Hardship, in *Bortolotti F. Ufot D. (eds.)*, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*, Alphen upon Rhine: Kluwer Law International, 2018, par. 12.

³⁶ For instance, Romania and France.

³⁷ *Lookofsky J.*, Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's “Competing Approaches to Force Majeure and Hardship, Reproduced from *International Review of Law and Economics*, Vol. 25, 2005, 438, <www.cisg.law.pace.edu/cisg/biblio/lookofsky.html> [10.10.2021].

³⁸ German and Georgian model.

³⁹ *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, *Procedia – Social and Behavioral Sciences*, 149, 2014, 176.

⁴⁰ *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, Alphen upon Rhine: Kluwer Law International, 2009, 402. ICC Case №16369, 2011, 39 YB Comm Arb 169 (2014), 202.

Continental law countries, and especially German Law represents a system significantly inclined towards friendly adaptation of the contract, which naturally is characteristic to the legal order oriented towards fulfillment of the obligation. In the legal system oriented towards performance, the primacy of fulfillment and therefore the contractual interest is depicted in the primacy of fundamental infringement, and in Georgia in the primacy of obligation to additional performance, which is at the top in the hierarchy of rights to secondary demand,⁴¹ and exit from contract is used as an extreme mechanism of legal protection – *ultima ratio*. The purpose is one – protection of the supremacy of contract, as for the ensuring legal constructions – various.

According to German doctrine, the breach is fundamental when it cannot be corrected in additional period (*nachfrist period*). With relation to the right to reject contract, the primacy of interest in performance is portrayed by the concept of fundamental breach in the Georgian law.⁴² The primacy of performance of the obligation results in normative support towards the contract adaptation regime in the continental law countries.

The doctrine of the German law (*interference with the basis of the contract* – wide paradigm of hardship) has influenced on the normative approach towards the issue in Scandinavian countries (Norway, Denmark, Sweden, Finland), as well as in Japan, Greece and Brazil.⁴³ However, the approaches of legal orders differs in terms of the scale of intervention from the court.⁴⁴ Certain legal orders considered termination of the contract (in circumstances of satisfying prerequisites of changed terms) as only legal outcome, excluding the outcome of adaptation. However, such approach contradicts with the essence of existence of the legal category of hardship and the main purpose – to rescue the contract, which is recognized in the theory and practice of the international contract law. The mentioned provides that in case of hardship based on the change in terms, such outcome must be found, which will avoid arbitrary, immature termination of the contract by one of the parties, and termination of the contract by the court may be used as outcome for the claim of adjusting contract as the legal protection mechanism to be applied in extreme case (*ultima ratio*) after establishing objective impossibility of adaptation.⁴⁵

In the common law countries, the doctrines of frustration of contract (English), commercial impracticability (UCC – American) are applicable, however not to such an extent as they are developed in the continental legal systems. The mentioned legislative paradigms are oriented on

⁴¹ *Merryman J. H., Clark D. S., Haley J. O.*, Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia, LexisNexis, San Francisco, 2010, 139.

⁴² *Chitashvili N.*, Concept of Fundamental Breach in Comparative Perspective and its Impact on Georgian Law, Polish-Georgian Law Review, Faculty of Law and Administration University of Warmia and Mazury in Olsztyn Faculty of Law Ivane Javakishvili Tbilisi State University, No.2' 16, 49-93.

⁴³ *Lando O., Hugh Beale H.*, The Principles of European Contract Law, Combined & Revised, Boston: Kluwer Law International, 1999, 328.

⁴⁴ *Lorfin P. A.*, Adaptation of Contracts by Arbitrators in: *Bortolotti F., Ufot D. (eds.)*, Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Alphen upon Rhine: Kluwer Law International, 2018, 41, 43 [Accaoui Lorfin, “Adaptation of Contracts by Arbitrators”].

⁴⁵ Regarding the principle “ut res magis valeat quam pereat” see: Force Majeure TransLex-Principle IV 5.3 and Commentary №2, TransLex Law Research, <www.trans-lex.org/925000> [10.10.2021]; Association of service industry firms v Service industry firm, Award of 27 May 1991, 17 YB Comm Arb 11, 1992, 15.

ensuring the completion of the contract and liberation from the liability to fulfill the obligation and it is not expressed by granting to the judge the power to adapt the contract.⁴⁶ One of the numerous dogmatic reasons of the abovementioned is the fact that common law systems have rejected the classical doctrine of amended terms developed by the influence of canon law (*clausula rebus sic stantibus*). In the continental law system for transforming contract into individual law for parties, for its legal force, it is necessary to have the will to be self-bound by contract terms. If the purpose, basis for which the parties expressed the will to be bound does not exist anymore, the mentioned justifies excuse of modification/exclusion of performance for legal systems and it gives rise to recognition of concepts of hardship and force majeure.

The approach of English law, which does not acknowledge the power of courts to adjust the contract to modified terms,⁴⁷ is criticized in the doctrine in the context of constantly changing commercial reality.⁴⁸ American law recognizes application of the doctrine of commercial impracticability in case of the extremely complicated contractual obligations caused by dramatic and unexpected change of terms, however the power of American courts is not wide with regard to exclusion from contractual liability completely or partially.⁴⁹

4. The Doctrine of Interference with the Basis of the Transaction – from the Depths of Judiciary to the Codification by Civil Legislation

In German law on the stage of creating civil legislation (1900) there was a huge contradiction against integration of the principle *clausula rebus sic stantibus* with the argument of endangering legal certainty and stability. The will theory known for Canon law appeared to be incompatible with *clausula*⁵⁰ theory. Despite the resistance to the adoption of adjustment to modified terms, in the end of 19th century and beginning of the 20th century the controversial discussion on necessity to acknowledge the doctrine was activated among German dogmatists.⁵¹ Before the civil legislation entered into force, German scientist Windscheid stated that “if the Canon law doctrine about modified

⁴⁶ *Marchioro I.*, European Contracts in the COVID-19 age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <<http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation/>> [10.10.2021].

⁴⁷ *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 98-103.

⁴⁸ *Rogers A.*, Frustration and Estoppel in: *McKendrick E. (ed.)*, Force Majeure and Frustration of Contract, 2^{ed}, London: Lloyd's of London Press, 1995, 245.

⁴⁹ *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 103-107.

⁵⁰ *Schwarzenberger G.*, A Manual of International Law, 169, 5th ed. 1967; *Verdross A., Simma B.*, Universelles Völkerrecht, 1976, 418-424; *Brownlie I.*, Principles of Public International Law, 2nd ed., 1973, 599.

⁵¹ *Köbler R.*, Die „clausula rebus sic stantibus“ als allgemeiner Rechtsgrundsatz, Tübingen: Mohr Siebeck, 1991, 90, Further reference: *Endemann* (1899), *Dernburg* (1899), *Bindewald* (1901) a *Artur Kaufmann* (1907).

terms is thrown away from the door, it will always return from the window.”⁵² In German law the dramatic hyperinflation after the first world war was considered as the “return from the window” of *clausula* doctrine, which was followed by the introduction of new currency (*Rentenmark*) for overcoming hyperinflation in 1923. The mentioned reality caused numerous dilemmas for the German court.⁵³ In 1922, in one of the first cases on adjusting contract to modified terms,⁵⁴ the imperial court relied on the doctrine of “interference with the basis of the transaction” (*Wegfall der Geschäftsgrundlage*) developed by Ortmann several years before and on the normative provision of the principle of good faith (BGB par. 242), which in essence comes closer to the substance of the changed circumstances’ theory of Canon law. The principle of good faith has justified establishment of the doctrine of changed circumstances in German law, under direct legislative support.⁵⁵ Hence, even though *clausula* principle could not enter into German legislation directly (“from the door”), but by force of the principle of good faith (“from the window”) it indirectly settled in the judicial law.⁵⁶ Therefore, the institute of adjusting contract to changed circumstances is the firstborn of judicial law in German legal system, which emerged from the depth of judiciary and then has been regulated in the legislation.⁵⁷

According to the doctrine of the basis of transaction, any contract is based on grounds agreed by the parties, often not on directly expressed, but on implied terms. These implied terms represent the essence, basis, notion of the contract, on which the agreement between parties is based. If the mentioned basis of transaction is fundamentally interfered, then the contract shall be modified or

⁵² *Windscheid B.*, Die Voraussetzung (1892) 78 AcP, 197; *Windscheid B.*, Die Lehre des römischen Rechts von der Voraussetzung (Düsseldorf: Buddeus, 1850).

⁵³ For this issue see: *Rheinstein*, The Struggle between Equity and Stability in the Law of Post-War Germany, 3 U. Pitt. L. Rev. 91-103 (1936/37); *Horn N.*, *Kötz H.*, *Leser H.G.*, German Private and Commercial Law: An Introduction, 1982, 141.

⁵⁴ Reichsgericht [RG] [Imperial Court], 3 February 1922, 103 RGZ 328 at 332 (Germany).

⁵⁵ The preference of analogy to law does not secure us from such gaps when the court is obliged to apply analogy of law and regulate relation “in accordance to general principles of law, fairness, good faith and moral requirements” (CCG, Article 5 III), Often the decision made in this basis, despite that it is not limited neither generally nor formally, it takes even more importance than ordinary precedent. This is caused by the circumstances that it does not have exact analogy in the legislation and there is no norm regulating such relations. Therefore, the mentioned *ratio descidendi*, deriving from its persuasive authority, factually applies and its consideration is done voluntarily by other courts with the principle of *cetera parem*. After long application (*consetudo*) this decision changes its initial form and received public recognition (*opinion necessitatis*), as a fair general rule of conduct, by which it becomes a usual norm. The custom has normative ground of operation (*opinion iuris*) and pretension to apply. By this way the principle of good faith evolved in the German judicial practice and based on it a lot of norms appeared, which become findings of modern law of obligations. The described process portrays such episode of judicial activity, when area not organized based on the principle of good faith are regulated and legislative gaps are being filled in (function of filling in the law). See *Vashakidze G.*, Good Faith according to the Civil Code of Georgia – Abstraction or Acting Law, Georgian Law Review, 10/2007-1, 44 (in Georgian).

⁵⁶ *Berger K. P.*, *Daniel Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 122.

⁵⁷ In the European Law the changed circumstances are mostly determined in the judicial practice, by which the civil code provisions are revived. See: *Chanturia L.*, *Zoidze B.*, *Ninidze T.*, *Shengelia R.*, *Khetsuriani J.* (eds.), Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 400 (in Georgian).

terminated. The German doctrine of hardship – interference with the basis of transaction covers mechanisms of adjusting or terminating contract in the Covid-19 scenario as well,⁵⁸ when without fault of any of the parties the basis of contract is dispelled.⁵⁹

The fundamental reform of the law of contract in Germany was finalized on 26 November of 2001 by adoption of the law on modernization of contract law,⁶⁰ which entered into force on 1st January 2002, after 102 years after adoption of BGB.⁶¹ The reform was caused by requirement of implementation of the EU law and the outcomes of its conceptual improvement was determined by the strive for uniform law. The reform touched upon the hardship, as well as regulation of the concepts of impossibility of performance,⁶² deriving from the purpose of legislator – to codify institutes developed by the court independently from code.⁶³ Therefore, in the paragraph 313 of BGB the firstborn of the German judicial law was portrayed – the doctrine of the interference with the basis of the transaction (Störung der Geschäftsgrundlage).⁶⁴

4.1. Substantive Legal Preconditions for the Interference with the Basis of the Transaction

The concept of the collapse of the basis of transaction prescribed under the new normative provision of BGB (paragraph 313) entails change in the objective grounds of the contract emerged after the conclusion of the agreement, extreme hardship, which results in failure of correlation of contractual obligations, equivalence and contractual balance. The change must be so essential that in case of having considered it in advance, parties would not have concluded the contract, or would have concluded with completely different content.

In the concept of collapse of the basis of transaction three elements may be considered: (1) factual, which provides that the essential conditions considered by the contractors or any of them as the basis of contract are understood, implied from then on, at the stage of conclusion of the contract. If these conditions were not supposed by the parties (or party), the contract would not have been concluded, or it would have been concluded with completely different content. (2) hypothetical element – implied conditions considered as basis of the contract by parties/party would definitely become

⁵⁸ *Weller M. P. et al*, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) *Neue Juristische Wochenschrift* 1017, 1021 (for German law); *Wagner E. et al*, “Auswirkungen von COVID-19 auf Lieferverträge”, *Betriebs-Berater*, 2020, 846.

⁵⁹ *Berger K.P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 122.

⁶⁰ Gesetz zur Modernisierung des Schuldrechts, Vom 26.11.2001, verkündet in Jahrgang 2001 Nr. 61 vom 29.11.2001, <http://www.rechtliches.de/info_Gesetz_zur_Modernisierung_des_Schuldrechts.html> [10.10.2021].

⁶¹ Regarding the reform see: *Zimmermann R.*, Breach of Contract and Remedies under the New German Law of Obligations, 2002, 1-5, <<http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>> [10.10.2021].

⁶² *Rösler H.*, Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, *Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L.*, Vol. 15, №4, 2007, 486, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

⁶³ *Markesinis S. B., Unberath H., Johnston A.*, *The German Law of Contract – A Comparative Treatise*, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 383.

⁶⁴ *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, *Kluwer Law International BV, the Netherlands*, 2009, 79.

integral part of the contract in case of the respective desire of one of the parties. (3) normative element – second party would have definitely agreed to insert the mentioned conditions into the contract. The normative element is the most important criterion, as far as it creates basis of the contract for both parties.⁶⁵ Therefore, when evaluating the basis of the contract the following preconditions must be taken into account: 1. Expectations of one of the parties 2. Were expressed at the stage of conclusion of the contract 3. Expectations were perceived by the second party 4. and the common contractual interest in the relation was based on this expectation.

Hence, the normative provision of German law does not apply only to economic hardship of performance, as it is stipulated in certain legal orders and uniform legal instruments of continental law. The concept of interreference with the basis of transaction is remarkably wide in accordance with the Ortmann doctrine and German judicial practice,⁶⁶ as it exceeds the notion of economic force majeure. In addition to the changes of terms emerged after conclusion of the contract, by virtue of which the balance, proportionality collapses between reciprocal rights and obligations of the parties it also entails the occasion when substantial visions of parties, which became the basis for concluding contracts, appeared to be incorrect, i.e. parties were wrong in evaluation, perception of those conditions, which formed the basis of contract (mistake in the basis of transaction).

In the systemic point of view, the doctrine of interference with the basis of transaction often is considered in the frames of the breach of obligation (*Leistungsstörung*). Paragraph 313 of BGB, which is expression of the principle of good faith, was not placed with the paragraph 242 prescribing the principle of good faith, as it was anticipated, but in the book II on the Law of Obligations – in the part of contractual obligations, hence its provisions apply equally to all contractual obligations.

Moreover, paragraph 313 of BGB has strictly assisting significance.⁶⁷ First of all, contractual provisions are interpreted, the provisions regulating mistake, hardship, faulty performance and if these mechanisms do not ensure solution of the issue, then the judge may interpret the contract based on the principle of good faith (§§157, 242). Therefore, paragraph 313 of BGB is applied when all the means of legal protection are exhausted.⁶⁸

4.2. Adjustment and Termination of the Contract

After confirmation of existence of the substantial legal preconditions for the interreference with the basis of transaction, the primary and prioritized mean and outcome of legal protection is the

⁶⁵ *Rösler H.*, Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L., Vol. 15, №4, 2007, 489, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

⁶⁶ *Fontaine M.*, The Evolution of the Rules on Hardship, in: *Bortolotti F., Ufot D. (eds.)*, Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Alphen upon Rhine: Kluwer Law International, 2018, par. 12.

⁶⁷ *Hondius E. H., Grigoleit H. Ch.*, Unexpected Circumstances in European Contract Law, Cambridge University Press, New York, 2011, 55.

⁶⁸ *Rösler H.*, Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L., Vol. 15, №4, 2007, 490-491, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

adjustment of the contract by the court. BGB provides the possibility to adjust the contract to changed circumstances, if, considering the principle of good faith, it is unreasonable to require from the party to perform obligation in initial, unchanged form. The issue of binding force of the contract must be decided in light of the contractual risk and factual circumstances.⁶⁹ In this case the principles of binding force and good faith are confronting one another,⁷⁰ which must be determined based on the criterion of reasonableness.

“The area of application of the principle of good faith is mainly caused by occasions, where the requirement formally complies with the acting substantial law, but its enforcement is unfair in certain cases. It is inadmissible that the right deriving from acting law or outcome of its realization is unfair. Consequently, “reservation of the good faith will resist against the execution of requirement deriving from such right, “which in given case has only the form of the right and not the content.”⁷¹

When analyzing the character and gravity of the circumstances obstructing performance, the court may ascertain that it the breach of obligation is based on hardship, and not interference with the basis of transaction. The fundamental reform touched upon the issues of regulating hardship. It may be expressed in the form of absolute, subjective or objective, as well as moral relative and economic impossibility to perform.⁷²

Based on the paragraph 275 of BGB it is possible to establish hardship in contracts, which provides delivery of services or goods.⁷³ For example hardship may be established with absolute term

⁶⁹ Paragraph 313 of BGB prescribes:

(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

⁷⁰ *Hesselink M.*, The Concept of Good Faith in: *Hartkamp A.S., Hesselink M., Hondius E. H., du Perron E., Joustra C., Veldman M. (eds.)*, Towards a European Civil Code, 3rd ed., Kluwer Law International, 2004, 471-498; *Ebke W. F., Steinhauter B. M.*, The Doctrine of Good Faith in German Contract Law, in: *Beatson J., Friedman D. (eds.)*, Good Faith and Fault in Contract Law, Oxford University Press, 1995, 171-180; *Houh E.*, The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel? *Utah L. Rev.*, Vol. 2005, U. of Cincinnati Public Law Research Paper, №04-12, 2005, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622982###> [10.10.2021].

⁷¹ „...im gegebenen Falle also nur die Form, nicht das Wesen des Rechtes hätte”. *Dernburg*, Pandekten, Band I, 1: Allgemeiner Theil, 1900, § 138, 320, Referred in: *Kereselidze D.*, Most General Systemic Concepts of Private Law, Tbilisi, 2009, 8 (in Georgian).

⁷² In details see *Chitashvili N.*, Impact of Changed Circumstances on the Performance of Obligation and Potential Secondary Rights of the Parties, Dissertation, Ivane Javakhishvili Tbilisi State University, 2015, 68-76 (in Georgian).

⁷³ On the exclusion of principle faulty responsibility in financial obligations (“one has to have money”) (“Geld hat man zu haben”) see BGH, Judgment, February 4, 2015, №VIII ZR 175/14.

(*absolutes Fixgeschäft*) in precise relationship, where delay dispels the contractual interest of performance. The outcome of qualification of hardship may be complete, as well as temporary exclusion from the performance of obligation, i.e. suspending, postponing performance of the obligation (as well as counter/substitute performance⁷⁴) before the eradication of the circumstances causing hardship. In case creditor loses interest in performance during extra term, he/she obtains right to exit the contract.⁷⁵ As for the analysis of the right for restitution of damages, even though it is evaluated independently, as a rule in case of unfaulty hardship (force majeure caused by pandemic) (with the reservation that it is not caused by the fault of debtor⁷⁶), it excludes the precondition of fault and therefore, requirement of damages.

Force majeure in German law does not have a normative regulatory support,⁷⁷ thus the claim of the party regarding liberation from performance of obligation (“*impossibility*” – “*Unmöglichkeit*”) or adjustment (“*discontinuation or adjustment of the basis of the transaction*”) must be based on normative prerequisites of paragraphs 275 and 313 of BGB (“*Wegfall der Geschäftsgrundlage*”). When determining boundary between these two categories, according the fact which concept will exist during the individual analysis of particular dispute (interference with the basis of transaction or hardship), the respective tools of protection are applied – temporary suspension of performance, temporary or permanent liberation from the fulfillment of obligation, adjustment of contractual obligation to changed circumstances, termination of the contract.

The legal system of Germany is a model essentially oriented on adaptation. If the normative prerequisites of paragraph 313 are fulfilled and there is reasonable alternative of adaptation, party may require from other party adaptation of the contract through court proceedings. The nature of German law inclined towards adjustment of contract remains special load in the context of Covid-19 as well, as deriving from the similar nature of pandemic as of the war, the contractual risk of negative (unfaulty) outcomes coming therefrom, in accordance with the principle of fairness, it is impossible to be imposed only on the one party of the contract.⁷⁸ The fact that the voluntary agreement on adaptation of contact cannot be reached between parties, does not hinder the court for implementing the

⁷⁴ BGB 326 (1) If debtor in accordance to paragraph 275 part 3 can refuse to perform, then the right to reciprocal satisfaction is excluded; In case of partial performance paragraph 441, part 3 is applied.

⁷⁵ Paragraph 326 (5) If debtor according to paragraph 275 part 3 can refuse performance, then creditor can reject the contract; with regard to exit from the contract paragraph 323 is used, with the condition that determination of term is excessive.

⁷⁶ In case of neglecting obligation to notify regarding the prior consideration, avoidance based on anticipatory breach (CCG, 405 IV) etc.

⁷⁷ However, German court uses force majeure as general contractual principle and interprets categories of force majeure with generalized signs prescribed in internal legal order. For instance, in the Decision (BGH, Judgment May 16, 2017, №X ZR 142/15), which was related to the adjustment of contract of Air transport, the Federal Court of Justice of Germany (“Bundesgerichtshof” — “BGH”) established, that force majeure is the event existing outside the control, which cannot be avoided by special circumspection, that reasonably may be requested by other party, which also is not related to operative area of organization of air tour, as well as area of personal control of passenger.”

⁷⁸ *Marc-Philippe Weller et al, Virulente Leistungsstörungen — Auswirkungen der Corona- Krise auf die Vertragsdurchführung* (2020) *Neue Juristische Wochenschrift*, 1021.

adaptation.⁷⁹ In case of not getting consent on adjustment of the contract from other party, the part applies to the court with the query of adjusting the contract. Thus, the court will decide on terminating the contract if the adjustment of the contract is illegal, impracticable or unreasonable for second party.⁸⁰

According to the compromise reached between the German legal doctrine and judicial law, despite the wide spectrum of application of paragraph 313, it is still exceptional and assisting legal protection mechanisms for parties⁸¹ ensuring contractual equality, public order and the principle of exercising rights in good faith within the framework of civil circulation. Application of the concept of hardship must be still done carefully and within moderate limit, so that the mentioned mechanism does not cause temptation in parties to run away and avoid performance of contractual obligations. Hence, the doctrine of interference with the basis of transaction remain connected to its historic ancestor – the principle of good faith, from which the mentioned normative category has been born.

The doctrine of interference with the basis of transaction may be applied as mean of legal protection in contractual relation only in favor of parties acting in good faith. Use of the doctrine of interference with the basis of transaction remains restricted with the reasonable limits of legal certainty and obligation to fulfill the contractual obligation. Therefore, application of this mechanism for liberation from contractual responsibility must be done with same caution as the function correcting and terminating the principle of good faith in contract law.

5. French Doctrine – *Théorie de l'imprévision*

The historic path of French law from rejection of the doctrine of changed circumstances was ended in 2016 by its codification. Notwithstanding lengthy resistance, in condition of constantly changing civil circulation, the French legal order has come to legislative recognition of the *théorie de l'imprévision* doctrine.

Before 2016 French law completely rejected the *théorie de l'imprévision*, because the Canon law doctrine on changed circumstances could not find place in the Code of Napoleon. In 1876 the Cassation Court of France in the most important decision for French law⁸² has strictly criticized *l'imprévision* theory. Based on the binding force of contract (article 1134 of the French Civil Code) the Court rejected the claim of adapting amount of fee defined between parties in 1567 and stated that, despite the high necessity for adaptation, the Court cannot implement adaptation without respective normative provision and in condition of the absence of legislative support.⁸³

⁷⁹ BGH, 30 Sept 2011, NJW 2012, 373.

⁸⁰ *Christian Grüneberg in Palandt: Bürgerliches Gesetzbuch*, 79th ed., Munich: C.H. Beck, 2020, at § 313, par. 42.

⁸¹ *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 124.

⁸² Cass civ, 6 Mars 1876, Canal de Craponne [1876] D 1876 I 193 [Craponne].

⁸³ *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 118.

The mentioned approach for years became the subject of criticism from dogmatists,⁸⁴ however the Cassation Court remained on its position. In the view of courts, admissibility of adaptation would have encouraged deviation from the contractual obligation by the parties, and giving discretion of adapting contract to the court would have increased the danger of collapse of legal stability.⁸⁵

With the influence of the mentioned legislative policy and normative reality, parties of the commercial relation ran away from strict judicial or legislative reality by using mechanism of arbitration, as well as by reinforcement of contractual reservations of adaptation and negotiation. Only in 1916 the Court⁸⁶ made a precedent of adapting the contracts and admitted adjustment of contract to changed circumstances.⁸⁷ The mentioned fact was justified by the public interest of preserving cycle of service in the public sphere, however the court did not give the possibility of adaptation directly to the parties.

In 2016 the legislative reform took place in the French contract law,⁸⁸ which changed the conceptual approach developed by the case *Canal de Craponne*.⁸⁹ Having analyzed that French law was lagging behind from the major development course of the European law with regard to regulating the issue of changed circumstances,⁹⁰ article 1195 reflecting *théorie de l'imprévision* was added to the French Civil Code: if the changed circumstances, which were impossible to be considered at the stage of concluding contract, extremely complicated the performance of contract for the party who has not taken the contractual risk of appearance of such conditions, then he/she may apply to other party with the query to review the contract, initiate new contractual negotiations. During the negotiation process, the debtor still has obligation to perform the obligation under the agreed terms.

In case of refusal from the second party or failure to successfully conclude negotiation, parties have right to terminate contract by mutual agreement from the determined period and under the agreed terms. Parties have right to jointly apply to the court with the query of adaptation of the contract. In case of failure to agree in the court within a reasonable term, the court may adapt contract terms by the request of one of the parties or terminate the contract from the determined (by the court) period and under determined (by the court) terms.

⁸⁴ *Berger K. P. Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, with further reference.

⁸⁵ *Ibid*, 118.

⁸⁶ CE, 30 Mar 1916, *Compagnie générale d'éclairage de Bordeaux*, [1916], <<https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-30-mars-1916-compagnie-generale-d-eclairage-de-bordeaux>> [10.10.2021].

⁸⁷ The mentioned has given rise to establishment of similar provisions in Egypt, Algeria, Iraq, United Arab Emirates, Sudan. See *Horn N.*, *Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law*, in: *Horn N. (ed.)*, *Adaptation and Renegotiation of Contracts in International Trade and Finance*, Antwerp, Boston, London, Frankfurt a.M. 1985.

⁸⁸ Ordonnance of 10 February, 2016.

⁸⁹ *Craponne case*, Cass. D.P. 1876 I. 197.

⁹⁰ *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, *Légifrance*, <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004539&categorieLien=id>> [10.10.2021].

From the mentioned provisions it is obvious that the French Civil Code defines extreme, unusual hardship of performance as a prerequisite, which differs from the model of German and Dutch law, for which the main thing is the interreference with the basis of transaction.⁹¹ Specific complication of performance exceeds such change of price, that is characteristic and may be reasonable for long-term contractual relations. In this case one party must face extraordinary, unusually strict and unpredictable increase of performance expenses and such extreme decrease of the benefit which he/she expected to receive consequent to the performance of other party (decrease of interest of receiving performance). Therefore, article 1195 does not apply if the debtor took the mentioned risk by direct contractual reservation or entered into the speculative contract bearing high risk.⁹² Thus, is the contract party could not take the risk of emergence of Covid-19 by contractual reservation, the latter must be qualified as reservation on hardship and not force majeure, and article 1195 must apply.⁹³ In France the court fulfills request for adaptation in case when the negotiation between parties conducted in good faith ends without result and one of the parties applies the court with the query to adjust the contract.

The newest approach of France is amazing and innovative,⁹⁴ as during decades the authority of administrative court in terms of adaptation of administrative contracts was implemented within a very limited framework. According to new regulation the court is given a wide discretionary power only after the parties are not able to reach consensus on the terms of adjustment through negotiations performed in good faith.

It must be noted that in French law parties have right to exclude application of article 1195 in their contractual relation. In particular, they may reinforce that they will not apply the court with the query to adjust contract to changed circumstances. If the mentioned is considered by the contractual reservation clause, the power of court in terms of adaptation of contract cannot be exercised.⁹⁵

⁹¹ *Fontaine M.*, The Evolution of the Rules on Hardship, in: *Bortolotti F., Ufot D. (eds.)*, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*, Alphen upon Rhine: Kluwer Law International, 2018, para. 39.

⁹² *Pascale Accaoui Lorfing*, L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé (2018), 5 IBLJ, 452-453, referred in: *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 119; *Brunner Ch.*, Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration, *Kluwer Law International*, The Hague, 2009, 220; *Treitel G.*, *Frustration and Force Majeure*, 2nd ed., Sweet & Maxwell, London, 2004, 455; CISG AC Opinion №7 Exemption of Liability for Damages Under Article 79 of the CISG (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Opinion 3.1 [CISG AC Opinion №7], par.39.

⁹³ *Heinich J.*, L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision, 2020, 614, referred in : *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 119.

⁹⁴ *Lorfing P. A.*, L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit compare, 2018, 5 IBLJ, 458, referred in: *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, *McGill Journal of Dispute Resolution*, Vol. 6, 2019-2020, 119.

⁹⁵ *Heinich J.*, L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision, (2020) *Recueil Dalloz*, 614.

The French⁹⁶ model in relation to the issue of hardship was developed under the influence of UNIDROIT principles of International Commercial Contracts (PICC).⁹⁷ In UNIDROIT principles the purpose of hardship mechanism is restoration of economic balance of real contract, continuing performance of which, with the initial content, will significantly damage one of the parties.⁹⁸ The concept of hardship reinforced by the UNIDROIT principles is connected to existence of the following prerequisites: a) the balance of contract is essentially, fundamentally collapsed because of the increase of performance burden or decrease of contract performance value⁹⁹ b) circumstances emerged or became known to the party after conclusion of the contract c) circumstances could not have been considered by the injured party, at the stage of predictable contract conclusion d) circumstance are out of injured party's control e) injured party have not taken the risk of emergence of such circumstances (article 6.2.2).

Hence, French law has combined generalized signs recognized by the uniform legal instrument (PICC) in the substantial composition of *théorie de l'imprévision* doctrine. This partially was due to the fact that uniform law is free from national regulatory barriers of particular countries and is used as source for interpreting or codifying categories prescribed in national legislation.

6. Reform of the Romanian Civil Code (2009) with an Orientation Towards the UNIDROIT Principles of International Commercial Contracts

Before adoption of the new civil code of Romania,¹⁰⁰ the Romanian judicial practice recognized legal mechanism only for the review, evaluation of lease and rent agreements [deriving from its long-term nature], and the *imprévision* doctrine is established by the new Civil Code and is based on Romanian principle *omnis conventio intellegitur rebus sic stantibus* [contract terms are acting in case of unchanged conditions].

According to article 1271 of the Romanian Civil Code, 1. the party is bound by obligation to perform contract even in case when this performance gets extremely complicated due to the increase of performance expenses or decrease of performance value. 2. However, if the performance of contract is complicated due to unusual/exceptional changes of circumstances and performance of the contract with unchanged terms causes collapse of the principle of equity, the court may establish: a) adaptation of the contract, by which the damage or benefit caused by changed circumstances will be equally distributed among parties. b) termination of the contract in the period and under the terms determined

⁹⁶ Also, Dutch model.

⁹⁷ ICC Case № 8468, 24 YB Comm Arb 162 (1999) 167.

⁹⁸ *Berger K. P., Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 127.

⁹⁹ Regarding precondition of strict disbalance of reciprocal performances see *Ciongaru E.*, Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 175; *Starck B.*, Droit civil. Les Obligations. Paris: Librairies Technique, 1972, 75. The injured maybe one of the parties, or both. See *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, 2008, 39 VUWLR, 715.

¹⁰⁰ New Civil Code of Romania was adopted on 14 July 2009 (287/2009 Official Herald N511), based on which the Civil Code of Romania from 1864 was abolished.

by itself. c) for this to happen it is necessary that the party does not has not taken risk of emergence of such circumstances by direct contractual agreement or reasonably none of the parties may not bear directly or implied the risk of emergence of such circumstances¹⁰¹ d) the debtor tried to reach the fair and reasonable adaptation by negotiation in good faith and within a reasonable period.

The Romanian Civil Code, alike to French law, has shared the mode of UNIDROIT principles of contract (article 6.2.3.), according to which the most injured party due to changed circumstances is obliged to require in the framework of negotiations adjustment of contract to changed circumstances, which must be performed duly, without delay and with indication to objective grounds for adaptation of the contract. Putting a claim to adapt the contract does not give the right to injured party to exit the contract by itself. In case of disagreement, each party has right to apply to the court, which in case of determining substantial prerequisites for hardship, it suggests two alternative outcomes: it performs adaptation of the contract with the criterion of restoring contractual balance or terminated contract within the period and under terms prescribed by itself.

7. Legal Outcomes of Hardship based on Changed Circumstances

7.1. Adjusting the Contract to Changed Circumstances

Adaptation of the contract, which changes the volume of the performance to be carried out by parties with the vector oriented to restore contractual balance, is the prioritized outcome determined by the legislator during establishment of hardship in relation to termination of the contract.¹⁰² Civil Codes of Italy,¹⁰³ France and Netherlands considers adaptation and termination of the contract on parity initials, without giving priority to any of the outcomes.¹⁰⁴ The approaches of German and Greek¹⁰⁵ Civil Codes differ, where adjustment appears to be priority protective mechanism in relation to termination deriving from the existential purpose of hardship – primacy of preservation of the contract (BGB paragraph 313, CC of Greece article 388). In systems oriented on adaptation the primary rule applies regarding what can be preserved from the initial content of the contract, must be preserved in the conditions of adaptation.¹⁰⁶ In Austria (ABGB – Austrian Civil Code) adaptation, as well as the outcome of termination are available, however the latter still is considered as mechanism to be applied in extreme occasion. Despite the primacy of adaptation, the court still treats carefully essential

¹⁰¹ *Geamănu R. Gh.*, *Hardship Clause in the International Commercial Contracts*, Bucharest: Hamangiu, 2007, 23.

¹⁰² *Dumas H. B.*, *Les contrats relationnels et la théorie de l'imprévision*, *Revue internationale de droit économique*, №3 (t. XV, 3), 2001, 371, referred in: *Ciongaru E.*, *Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice*, *Procedia – Social and Behavioral Sciences*, 149, 2014, 177.

¹⁰³ Articles 1467-1468 of Civil Code of Italy.

¹⁰⁴ *Valk W. L.* in: “*Burgerlijk Wetboek*”, *Krans H. B., Stolker C.J.J.M., Valk W.L.*, 2017, 3660, referred in: *Marchioro I.*, *European Contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives*, Wolters Kluwer, 2020.

¹⁰⁵ *Karampatzos A.*, *Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to AngloAmerican, German, French and Greek Law*, in *European Review of Private Law*, 2005, II, 142.

¹⁰⁶ *Stathopoulos M.*, *Contract Law in Hellas*, 1995, par. 265 c.

modification of the contract terms.¹⁰⁷ The possibility of adaptation is determined by the evaluation of lawful balance of parties' interests. Adaptation is impossible when it cannot be mitigated from the perspective of fairness or law.¹⁰⁸

If at the stage of conclusion of the agreement unpredictable circumstances emerged after conclusion of the contract fundamentally change economical condition of the contract or other circumstances, the principle of binding force of the agreement does not apply anymore and the competent body is entitled, in case of existence of respective contractual reservation, adjust contract to changed circumstances or alternatively, terminate the contract, hence reduce/exclude contractual liability of debtor with the criterion on fairness.¹⁰⁹ Fairness must be conducted with the principle of preserving fair balance with the creditor's interests. By the force of contractual solidarity and principle of due diligence, on the stage of performance of the contract parties are obliged to bring their actions into correspondence with interests of contractors and maximally approximate contractual performance to the conditions and contractual balance envisaged at the stage of conclusion of the contract. By the power of contractual solidarity, parties shall be maximally tolerant with regard to reciprocal interests and needs of contracting parties, which may imply postponing the request of performance, decrease of the debt, etc. When the issue is related to changed circumstances of economic nature, currency exchange rate changed for worse, party shall choose from the mechanisms, prerogatives existing in his/her hands such means, the aim of which will not be sanctioning of the debtor. The doctrine of hardship implies using such legal technique, which in case of changed circumstances will ensure collapsed balance and contractual equality.

In the legal doctrine there are slightly different opinions with regard to the scale of legitimate interference by the judge. Some scholars consider that this must be limited to detailed offer from the creditor, according to diverse opinion, the judge may approve creditor's desire, decrease activity of debtor and interfere actively with the aim to determine quantitative evaluation of decrease.¹¹⁰ In any case, during impossibility to adapt, claims to exit from/terminate the agreement (in long-term relations) still remain available for injured party.¹¹¹ The desire of creditor to review the contract terms,

¹⁰⁷ *Bollenberger R.* in: *Koziol H., Bydlinski P., Bollenberger R. (eds.)*, *Kurzkommentar zum ABGB*, 2017, para. 901.

¹⁰⁸ *Unberath H.*, BGB § 313, in: *BeckOK BGB, Bamberger H. G., Roth H.*, 2011, par. 33.

¹⁰⁹ *Sitaru D.*, *International Commercial Law – Treaty*, Bucharest: Acatami, 1996, 77.

¹¹⁰ Judgment №5922/1991 rendered by the Italian Supreme Court (Corte di Cassazione).

¹¹¹ *Schwenzer I.*, *Force Majeure and Hardship in International Sales Contracts*, 2008, 39 VUWLR, 724. CISG Articlec 79(5); *Stoll H., Gruber C.*, in *Schlechtriem P., Schwenger I. (eds.)*, *Commentary on the UN Convention on the International Sale of Goods*, 2 English ed., Oxford University Press, Oxford, 2005, Article 79, par 4.; *Brunner Ch.*, *Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration*, Kluwer Law International, The Hague, 2009, 366-367; *Honnold J.*, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations*, Kluwer Law and Taxation Publishers, Deventer, Netherlands, 1989, Article 79 par. 435.1; *Magnus U.* in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, Wiener UN-Kauji-echt (CJSG), 15 ed., Sellier, Berlin, 2006, Article 79 par. 55. See also BGB paragraph 313.

must be considered, as for the “termination of the contract remains the core of the disadvantaged party’s protection”.¹¹²

Besides, it must be mentioned that precondition for the right to exit from contract (in Georgian law – significant infringement, in other legislations – fundamental infringement), will be in place in most cases of hardship, as complication of the contract implies collapse of the basis of transaction for German, as well as Georgian law.

As for the legal outcomes of hardship,¹¹³ according to numerous legal orders and uniform laws, first of all the vector is directed towards primacy of negotiation between parties. If the negotiation ends without result, the party is entitled to apply to the court with the claim to adapt or terminate the contract. For the purposes of adaptation of the contract the court must take into consideration nature and gravity of hardship. In case of extraordinary circumstances such as pandemic, the court must consider that in case of existence of contractual or implied distribution of force majeure risk in the contract, it is inadmissible to put risk of negative outcomes of pandemic only on one party. In return, negative outcomes of force majeure event and damages must be exchanged.¹¹⁴ In such case the discretion of the court implies fair distribution of negative outcomes caused by the pandemic among parties.¹¹⁵

7.1.1. Limits of Protection of Autonomy of Parties’ Will in the Process of Executing Judicial Control

Any interference of the court in the content of contractual relation, may possibly restrict the contract freedom and principle of party autonomy. The issue, whether it is possible to conduct adaptation to changed circumstances against the will of one of the parties and with what extent, is important.¹¹⁶ Hence, in the process of adaptation of contract to changed circumstances by the court, the principle of party autonomy and necessity to ensure stability of the contract may confront each other.¹¹⁷

Principles of good faith, cooperation and flexibility are considered as main grounds for adjustment of the contract to changed circumstances. Adjustment of the contract to changed circumstances by the court implies application of methods of interpretation and filling in gap. Review of contract by the court always entails determination of factual circumstances, as well as aims parties’ aims through interpretation, when there is a lacuna in the contract. Therefore, modified contract in

¹¹² *Marchioro I.*, European contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020.

¹¹³ UNIDROIT Principles of International Commercial Contracts article 6.2.3.

¹¹⁴ *Marc-Philippe Weller et al.*, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1021.

¹¹⁵ UNIDROIT Principles of International Commercial Contracts, 2016, Art 6.2.3, Comment №7.

¹¹⁶ *Ciematniece I.*, Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 13.

¹¹⁷ *Faruque A.*, Possible Role of the Arbitration in the Adaptation of Petroleum Contracts by Third Parties, Asian Int’l Arb. J., Vol. 2, 2006, 152, <www.heinonline.org/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22%20A%20Faruque,%20Abdullah%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search&base=js&all=true> [10.10.2021].

accordance with the changed circumstances must be always expressing the initial contractual balance of the parties.¹¹⁸ The purpose of the court is that the adapted contract portrays will of parties in new conditions as well.¹¹⁹ Adjustment of contract by the court, in most cases, causes improvement of the contract terms, if the lawfulness is the guiding principle in the revision process.¹²⁰ Adjustment of contract to changed circumstances may be discussed as a type of specific performance, by which the contractual will of parties will be implemented.¹²¹

Any commercial transaction is based on the balance of reciprocal obligation of parties to the contract.¹²² In case of adjusting contract to changed circumstances the quality and outcomes of collapse of the balance of mutual obligations of parties must be evaluated in light of the principle of lawfulness. As far as the principle of lawfulness is the major mechanism for evaluating relations, hence adaptation of the contract does not cause restriction of the principle of freedom of contract, but rather aims at ensuring natural and fair outcomes.¹²³

The contract may not be discussed without taking into account surrounding circumstances. Adjusting the contract to significantly changed conditions does not change the will of parties, but in case of changed circumstances it becomes tool for determining the initial intention of parties, their real will. The will of parties at the stage of conclusion of the contract is its performance and adjustment of contract to changed circumstances in the prerequisite for performance of the contract, therefore implementation of the will of parties.

Hence, restoring economic balance of the contract based on the principle of equality is conducted through determination of initial will of parties and their interpretation in light of the changed circumstances.¹²⁴

According to one of the opinions spread in the doctrine of Anglo-American law, the court cannot have right and respective competence to “rewrite the contract”¹²⁵ instead of parties.¹²⁶ The

¹¹⁸ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 237.

¹¹⁹ *Karampatzos A.*, Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol.13, №2, 2005, 111, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults> [10.10.2021].

¹²⁰ *Kull A.*, Mistake, Frustration, and the Windfall Principle of Contract Remedies, Hastings L. J., Vol. 43, 1991-1992, 38.

¹²¹ *Hillman R. A.*, Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, Duke L.J., 1987, 27, referred in: *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 242.

¹²² ICC Arbitration Case №2291, 1976 Lunet 989 (1976).

¹²³ *Ciematniece I.*, Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 22.

¹²⁴ *Karampatzos A.*, Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol.13, №2, 2005, 111, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults> [10.10.2021].

mentioned would have restricted the freedom of contract.¹²⁷ However adjusting contract to changed circumstances by the court does not restrict the autonomy of parties, as far as parties cannot have shown their will on such events and regulation of their outcomes, which reasonably could not have been taken into consideration on the stage of conclusion of contract. Therefore, regulation of changed circumstances exceeds the limits of content of the contract and thus, it is possible to trust court, as third objective party.

Consequently, in case of filling in the contract lacuna by the court, the party autonomy is infringed, as in case of lacuna there is no agreement between parties on certain important conditions, which would act in case of changed circumstances. The mentioned may be considered as implied consent of parties and the court adjust the contract to changed circumstances instead of them.¹²⁸ As far as parties have not expressed the initial will on the extent of action and responsibility in case of emergence of changed circumstances, the adaptation of contract is made by judge through filling in the gap and interpreting the will of parties in the terms of changed circumstances.

It is a legal axioma that the court cannot have authority to invent essentially new contract terms instead of parties.¹²⁹ However, if the body executing justice has not legitimacy to adapt the contract, the will take away motivation from parties to agree through negotiations, before the interference into relation regulated under the law of obligations. The power to adjust the contract is a practical kick for business representatives, to solve the disagreement emerged in a long-term contractual relation through negotiation.¹³⁰

The court may have significant lever to encourage negotiations between parties and agreement about adaptation of the contract. On one of the cases¹³¹ the court has refused to determine the legal protection means when circumstances are changed with the argumentation that parties have better ability to make fair and mutually beneficial decision.¹³²

¹²⁵ *Gotanda J. Y.*, Renegotiation and Adaptation Clauses in Investment Contracts, Revisited, Villanova University School of Law, *Vand. J. Transnat'l L.*, 36, 2003, 1463, <<http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=gotanda>> [10.10.2021].

¹²⁶ *Hillman R. A.*, *Principles of Contract Law*, 2nd ed., The Concise Hornbook Series, West, 2009, 330.

¹²⁷ *Ibid*, 331.

¹²⁸ *Hillman R. A.*, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, Duke L. J., 1987, 28, referred in: *Uribe M.*, *The Effect of a Change Circumstances on the Binding Force of the Contracts*, *Comparative Perspectives*, Intersentia, 2011, 242.

¹²⁹ *Ciematniece I.*, *Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts*, Lambert Academic Publishing, Saarbrücken, 2010, 30.

¹³⁰ *Aluminum Co. of American vs. Essex Group, Inc.*, 449 F. Supp.53 (W.D. Pa.1980).

¹³¹ *Florida power & Light Company v. Westinghouse Electric Corporation*, 517 F. Supp. 440, E.D. Va., 1981, <<http://openjurist.org/826/f2d/239/florida-power-light-company-v-westinghouse-electric-corporation>> [10.10.2021].

¹³² *Ciematniece I.*, *Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts*, Lambert Academic Publishing, Saarbrücken, 2010, 28-29, also, *Florida power & Light Company v. Westinghouse Electric Corporation*, 517 F. Supp. 440, E.D. Va., 1981, <<http://openjurist.org/826/f2d/239/florida-power-light-company-v-westinghouse-electric-corporation>> [10.10.2021].

According to the interpretation of the court, in the process of adjusting the contract to changed circumstances the guiding method for the court may be attaining reasons causing damage to the spheres of risk of parties and distributing negative outcomes to contractor with respective proportion.¹³³

The distribution of damage with equal proportion to two non-guilty parties may be considered as one of the guiding principles, only in case if differentiation of their responsibility is impossible in accordance with the sphere of risk of different scale.

In the process of adjustment to changed circumstances, when there is discrepancy, collapsed balance in reciprocal performance of parties, it is possible to modify contract price in the legal regime of initial contractual obligation, by which it becomes possible to continue contractual relation with renewed terms and based on decrease of contract price balancing nonequivalent performances of parties.

The court id granted power to prolong term defined for performance, make modification of the contract price and scope of performance. In the process of adjustment of contract, the judge does not have power to draft contract for the second time or change its legal nature and purpose.¹³⁴ If the restoration of contractual balance implies change of the essence of contract, then the court must terminate the contract.¹³⁵

The court must distribute to the parties the negative outcomes caused by changed circumstances with the principle that the performance becomes of reasonable gravity for debtor.¹³⁶ It is natural that adaptation of the contract does not imply absolute restoration of contractual balance and total liberation of the party by the court from negative outcomes caused by changed circumstances.¹³⁷

The court may prolong the term of performance, increase or decrease the contract price, or the scale of reciprocal performances. Modification of contractual obligation does not entail imposing obligation to the parties with totally new content and different essence.¹³⁸ The double-meaning existing in contract does not give title to the court to transform content of the case in the process of finding fairness.¹³⁹

¹³³ *Hubbard S. W.*, Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment. *Mo. L. Rev.*, Vol. 47, 1982, 109, <<http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/molr47&id=139>> [10.10.2021].

¹³⁴ *Lando O., Beale H.*, Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 327.

¹³⁵ *Ibid.*

¹³⁶ *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration. Kluwer Law International: Alphen aan den Rijn, 2009, 499.

¹³⁷ UNIDROIT Principles of International Commercial Contracts 6.2.1, European Principles 6:111 (1) and DCFR III 1:110 articles.

¹³⁸ *Flambouras D.*, Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108, Pace Law School Institute of International Commercial Law, May, 2002, <<http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>> [10.10.2021].

¹³⁹ *Goldber V. P.*, Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 347.

7.1.2. Objective Factors to be Considered in the Process of Adjustment of the Contract

With the purpose of restoring the balance of contract certain objective factors and criteria shall be taken into consideration:

Initial notion of contractual economy, profitability, which was agreed by parties at the stage of concluding contract. During the adaptation of the contract the court must take into consideration initial contractual balance defined by economic parameters, which existed at the stage of conclusion of the contract and it is natural that it should not rely on ideal contractual balance and proportionality. Hence, the initial economic balance is orientational criterion between parties in the process of adaptation of contract. It is hard to provide simple guiding principles for adaptation of contract to the court by the doctrine, but at the stage of concluding contract the initial equilibrium must be preserved with the outcome reached through adaptation of the contract.¹⁴⁰

Continuing nature of interfering conditions and objective perspective of the performance of adapted contract. The court must take into consideration possibilities and form of the performance of contract with the forecast for certain period in future, during which the impact of outside interfering factors and action on the contractual relation of parties (context of future performance) will continue.

Limits of intervention. The court may change the contract provisions, as well as means of performance, mechanisms and forms, which are necessary for restoration of the balance of parties' rights and obligations.

Analysis of the contractual risk. The attention of the court must be directed to one of the key factors – limits of the admissible for economic and professional activity, normal risk, which is, as a rule, imposed by the legislator on the person obliged to perform – debtor. The issue of direct distribution of contractual risk by agreement becomes subject of evaluation by the court. The risk of emergence of circumstances of certain category may be implicitly be imposed on the party based on the performance content and nature or may be entirely excluded from the area of the risk of party (for instance, from such extraordinary event as pandemic).¹⁴¹ Hereby it must be mentioned that issue of distribution of the contractual risk must be studied with regard to the limits of unfulfilled obligation.¹⁴² Adaptation mechanism cannot affect already performed part. Attention of the court is directed to the issue of what is the extent to which the obligation is performed (it may be that one party has performed the obligation and the other party not entirely or partially) or enforceable and what may be

¹⁴⁰ *Norbert H.*, Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

¹⁴¹ Legislative rule of distribution of the risk is excluded is the risk of incidence is imposed on one of the parties by the contract. *Bulgian Chamber of Commerce and Industry* 12 Feb 1998, CISG-online 436; *Katz A.*, Remedies for Breach of Contract under the CISG”, 25 *Jnt’J Rcv L & Econ* 378, 2006, 381. *Obcnnan N.G.*, Transfer of Risk from Seller for Buyer in International Commercial Contracts: A Comparative Analysis of Risk Allocation under the CISG, UCC and Incoterms, LLM Thesis, Universite de Montreal, 1997, referred in: *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, Vol. 39, 2008, 715. see also: *Oberreit W.W.*, Turnkey Contracts and War: Whose Risks?, in: *Transnational Law of International Commercial Transactions*, *Horn N., Schmitthoff C. (eds.)*, 1982, 191.

¹⁴² *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, *Procedia – Social and Behavioral Sciences*, Vol. 149, 2014, 177.

the scale of the obligation the liberation from the request of performance with unchanged terms what is the scale of the obligation to which it may be related.¹⁴³ It is essential that the fundamental purpose and content of the contract must not entirely transform in the context of adaptation of the contract.

Objective possibility of temporary adjustment. When implementing adjustment of the contract, the factor of operation of adapted terms in time must be taken into account. Adjustment must be performed in a way that in case of non-existence of changed circumstances, it still must be performed at the initial stage of conclusion of the contract in accordance with the terms and restrictions envisaged respectively.¹⁴⁴ The mentioned implies the possibility of executing adaptation with the term of changed circumstances (or their outcomes) (temporary adaptation), which leaves to the party the possibility to renew operation of the initial contract after eradication of interfering circumstances (or negative continuing impact of these circumstances).

Priority of adjustment considering the term of contract. In the process of adjustment of the contract it must be considered whether the issue is related to long-term or short-term aggravation of contractual obligation.¹⁴⁵ The risk of emergence of changed circumstances is particularly high in the long-term contractual relations, which results in disbalance of parties' reciprocal rights and obligations.¹⁴⁶ Besides, the future economic interest¹⁴⁷ of preserving contractual connection and the scale of possible negative outcomes must be considered in the long-term contracts.

The limit of average profit characteristic to particular trade sector¹⁴⁸ and the index of its decrease caused by changed circumstances, as an objective, valid indicator of gravity of hardship.

Speculative nature of the transaction – The German court of second instance has not released the vendor from the liability based on article 79 of the Vienna Convention, despite the fact that the price of the subject of contract – the iron Molybdenum imported from china increased by 300%. The Court has explained that the limits of interpretation of the hardship in the trade sector, where operations have speculative nature and bear high risk, must be restricted.¹⁴⁹ The price fluctuation characteristic to the area of trading goods, as a rule, shall not take us to recognition of existence of

¹⁴³ *Norbert H.*, Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: book: *Horn (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

¹⁴⁴ *Boroi G.*, Civil Law Treaty. General Part. Persons. Bucharest: All Beck, 2001, 156.

¹⁴⁵ *Brunner Ch.*, Force Majewe and Hardship under General Contract Principles: Exemption of Non-Performance in International Arbitration (Kluwer Law International, The Hague, 2009, 438-441.

¹⁴⁶ Bilateral contracts loaded with reciprocal right and obligations of parties are based on the economic balance of obligations to be performed mutually, which is formed in accordance to parties' will and intention. Hence, the mentioned is considered as subjective contractual balance. See *Karampatzos A.*, Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol. 13, №2, 2005, 110, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults> [10.10.2021].

¹⁴⁷ *Norbert H.*, Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

¹⁴⁸ *Brunner Ch.*, Force Majewe & Hardship under General Contract Principles: Exemption of Non-Performance in International Arbitration, Kluwer Law International, The Hague, 2009, 438-439.

¹⁴⁹ Oberlandesgericht Hamburg, 28 Feb 1997, №167, CISG-online 261.

hardship.¹⁵⁰ According to the commentary of article 6.2.2. of the 1994 edition of the UNIDROIT principles of contract, the change in economic balance with the scale if more than 50% will establish “fundamental change”, however, in the (second) edition of 2004 of the UNIDROIT principles of contract we do not see exact numbers, as far as the issue must be evaluated based on studying particularities of individual case. Despite the mentioned, the legal certainty requires determination of certain index. Based on the approaches and practical solution used by the national legal orders, there is an opinion in the legal doctrine that according to empirical rules, change of 100% is enough for establishing hardship.¹⁵¹ But it must be mentioned that the limit of 100% change may be justified for national and not international transactions, for international market, where the risk and possibility of change in prices is high in relation to national, internal market systems.¹⁵² For international markets, according to empirical practice, it is recommended to recognize limit of 150-200%. Therefore, in case of using Vienna Convention the courts refrain from recognizing hardship when there are 100% economic changes.¹⁵³ Nowadays there are numerous court and arbitration decision, which does not consider 100% price change as sufficient prerequisite for establishing hardship, as far as the change is more-or-less probable for entrepreneurs acting on the trans frontier markets.¹⁵⁴

Study of prehistory of relation of parties and trading practice. In the process of adjustment the court must evaluate what is fair in the new, changed circumstances, in such a way that none of the parties have to bear negative outcomes caused by changed circumstances (risk) and none of the parties shall receive unjustified advantage on the account of other party using changed circumstances.¹⁵⁵ UNIDROIT Conciliation rules (article 7.2.)¹⁵⁶ imposes on the party and conciliator obligation to use principles of objectivity, fairness and good faith in the process of adjustment, during which parties’ rights and obligations, trading practice, circumstances of the dispute and prehistory of business relations must be taken into account.

Initial balance with compromise limits. According to the interpretations of Arbitration tribunals, the compromised outcome of adaptation of the contract, as a rule, cannot ensure for parties a

¹⁵⁰ *Leisinger B.*, Fundamental Breach Considering Non-Conformity of the Goods, Sellier, Munich, 2007, 119.

¹⁵¹ *Brunner Ch.*, Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration, Kluwer Law International, The Hague, 2009, 428-435.

¹⁵² *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 717.

¹⁵³ ICC Award. 26 Aug 1989, №6281, CISG-online 8; Tribunale di Monza, 14 Jan 1993, CISG-online 540; Joseph Lookovsh.) “Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's 'Competing Approaches to Force Majeure and Hardship'” (2005) 25 Int'l Rev L & Econ 434, 438, referred in: *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 716.

¹⁵⁴ CIETAC, 10 May 1996, №21, CISG-online 1067; Bulgarian Chamber of Commerce and Industry, 12 Feb 1998, №11, CISG-online 436; Rechtbank van Koophandel, Hasselt, 23 Feb 1994, №1849, CISG-online 371; Cour d'Appel de Colmar, 12 Jun 2001, CISG-online 694; Cour de Cassation, 30 Jun 2004, №964, CISG-online 870.

¹⁵⁵ No profit no loss principle. See *Schmitthoff C.M.*, Hardship and Intervener Clauses, Journal of Business Law, 1980, 82-91.

¹⁵⁶ Resolution №35/52 adopted by the General Assembly on December 4, 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf>> [10.10.2021].

better agreement than it existed at the stage of conclusion of contract.¹⁵⁷ Hence, the contract adjusted to changed circumstances must preserve the initial balance, which was established by the agreement of parties at the stage of conclusion of the contract, however the scale of value of performance and contractual benefits cannot be of same size, as it was expected at the stage of conclusion of the contract. In such case the issue is related to proportional, compromised decrease of expectations of parties with the quality by which the changed circumstances caused decrease of the value resource of the transaction. The entitled body implementing adaptation must be cautious during adaptation of the contract and must apply mechanisms justified by general principles of the contract adaptation, such as good faith and equality.¹⁵⁸

Party autonomy and limits for determination of particular content of lawfulness. When the issue is related to approximation of changed contract prices to market prices or adjustment to the terms caused by change of currency exchange rate, the mentioned can be implemented on the basis of general parameters established by special contract reservations for adaptation, legislation and judicial practice, but when the issue is related to modification of not only quantitative, but qualitative characteristics of the terms, the parties are autonomous in determining contract adaptation terms and limits considering the primacy of freedom of contract.¹⁵⁹ Hence, in case of requirement of adaptation of the contract the maximum expectation is from the party to determine reasonable, fair scope of contract adaptation and objectively substantiated grounds of this requirement. In the process of contract adaptation, the general standard of lawfulness is guiding for the court (rule of fair determination of terms prescribed under article 325 of Civil Code of Georgia (hereinafter – CCG),¹⁶⁰ by application of which the court may rely on the *gap-filling function* of the principle of good faith, however for the prevention of unjustified and unproportionate interference into the limits of party autonomy the priority are general orientations of adaptation also deriving from the source of party autonomy.¹⁶¹

¹⁵⁷ Wintershall AG, International Ocean Resources, Inc (formerly Koch Qatar, Inc) and others v the Government of Qatar, 15 YB Comm Arb 30 (1990); Antonio Crivellaro, “La révision du contrat dans la pratique de l’arbitrage international” (2017) 1 Rev Arb 69.

¹⁵⁸ Berger K. P. *Daniel Behn D.*, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 129, with further reference: Government of the State of Kuwait v the American Independent Oil Company (AMINOIL), 9 YB Comm Arb 71 (1984) at par. 24, 59 [AMINOIL]; 293 Mobil Oil Iran, 294 Wintershall AG, International Ocean Resources, Inc (formerly Koch Qatar, Inc) and others v the Government of Qatar, 15 YB Comm Arb 30 (1990) [Wintershall AG v Qatar]; Mobil Oil Iran v Iran, IUSCT Case №150 (1987).

¹⁵⁹ *Bockstiegel Kh.*, Hardship, Force Majeure and Special Risks Clauses in International Contracts, 159, in the book: *Horn N. (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance: Studies in Transnational Economic Law, Antwerp: Kluwer Law International, Vol. 3, 1985, 166.

¹⁶⁰ According to paragraph 1 of Article 325 of the Georgian Civil Code, if terms of performance of the obligation must be determined by one of the parties or third part, then in case of doubt it is supposed that such determination must be made based on fairness. 2. If the party does not consider the terms fair, or their determination is delayed, the court makes a decision.

¹⁶¹ See also article 6:248 of the Civil Code of Netherlands according to which, contract is followed not only by the legal outcomes agreed by the parties, but also considering the nature of a contract such rights and obligations arise therefrom, which arise by force of law based on reasonableness and principle of fairness. The Civil Code of the Netherlands, *Warendorf H., Thomas R., Curry-Sumner I. (trans.)*, Alphen aan den Rijn: Kluwer Law International, 2009.

In terms of practical results, intervention of the court may be materialized in several directions:

1. Quantitative/qualitative¹⁶² increase of decrease of the price of goods and services inserted into the framework of requested adaptation – decrease of scale of obligation, postponing, partial payment, distribution of risk.¹⁶³ The court may change the contract terms and determine criteria for price indexation.¹⁶⁴ After confirming existence of substantial legal prerequisites of hardship, debtor is released from the obligation to perform with initial content and scale in the period of interfering circumstances. The mentioned outcome is especially used when interfering circumstances have a continuous nature. Liberation from the obligation to perform with unchanged content is recognized by the German law as well, not only in case of impossibility to perform, but also in case of hardship (paragraph 313 – interreference with the basis of transaction).¹⁶⁵ As for the obligations of collateral accessory nature, modification of guarantees, as a rule, the court does not interfere in their modification, if it directly implied in the scope of requested adaptation.¹⁶⁶

Regarding the adaptation of the contract we can imagine two possible scenarios. In the sale-purchase agreement the seller offers to buyer delivery of goods if the increased contract price is paid, which is caused by the aggravation of performance of the obligation (hardship). If buyer agrees, the contract is considered as adjusted to changed circumstances agreed based on negotiation. If buyer refuses to pay increased price, and debtor declines and exits from the contract pointing at the hardship, buyer will file a claim for specific performance, or more likely, restitution of damages. Seller may file the counter-petition on the ungrounded refusal of debtor to adjust the contract and request compensation of damages. The substantiation of buyer will be the existence of significant infringement from the side of debtor (refusal to sell the goods), as it was impossible to pay increased contract price. The purpose of evaluation by the court will be determination of whether the requirement to buy goods with the increased price establishes significant infringement for creditor and whether it gives right to refuse substitute performance. The court assesses how reasonable and fair it was to pay increased price by the buyer considering the nature of changed circumstances existing for

¹⁶² Amsterdam Court of Appeal (Hof Amsterdam 6 May 1982, nr. 314/81), referred in: *Abas P.*, *Rebus Sic Stantibus*, Deventer: Kluwer, 1989, 202-205; *Hijma J.*, *The Role of the Court and of the Parties in Adapting a Contract to Unforeseen Circumstances*, Ovid Technologies, Wolters Kluwer Health, 2012, 20, <<https://core.ac.uk/reader/43503426>> [10.10.2021].

¹⁶³ *Kropholler J.*, *German Civil Code, Study Comments*, *Darjania T., Tchetchelashvili Z. (trans.), Chachanidze E., Darjania T., Totladze L. (eds.)*, 13th ed., Tbilisi, 2014, 218 (in Georgian).

¹⁶⁴ *Ciongaru E.*, *Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice*, *Procedia – Social and Behavioral Sciences*, 149, 2014, 177.

¹⁶⁵ *Schwenzer I.* in: *Schlechtriem P., Schwenzler I. (eds.)*, *Kommentar wm einheitlichen UN Kaufrecht CISG*, 5 ed., CH Beck, Munich, 2008, Article 79 par. 4, 53-54; *Magnus U.* in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, *Wiener UN-Kauji-echt (CJSG)* 15 ed., Sellier, Berlin, 2006, Article 79, 59-60; *Achilles W.A.* *Kommentar zum UN-Kaufrechtsübereinlwmmen (CISG)*, Hermann Luchterhand, Berlin, 2000, Article 79 par. 14. John Honnold *Uniform Law for International Sales*, 3 ed., Kluwer Law International, The Hague, 1999) Article 79, para 435.5, referred in: *Schwenzer I.*, *Force Majeure and Hardship in International Sales Contracts*, *Victoria U. Wellington L. Rev.*, Vol. 39, 2008, 720.

¹⁶⁶ *Ciongaru E.*, *Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice*, *Procedia – Social and Behavioral Sciences*, Vol. 149, 2014, 177.

the seller. If the court establishes that buyer was obliged, based on the principle of good faith, to take into consideration circumstances interfering performance and pay increased contract price, the decision will be made in favor of seller.

In the second scenario, buyer offers seller to pay increased contract price, but debtor wants to exit the contract. The buyer will file a claim asking for specific performance and/or restitution of damages. The court must evaluate whether hardship continues to exist in case when the buyer offers seller increased contract price – whether this offer was enough for debtor to overcome hardship. If the contract price increased by the buyer annuls the hardship condition (for seller), then the latter is obliged to sell the goods to buyer with offered price. Hence, in this scenario the responsibility must be imposed on seller.¹⁶⁷

7.2. Termination of Contract by the Court – Alternative to Adjustment Claim, Exceptional and *ultima ratio* Outcome

Termination of the contract, as an extreme outcome established by the court in response to claim for the adjustment of contract to changed circumstances,¹⁶⁸ is the most radical measure of intervention from the court. The mentioned requires substantial reasoning by the court on impossibility to adjust the contract. Introducing the legal outcome of the contract termination in the legal paradigm of hardship approximates hardship to the concept of force majeure, however termination of the contract is considered as *sui generis* of hardship – original, indigenous characteristic.¹⁶⁹ The outcome of termination of the contract by the court is in place when it is impossible, unattainable to adjust contract by ensuring fair distribution of the negative outcomes of changed circumstances, damage or benefit among parties. The result of termination is justified when adjustment of the contract to changed circumstances causes unfair outcomes to even one of the parties, termination is necessary for minimization of negative outcomes and damage, when the purpose of the performance of contract is reached by adaptation, it dispels or loses social profitability.¹⁷⁰

For example, the essential term is motivating and determining factor for stipulation of the contract in labor relations. Adaptation may decrease the volume of the work to be performed if the decrease of remuneration is extreme necessity for saving the contract. If the contractual interest dispels for the party, the mentioned establishes impossibility of adjustment and it brings us to the result *ex nunc* (future and without reflexive – *ex ante* results) of contract termination by the court.

When the issue is related to the basis of contract, collapse of contractual interest, the particular contractual interests of parties must be distinguished and in general, the essential purpose and interest of the contract. The interest of the contract covers economic benefit, economic purpose of the contract,

¹⁶⁷ *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 724.

¹⁶⁸ *Ciematniece I.*, Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 64.

¹⁶⁹ *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 177.

¹⁷⁰ *Pop L., Popa I. Fl., Vidu S. I.*, Civil Law Treaty. Obligations, Vol. II. Contract, Bucharest, Universul Juridic, 2012, 160.

which parties have given to this agreement and which may be established based on the systemic analysis of contract terms, determination of the common spirit. The general interest of the contract is not limited to reciprocal performance of the particular party, but rather its determination requires pragmatic evaluation of the economic benefit of the implied contract at the stage of conclusion. When determining the purpose of contract, the judge takes into consideration interest of parties, separates from it and defines general purpose of the contract, as of whole construction.¹⁷¹ From the mentioned perspective, the purpose of the contract is the notion of unifying, connecting contractual expectations of parties.¹⁷² The contract is independent legal organism, construction consisting of particular elements, which outside the mutual and covering will, carries indigenous, global logical purpose.¹⁷³ In the modern legal sphere the contract is considered as agreement portraying legitimate purposes and interests of parties and not only document regulating rights and obligations of contractors.¹⁷⁴

In the process of adjustment, the court interprets initial purpose of the contract in light of the good faith. Termination of the contract requires to fairly distribute negative outcomes of termination among both parties. For instance, if only one party is released from obligation of performance (debtor) without determination of compensatory outcome for the creditor, this will result imposition of the risk only to the creditor,¹⁷⁵ which cannot be tolerated by the principle of contractual proportionality. Therefore, in case of termination of the contract the court determines terms of termination in the equal interests of both parties, with the balancing vector.

For the determination of outcome of contract termination, the judge applies interpretation of the contract.¹⁷⁶ While proportional distribution of the outcomes of contract termination among parties, the court has to necessarily evaluate the damage, which may be caused for creditor by release of debtor from the performance of obligation. When terminating the contract, liberation of debtor from performance obligation and responsibility may not always cause entire imposition of negative outcomes of contract termination on the creditor. For instance, by virtue of changed circumstances the essential disbalance may emerge between value of performance to be received by creditor and financial burden of performance necessary for performance by the debtor.¹⁷⁷ In such case, by changed

¹⁷¹ *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, *Procedia – Social and Behavioral Sciences*, 149, 2014, 177-178.

¹⁷² *Tison R.*, *Le principe de l'autonomie de la volonte dans l'ancien droit francais*. Paris: Domat, Montchrestien, 1931, 15.

¹⁷³ *Carbonnier J.*, *Flexible droit*, 8th ed., Paris: Librairie Générale de Droit et de Jurisprudence, 1995, 312, Referred: *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, *Procedia – Social and Behavioral Sciences*, Vol. 149, 2014, 178.

¹⁷⁴ *Ciematniece I.*, *Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts*, Lambert Academic Publishing, Saarbrücken, 2010, 74.

¹⁷⁵ Draft European Private Code, 2000, Art. 6:111.

¹⁷⁶ *Schwenzer I.*, Force Majeure and Hardship in International Sales Contract, *Victoria U. Wellington L. Rev.*, Vol. 39, 2008, 715.

¹⁷⁷ The German Doctrine qualifies the mentioned as “relative” impossibility to perform. See Civil Code of Georgia, Article 275 (2) debtor can refuse to perform obligation, as far as performance requires expenses, which are significantly inconsistent with the interest of creditor toward performance of obligation considering the content of relation and principle of good faith. When determining what reasonable effort may be requested from debtor, debtor’s fault in interference in the performance must be taken into account.

circumstances the financial burden for ensuring performance is increase do the debtor, which in certain occasions may cause proportionate increase of the value to be received by the creditor, and this may significantly exceed the value of performance, which was presumed to be received in case of unchanged circumstances, during performance of the obligation by debtor. In such case releasing debtor from obligation to perform and compensate damages may be implemented with the limits, which balances and scales negative outcomes of termination of the contract not considering the initial value of performance and not considering the increased value of performance. Hence, if there is a disbalance between the burden of performance and the value of performance to be received by creditor, the scale of negative outcomes of termination of the contract for the creditor must be evaluated by the initial value of the contract performance (predictable at the stage of conclusion of contract) and not by inappropriately increased financial value of performance interest caused by the change of circumstances. Otherwise the paradigm of hardship would lose the essence of existence.¹⁷⁸ It is inadmissible to tolerate significant financial privilege of one party caused by the change of circumstances, getting reach on the account of other party.¹⁷⁹ In this regard, the balancing interventional power of the court to restore contractual balance is evident.

The study of reciprocal performances of parties or cost relationship between burden of performance and interest to receive performance¹⁸⁰ starts from the moment of emergence of changed circumstances with the orientation towards future performance of the contract, it is inadmissible to review already made performances with reflexive effect. Hence, adaptation of the contract, review of financial-economic obligations of parties is done for ensuring general contractual balance and equality, principles of performing contract terms in good faith.

Using termination of the contract as the extreme measure is justified in case when it is impossible to adjust or adaptation of contract to changed circumstances taking into account reciprocal interests of parties is unfair and unreasonable.¹⁸¹ 6.2.3 (4) of the UNIDROIT principles of international commercial contracts (2004). 6:111 (3) of the principles of European Contract Law and DCFR (2008) III 1:110 (2) (b) the opposite model is envisaged in the Civil Code of Italy, where injured party has right to claim termination of the contract. Adjustment of the contract is not prescribed in the legislation.¹⁸²

The court has right to terminate the contract with the terms differing from general rules, which acted in general during the exit from the contract. In case of termination of the contract by the court, it determines reasonable time for the termination of the contract, in order not to cause damage to the

¹⁷⁸ See also *Beleiu Gh.*, Theory of Imprevison – Rebus sic Stantibus, in Civil Law II, Law Magazine, Issue 10-11, 2003, 408-409.

¹⁷⁹ *Ciongaru E.*, Theory of Imprevison, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 178.

¹⁸⁰ *Horn N.*, Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn N. (ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, at 15 et seq.

¹⁸¹ BGB, paragraph 313 (3).

¹⁸² See similarly ICC Hardship Clause, 2003, par. 3.

injured party.¹⁸³ If neither adjustment of the contract to changed circumstances, nor the termination of the contract ensures reasonable balancing of best interests of parties, then the court can call upon the parties once again to negotiate or remain in force the contract without modification, with initially agreed terms.

It is crucial that adjustment of the contract to changed circumstances, as well as liberation from the contractual responsibility with the grounds of hardship or impossibility to perform, does not instigate infringement of the principle of freedom of contract.¹⁸⁴

7.3. Grounds for Obligation of the Parties to Negotiate in Continental, Uniform and Georgian Law

The contract is a tool which requires cooperation and mutual action (duty to cooperate), implementing due diligence obligation for execution of the legitimate expectation of parties. Duty to cooperate as a guiding principle of parties' behavior, considers contractual negotiation as collateral process of emergence of the changed circumstances.¹⁸⁵

Before using court power to adjust contract to changed circumstances, strengthening obligation to conduct negotiations by the parties in accordance with the principle of good faith¹⁸⁶ with the aim of adaptation of the contract in numerous legal orders, including in the common law system, as well as uniform law¹⁸⁷ and international acts¹⁸⁸ is the response of recognition of the primacy of party autonomy. This obligation operates especially strictly in case of adjustment of contract under national law.¹⁸⁹ In the German judicial practice the approach is recognized that the party has right to claim sending of notification and contractual negotiation.¹⁹⁰ From the German Federal judicial practice it is

¹⁸³ *Lando O., Beale H.*, Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 327.

¹⁸⁴ *Ciematniece I.*, Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 11.

¹⁸⁵ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 238.

¹⁸⁶ *Brunner Ch.*, Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration, Kluwer Law International, The Hague, 2009, art. 79, par. 24.

¹⁸⁷ UNIDROIT principles of international commercial contracts PICC 6.2.3 (1) Article, Principles of the European Contract Law (PECL) Article 6:111 (2) and DCFR article III-1:110 (3)(d), ICC's Hardship Clause 2003; Also see, *Barcellona M.*, Appunti a proposito di obbligo di rinegoziazione e gestione delle sopravvenienze, in "Europa e diritto privato", 2003, III, 501, referred in: *Marchioro I.*, European Contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <<http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation>> [10.10.2021].

¹⁸⁸ Resolution №35/52 adopted by the General Assembly on December 4, 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf>> [10.10.2021]; U.N. ECOSOC, Draft Code of conduct for Transnational Corporations, U.N. Doc. E/C.10/1982/6, Annex (1982).

¹⁸⁹ *Ciematniece I.*, Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 65.

¹⁹⁰ OLG Karlsruhe, DB 1980, 254 (the case relates to long-term contract of providing electricity).

evident that justice gives priority to contractual negotiations conducted based on the principle of party autonomy in long-term contractual relations. Even before the reform of German Law on Obligations, German judicial practice in case of interference with the basis of the contract considered as a first obligation of the party to enter into negotiation based on the principle of good faith in order to adapt the contract.¹⁹¹

Despite the fact that the norm establishing obligation to negotiate in case of changed circumstances does not exist in Civil Codes of Netherlands, Italy, Germany and Georgia, this obligation may be interpreted out of article 415 (2) of CCG¹⁹² and article 254 (2) paragraph of the German Civil Code.¹⁹³ The obligation to decrease the damage prescribed under the mentioned normative provision by itself implies parties' duty, in case of changed circumstances in the framework of good faith, to try adjustment of the contract to changed circumstances and avoid or decrease continuous, increasing risk of widening scales of negative outcome caused by changed circumstances.¹⁹⁴ Moreover, despite the fact that German, as well as Georgian Law does not categorically prescribe obligation to conduct negotiations, the party is equipped with the power to directly apply to the court with the query to adapt the contract.¹⁹⁵ In the Georgian judicial practice conduct of negotiations by the parties is interpreted as lawful requirement.¹⁹⁶ In one of the cases the Supreme Court the refusal to conduct negotiations based on the principle of good faith, in condition when the second party applied all possibilities in order to convince the claimant in the necessity to

¹⁹¹ *Karampatzos A.*, Supervening Hardship as Subdivision of the General Frustration Rule. A Comparative Analysis with Reference to Anglo American, German, French and Greek Law, *Eur. Rev. of Prv. L.*, Vol. 13, 2005, 134, <www.KluwerLawInternational.com> [10.10.2021].

¹⁹² Article 415: 1. If actions of the injured person contributed to the occurrence of damages, then the duty to compensate and the amount of compensation shall depend on which party was more at fault for the damages. 2. This rule shall apply also when the injured person is at fault because of his/her omission to avoid or reduce harm. See also article 77 of Vienna Convention and *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, *Victoria U. Wellington L. Rev.*, Vol. 39, 2008, 725.

¹⁹³ Paragraph 254 of BGB, Contributory negligence (1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party; (2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. The provision of section 278 applies with the necessary modifications.

¹⁹⁴ Several representatives of German Doctrine support existence of the principle of mandatory negotiation in German law. *Grüneberg Ch.* In: *Palandt O. and others (eds.)*, Bürgerliches Gesetzbuch (67ed, Munich, 2008) § 313 BGB, par. 41; *Heinrichs H.*, "Vertragsanpassung bei Störung der Geschäftsgrundlage: Eine Skizze der Anspruchslösung des § 313 BGB" in *Stephan Lorenz and others (eds.)* Festschrift für Andreas Heldrich zum 70. Geburtstag (CH Beck, Munich, 2005) 183, 195; *Riesenhuber K.* "Vertragsanpassung wegen Geschäftsgrundlagenstörung – Dogmatik, Gestaltung und Vergleich", 2004 59, *Betriebs-Berater*, 2697-2698, referred in: *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, *Victoria U. Wellington L. Rev.*, Vol. 39, 2008, 722.

¹⁹⁵ *Schlechtriem P.*, The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe", *Oxford U Comparative L Forum*, 2002, 2.

¹⁹⁶ Judgement of the Supreme Court of Georgia of April 19, 2019 on the case № as-1076-996-2017 (in Georgian).

adjust the contract to the objectively existing circumstances (has objectively substantiated grounds for impossibility to perform and suggested several alternatives of adjustment), interprets as an abuse of power from the side of owner in condition of non-existence of superiority of this right.¹⁹⁷

The mentioned legislative policy pushes parties to, first of all, conduct adjustment through their own control and participation before delegating this right to the court. However, it must be noted, that the obligation to conduct negotiations is the obligation of act (*Obligation de moyens*) and not of the result (*Obligation de résultat*) – obligation to reach the agreement.¹⁹⁸ In the classical face to face negotiation (without facilitation from third party) introducing a party, as a rule, is not oriented on the agreement, if the result of negotiation, agreement with the power of court, hence with the perspective of legal-economic stability, is not firmed. It is rare to expect constructive and cooperative negotiations from parties, mostly in the conditions of no liability for infringing the obligation to negotiate.¹⁹⁹ Moreover, classical negotiation does not have legislative guarantee to protect disuse of confidential information as evidence, because of that business disputes mostly reach agreement not in classical negotiations, but in the facilitative processes equipped with legislative guarantee of confidentiality and enforcement.²⁰⁰ Moreover, considering the complexity and difficulty of the issue, it is very hard to prove infringement of the obligation to negotiate in contrary to the principle of good faith in conditions of application of the principle of party autonomy.

In the Georgian normative reality the solution may be subjecting the case to compulsory judicial mediation, which serves several reasons: parties, with the expectation that the court will adapt the contract by itself, will try better to define the limits of their will with regard to adaptation through negotiation and reach the enforceable mediational agreement.

In the framework of mediation process, in case of disagreement the parties will have possibility to continue legal proceedings in the court with more precise, studied contractual interests and terms, clarify their claims and define for the court the orientating limits for adaptation (if the case was transferred to mediation before the main hearing in the framework of mandatory mediation). Hereby, the additional advantage of giving case in to mediation must be mentioned: necessity to solve the dispute timely because of the fast increase of monetary obligations due to delay. Besides, in the mediation process parties are entitled to approach the issue in complex manner and widen exchanging resources, distributable good, introduce those resources into the agreement orbit, which are related to the activity outside the dispute. Often parties are connected not only with arguable relation, but also other complex interrelations in the framework of various contacts. The systemic approach towards the issue and widening the area of the agreement will give parties the possibility to agree not only on arguable relation, but use as an alternative of agreement, business resources existing in the framework

¹⁹⁷ See Judgement of the Supreme Court of Georgia of March 22, 2019 on the case № as-1298-2018 (in Georgian).

¹⁹⁸ *Reimann M., Zimmermann R.*, *The Oxford Handbook of Comparative Law*, Oxford University Press, USA, 2008, 923.

¹⁹⁹ Even though the responsibility for infringement of obligation to negotiate maybe prescribed by contractual reservations, but the burden of proof in terms of *mala fide* makes these reservations ineffective.

²⁰⁰ See for instance, Resolution №35/52 adopted by the General Assembly on December 4, 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf>> [10.10.2021].

of other relations and systemically decide not particularly one dispute, but also perspective of preservation of business relations by introducing other substantive resources existing outside the dispute into the negotiations orbit. Therefore, there are often such disputes in the mediation practice, when parties with one court litigation solve disagreements existing in several contractual relations or they try to interest one another with resources available in other relation for deciding particular court case. Herein it must be mentioned that property dispute, which exceeds 20000 GEL cannot be given to mandatory mediation, however the court mediation practice knows occasions when the parties to the disputer being in higher limits that permitted attended the informational meeting of mediation with the recommendation of the judge and they chose mediation based on mutual agreement, after they were explained the essential/procedural benefits in the context of individualization of their dispute. For the future claims on adjusting contract to changed circumstances must be unified in the category of cases subject to mandatory mediation, which will be compatible with the legal orders of various countries and what is important, the mentioned will encourage realization of the principle of party autonomy with great extent in the process of adjustment of the contract.

The interventional role of the court in the framework of contractual liberty and essence of transaction will be determinative in case of not reaching the mediation agreement. Hereby one circumstance must be underlined that in the mediation process party makes decision only based on the analysis of the possible perspective in the court. The party by forecast of the best and the worst alternatives of mediation, determines optimal area of agreement in the mediation process. Therefore, with the purpose to reach agreement in the mandatory mediation the informal participation in good faith will depend significantly on whether court has established practice of adaptation of the contract, which will give the party possibility to analyze, that in case of not reaching voluntary agreement, the adaptation terms will be defined by the court. The mentioned may encourage and stimulate conduct of adaptation in the process of mediation within the framework of party autonomy. In the legal doctrine there is an opinion that opposed to the principle of good faith the failure of negotiation may be considered as a ground for imposing procedural costs.²⁰¹ Similarly, in case of refusing participation in the mandatory judicial mediation, the party I fined and it bears the obligation to pay court expenses.²⁰² Moreover, infringement of the principle of good faith by the party is considered as refusal of participation in the mandatory judicial mediation, when despite appearance at the court, he/she does not provide objective data necessary for reaching agreement, does not have offer and does not react to the equivalent suggestions. Hence, contrary to principle of good faith, formal participation in the process without purpose of the agreement, is not considered as participation in mandatory mediation, based on which mediator may terminate the process on two grounds: 1. The mandatory mediation process has not been conducted, because the second party was not given chance to have possibility to conduct conscientious and result-oriented negotiation. 2. The process of mandatory mediation must

²⁰¹ *Brunner Ch., Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration*, Kluwer Law International, The Hague, 2009, 483.

²⁰² Civil Procedure Code of Georgia, article 187⁶ (2): 2. In the process of judicial mediation inexcusable absence of party at the meeting appointed by the mediator in accordance with paragraph 1 of article 187⁵ of this Code, he/she will be imposed with court expenses entirely, despite the outcome of the case in the Court, and fine of 150 GEL.

finish with the initiative of mediator, as it may be used as measure for procrastination of the negotiation and became a threat for enforcement of the right of accessibility to justice. The mechanisms ensuring operation of the principle of process effectiveness prescribed under the Code of conducts for mediators, exclude the caution of using mediation process for lingering the case. As it was mentioned, in certain legal orders of continental legal system the adaptation of the contract in case of changed circumstances is the prioritized, primarily applicable legal mechanism and form of intervention to be conducted by the court.²⁰³ Adaptation of contract is flexible mechanism, on the one hand to ensure lawful and proportionate outcomes for participants of contractual relations, and on the other hand, the legal stability and principle of enforcement of rights in good faith shall be guaranteed for subjects of civil circulation. The mentioned overall serves to purposes of public order, which by sub elements of social-economic and legal order is reached systemically and therefore, it approves judicial control of the enforcement of private law principles.

8. Hardship in Georgian Law

8.1. The Substantive Legal Composition of the Hardship Established by Changed Circumstances

According to the first sentence of Article 398 I CCG, the adjustment of the contract to the changed circumstances is related to certain legal preconditions²⁰⁴: (1) The emergence of a (2) substantial change (3) in the circumstances considered to be the basis of the contract after the conclusion of the contract; (4) inability to anticipate circumstances²⁰⁵ – unpredictability, unforeseeability; (5) The existence of circumstances beyond the debtor's control, hence the debtor's innocence²⁰⁶ (6) Extreme aggravation of the obligation²⁰⁷ (7) Causal connection²⁰⁸ – complication of

²⁰³ Roth G. in: *Krüger W.(ed.)*, Münchener Kommentar zwn Bürgerlichen Gesetzbuch, 5ed., CH Beck, Munich, 2007, § 313 BGB, par. 93; *Barbara Dauner-Lieb and Wolfgang Dötsch* “Prozessuale Fragen rund um § 313 BGB” [2003] NJW921, 925, referred in: *Schwenzer I.*, Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 723.

²⁰⁴ On the legal preconditions for the application of Article 398 of CCG, see: Judgment of the Supreme Court of Georgia of June 6, 2010 on the case № AS-7-6-2010 (in Georgian); Judgment of the Supreme Court of Georgia of November 25, 2008 on the case № AS-466-707-08 (in Georgian); Judgment of the Supreme Court of Georgia of July 4, 2011 on the case № AS-762-818-2011 (in Georgian).

²⁰⁵ Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of July 6, 2010 on the case № as7-6-2010 (in Georgian); Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of November 25, 2008 on the case № AS-466-707-08 (in Georgian).

²⁰⁶ Obstruction or inability to fulfill an obligation is considered a ground for release from liability if it is caused by force majeure circumstances and is not related to the intentional or negligent action of the person. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of November 10, 2008 on the case № AS-617-842-08 (in Georgian).

²⁰⁷ According to the Judgement of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of November 25, 2008 on the case № AS-466-707-08 (in Georgian), it is established that the basis for adjusting the contract to the changed circumstances is a sharp, cardinal change in the economic basis of the contract and a significant imbalance of obligations between the parties.

²⁰⁸ See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of January 9, 2014 on the case № AS-735-697-2013 (in Georgian).

contract performance as a direct result of changed circumstances (8) In the event of prior consideration of the circumstances: (a) the non-conclusion of a contract by the parties (i.e. lack of contractual interest in concluding the contract) or (b) agreement on its different content.²⁰⁹

It is important to note that most of the above-mentioned preconditions, both in the various rules of law of the continental system and in Georgian law, are considered not only as a hardship, but also as a founding precondition for force majeure.²¹⁰ The difference is that in a hardship the obligation may still have an objective performance resource as opposed to a force majeure.

Based on the legal analysis of the above-mentioned legislative provision (Article 398 I), additional preconditions are revealed necessary for hardship, but not directly formulated in the article. In particular, if the change of circumstances is not estimated for the party at the stage of concluding the contract, there is a precondition of contingency²¹¹, which at the same time implies the uncontrollable nature of the obstacle, its inevitable nature. In particular, if the counterparty did not and could not anticipate a change in circumstances, it would therefore be deprived of the objective ability²¹² to avoid, overcome or eliminate its negative consequences even if the necessary precautions²¹³ and prudence were exercised.²¹⁴

The existence of the above preconditions is considered an obstacle beyond the control of the debtor²¹⁵ and, therefore, establishes another additional precondition for the debtor's innocence towards

²⁰⁹ *Akhvlediani Z.*, Law of Obligations, Tbilisi, 1999, 57 (in Georgian).

²¹⁰ Force majeure, makes it impossible to perform the obligation properly, thus a force majeure situation implies independent from the parties, objectively existing circumstances, which precludes the debtor's fault. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of July 23, 2009 on the case № AS-30-367-09 (in Georgian).

²¹¹ Judgment of the Supreme Court of Georgia of October 24, 2017 on the case № AS-1096-1053-2016 (in Georgian) – that the circumstances provided for in Article 398 of CCG will not be changed or misrepresented if the aggrieved party has shown negligence or carelessness and at the time of concluding the contract Could have predicted the origin of the obstacle. The party ... was obliged to show prudence and necessary diligence in order to find out the content of the obligations undertaken by it, to examine all the essential circumstances that were necessary to fulfill the obligation imposed on it. A different definition runs counter to the principle of good faith recognized in civil law.

²¹² Lack of funds from one of the parties will not be considered as a force majeure event. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of April 18, 2011 on the case № AS-218-204-2011 (in Georgian). Similarly, in the doctrine, subjective insolvency is not considered a ground for exemption from liability (Busch D., Hondius E., *The Principles of European Contract Law and Dutch Law: A Commentary (Perspectives on Company Law)*, Kluwer Law International; 1st ed., August 27, 2002, 341) For it is assumed in the sphere of the debtor's control, and hypothetically there is a possibility of it being influenced by the debtor.

²¹³ See Judgment of the Supreme Court of Georgia of October 24, 2017 on the case № AS-1096-1053-2016 (in Georgian).

²¹⁴ See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of July 5, 2010 on the case № AS-418-391-2010 (in Georgian).

²¹⁵ *Liu Ch.*, Changed Contract Circumstances, 2005, <<http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>> [10.10.2021]; *Lindström N.*, Changed Circumstances and Hardship in the International Sale of Goods, NJCL, 2006/1, 8, <www.njcl.fi/1_2006/commentary1.pdf> [10.10.2021]; *Southerington T.* In: *Maggi M.*, Review of the Convention on Contracts for the International Sale of Goods (CISG), 2002-2003, Kluwer Law International, Netherlands, 2004, 275-276. On the recognition of independently emerging, outside events as force majeure circumstances. See Also, the Judgement of the Chamber of Civil,

the obstacle.²¹⁶ The non-guilt criterion naturally excludes liability for hardship and inability to perform the obligation.

Therefore, in order to be released from liability, it is necessary to exclude the possibility for the parties to anticipate the occurrence of obstacles²¹⁷, to avoid them or to overcome²¹⁸ / reduce the negative consequences and, at the same time, the existence of an event beyond the debtor's control is essential.²¹⁹

The obligation of the party to reduce the negative effects of the changed circumstances, the expected damage, is also manifested in the obligation to immediately notify the creditor about the circumstances hindering the performance (anticipatory breach), the severity of the disturbing circumstances, the nature and extent of the impact on performance. Although the obligation to notify, unlike the uniform law, is not directly regulated by Georgian law, this obligation may derive from Articles 415 (2), 316 (2). Compliance with the obligation to notify is one of the factors determining the debtor's faultlessness. Articles 8: 108 (3) of European Principles²²⁰, Article 7.1.7 (3) of the UNIDROIT Principles²²¹ and Article 79 of the Vienna Convention²²² reinforce the obligation for the debtor to notify the creditor within a reasonable time of the obstacle, its quality, duration and possible consequences. It is not necessary to send a message in writing.²²³

Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of February 4, 2010 on the case № AS -1162-1424-09 (in Georgian).

²¹⁶ See Judgment of the Supreme Court of Georgia of April 19, 2019 on the case № AS-1076-996-2017 (withdrawal from the contract is allowed not only in case of a breach of obligation by the debtor, but also in the presence of the preconditions provided for in Article 398).

²¹⁷ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, 2006, 17, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>> [10.10.2021].

²¹⁸ If the debtor has the opportunity to find an alternative way of performance, then this excludes the release from liability under force majeure circumstances, for the debtor has not fulfilled his obligation to eliminate the negative consequences of force majeure circumstances and has not resorted to alternative enforcement mechanisms. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of July 27, 2010 on the case № AS-576-542-2010 (in Georgian).

²¹⁹ ICC Force Major Clause 2003, ICC Hardship Clause 2003, ICC Publication № 50, 2003, 2, <<http://www.trans-lex.org/700700>> [10.10.2021].

²²⁰ A party who fails to fulfill an obligation must ensure that the notification of the obstruction and the consequences thereof is received by the other party within a reasonable time after the offending party knew or should have known of the origin of the obstruction. The other party has the right to claim damages for any damage suffered as a result of not receiving such notice.

²²¹ The party who fails to fulfill the obligation shall notify the other party of the obstruction and its expected consequences. If a party does not receive the notice within a reasonable time after the infringing party knew or should have known about the obstruction, it shall be liable for the damage suffered by the party as a result of the inadmissibility of the notice.

²²² Flambouras DP, The Doctrines of Impossibility of Performance and Clausula Kebus Sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis, Reproduced with permission of 13 Pace International Law Review, 2001, 264, <<http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>> [10.10.2021].

²²³ Ibid.

The notice is an expression of a will that requires acceptance by the addressee for its validity and will be considered valid from the moment it arrives to the other party. Consequently, the risk of non-acceptance or delay of the notice is usually borne by the debtor.²²⁴ In case of violation of this obligation, the debtor is liable for damages caused by non-performance of the notice.

In one of the decisions of the Supreme Court of Georgia, submitting a request for adjustment of the contract to the changed circumstances is considered a precondition for exercising the right of adjustment.²²⁵

The burden of proving the preconditions for the hardship (listed in Article 398 (1)) rests with the debtor.²²⁶

8.2. Legal Outcomes of Hardship – a Legislative Gap of a Norm and the Necessity of Interpreting It in Existential Connection with the German Analogue

Adjustment of the contract to the changed circumstances in CCG (Article 398) is connected to the identical grounds of the preconditions set forth in paragraph 313 of BGB: *If the circumstances which became the basis for the conclusion of the contract have clearly changed since the conclusion of the contract and the parties would not have entered into this agreement or have entered into other terms with these changes in mind, then the contract may be required to be adjusted to the changed circumstances.* It is also noteworthy that such an obstacle to the performance of the obligation, when the party cannot (i.e. unreasonable) be required to strictly adhere to the irreplaceable contract on the basis of the principles of good faith and fairness, in legal doctrine, it is considered a necessary precondition for the occurrence of a hardship, insofar as the reasonableness of the performance is considered as a criterion for determining the binding force of the contract.²²⁷ It is the will of the legislator to protect the party who suffers disproportionately under the influence of changed circumstances. Execution of the contract on unchanged terms would put the participants of the civil turnover in an unequal position.

²²⁴ Lee W., Exemptions of Contract Liability Under the 1980 United Nations Convention, 8 Dickinson Journal of International Law, 1990, 391, <www.cisg.law.pace.edu/cisg/biblio/lee.html> [10.10.2021]; *Flambouras D. P.*, The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis, Reproduced with permission of 13 Pace International Law Review, 2001, 273, <www.cisg.law.pace.edu/cisg/biblio/flambouras1.html> [10.10.2021].

²²⁵ According to the Court of Cassation, in case of significant excess of the solid cost estimate, the tenant may request the client to adjust the contract to the changed circumstances. If the tenant does not exercise this right and still continues to perform the work, then he loses the right to demand reimbursement from the client. Judgment of the Supreme Court of Georgia of December 30, 2013 on the case № AS-888-834-2012, referred in the Judgement of the Supreme Court of Georgia of July 1, 2016, case № AS-397-381-2016 (in Georgian).

²²⁶ *Lando O., Beale H.*, Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 383; Lee W., Exemptions of Contract Liability Under the 1980 United Nations Convention, Dickinson Journal of International Law, Vol. 8, 1990, 388, <www.cisg.law.pace.edu/cisg/biblio/lee.html> [10.10.2021].

²²⁷ See German Civil Code – Bürgerliches Gesetzbuch, Federal Ministry of Justice, Juris GmbH, Saarbrücken, 2005) §313 (I).

Despite the fact that Article 398, which is identical to the German norm (par. 313), is part of the substantive preconditions for the application of the doctrine of change of circumstances, is regulated in a contradictory manner compared to its German equivalent (par. 313), which necessitates the interpretation of the Georgian Civil Code norm in relation to its German analogue. First of all, the second sentence of Article 398 (I) causes ambiguity: “If those circumstances ... may be required to adjust the contract to the changed circumstances. Otherwise, in certain circumstances, the party to the contract may not be required to strictly adhere to the irreplaceable contract.” Paragraph 313 of BGB in cases where a party may not be required to strictly adhere to an irreplaceable contract, attaches importance to the criteria and grounds for determining the adjustment scope of the contract. In particular, within the meaning of the CCG norm, adjustment should be made when and within the circumstances of an individual case, in particular, the distribution of contractual or statutory risk may not require a party to the contract to comply with the irreplaceable contract.

Accordingly, in the normative body of Article 398, the phrase “otherwise” excludes the result of the adjustment, is a carrier of the contrary admission and not a condition for the adjustment. Therefore, the norm of the Civil Code should be interpreted in the content of GBG paragraph 313: If the circumstances which became the basis for the conclusion of the contract have essentially changed since the conclusion of the contract and the parties would not have entered into this agreement or have entered into other terms with these changes in mind, then the contract may be required to be adjusted to the changed circumstances, to the extent that, under certain circumstances, a party to the contract may not be required to strictly adhere to the irreplaceable contract.

An alternative interpretation of CCG Article 398 (I) is also possible: “Otherwise, the party may not be required to strictly adhere to the irreplaceable contract,” may indicate the release of the debtor from the obligation and the termination of the contract when the purpose of the adjustment of the contract is unattainable (“otherwise”). For the purposes of this definition, Article 398 presupposes two consecutive results of the changed circumstances: First of all, the adjustment of the contract, and when this result is unattainable – the termination of the contract by the court, which may mean the release of the debtor from the obligation to perform within a reasonable timeframe (“cannot be required to strictly adhere”).

The first sentence of Article 398, Part III of CCG defines the primary obligation of the parties in negotiations for the adjustment of the contract under the changed circumstances: The parties must first try to adjust the contract to the changed circumstances. “The purpose is to support the implementation, to remind the parties that they should not run away from the changed circumstances, but should do everything possible to make the agreement work for them. This will maintain the stability of civil turnover and the agreement will be fulfilled.”²²⁸ The mechanism that ensures that the contract is adjusted to the changed circumstances is considered by default as a component of the binding of contract²²⁹, the purpose of which is to implement the principle of the supremacy of the contract.

²²⁸ Zoidze B., *The Reception of European Private Law in Georgia*, Tbilisi, 2005, 288-289 (in Georgian).

²²⁹ Mekki M., Pelese M.K., *Hardship and Modification (or ‘Revision’) of the Contract*, 2010, 17, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511> [10.10.2021].

A well-founded remark should be made in relation to Article 398, Part III: If it is impossible for the contract to be adjusted to the changed circumstances, **or the other party does not agree to it**, then the party whose interests have been violated may withdraw from the contract. *Continental and uniform law, as discussed in the paper, imposes the right to refuse / terminate a contract after the adjustment of the contract is objectively unenforceable or unjustified and unreasonable. The 313 (3) paragraph of BGB is imbued with the same spirit: If the contract cannot be adjusted to the changed circumstances or the other party cannot be required to agree to it, then the affected party may withdraw from the contract. In the case of a legal relationship with a long-term obligation, termination of the contract is used instead of rejection of the contract.*

The unreasonable refusal of the creditor to adapt the contract to the changed circumstances should not be taken into account, to the extent that it opposes the debtor's respectable interests, the contract must be maintained and adjusted to the circumstances in order to restore the balance of the contract and the balance of interests – this is the purpose of Article 398 protection, the existential basis of the institute of changed circumstances. Respectable interest becomes the basis for both the transformation and the termination of a binding relationship. The state of interest itself is determined by both the execution process and the circumstances outside it.²³⁰ The creditor naturally has the right to substantiate the impossibility of adjusting the contract to the changed circumstances, taking into account his contractual interest. or to offer the court a more reasonable area of adjustment to the changed circumstances, a version taking into account its legitimate interests. There are preconditions for rejection of the contract when the court considers that the purpose of restoring the balance of the contract – adjustment is impossible and / or unjustifiable to take into account the interests of the creditor of the other party, and the non-performance of the obligation is expressed in a significant violation. The court refuses to adjust the agreement when the adjustment fails to ensure the balanced exercise of the interests of the parties (taking into account the interests of the creditor).

In this case, too, the final decision on the possibility of adjusting the contract is entrusted to the court taking into account the mutual interests of the parties and not only the will of the creditor. This is particularly evident in the aspect that changed circumstances often lead to a disruption of the value balance between the debtor's performance burden and the creditor's performance interest.²³¹ It is possible that under changed circumstances one party (in this case the aggrieved debtor) will find themselves in a difficult situation with an aggravating burden of performance, and the creditor will be given a chance to receive increased performance value. In the event of such an imbalance between reciprocal obligations, the adjustment of the contract always responds to the interests of the debtor as the aggrieved party, for whom compliance with the original conditions is associated with dire consequences. No less severe consequences may occur with the withdrawal from the contract, which gives rise to an obligation to reimburse performance. In this case, it is better for the creditor to fulfill the contract on unchanged terms, which significantly increases the contractual interest, price and

²³⁰ Zoidze B., *The Reception of European Private Law in Georgia*, Tbilisi, 2005, 300 (in Georgian).

²³¹ See Judgment of the Supreme Court of Georgia of October 24, 2017 on the case № AS-1096-1053-2016 (in Georgian) – changed circumstances complicate the execution to the extent that the request for its execution, no matter how justified, is against the fair (equivalent) exchange of goods inherent in civil turnover and requirements of good faith, which may be due to both increasing the cost of performance and reducing it.

usefulness of the contract. However, even for a creditor, adjusting the contract to the changed circumstances will not have serious economic consequences, as during adjustment the court is guided by the principles of good faith (Articles 8 III, 361 II of CCG) and fairness (Article 325 of CCG).

Whereas the vast majority of the developed legal systems recognize that unjust enrichment and advantage at the expense of one party cannot be allowed, It is intolerable to impose the risk of a changed circumstance (unjustly, beyond control) on only one side (as shown above in the analysis of foreign law) the ability to determine the feasibility of the adjustment should be given primarily to the court. If the adjustment is not possible, the debtor then has the right to withdraw / terminate the contract. In this case, if the issue concerns withdrawal from the contract, reversal of performance (restitution) in the event of withdrawal from the contract should be less severe for the parties than the hypothetical outcome expected from the adjustment of the contract. The advantage of the outcome of the withdrawal from the contract for both parties should be assessed precisely by weighing the consequences of the adjustment of the contract. If there is a relationship that is long-term or the performance reversal is unattainable due to the nature of the performance (for example, an employment, service contract), the right to terminate the contract may be exercised after confirmation of the inability to adjust to the changed circumstances.

That is why, if there is a material legal basis for adjusting to the changed circumstances provided for in Article 398 of CCG (founding preconditions, which is considered in the scope of the court's objective assessment), the unilateral (unjustified, unreasonable) refusal of the other party to adjust is substantially contrary to the essential purpose of the performance complication mechanism. This makes it impossible under changed circumstances, to distribute the negative outcomes fairly between the parties, where in case of impossibility of adjustment, the court has the power to terminate the contract under different conditions. "When terminating a contract, special attention should be paid to the objective of fair distribution of the risk of the changed circumstances by the court (i.e. its consequences), thus restoring contractual justice and the economic order violated in the contractual relationship between the parties. If the adjustment of the contract to the changed circumstances depended on an unreasonable refusal by one of the parties, the institution of adjustment would lose all purpose of its practical application. However, termination of the contract may not be the best means of protecting the interests of the parties when the maintenance of the contract serves the interests of third parties or the public.

9. Conclusion

Contract law is dynamic and ever-changing field according to new developments. At the beginning of the 19th century, it was widely believed that the autonomy of the will of the parties was granted absolute freedom, which could not be limited by the power of the state. It was later recognized that the State was empowered to intervene in the contractual relationship by adjusting it to the changed circumstances in order to ensure the equality of the parties, the vital interests of the public and the fair outcome of the treaty.²³²

²³² *Syquia E. P.*, The Revision and Adaptation of Contracts in Philippine Law – With a Comparative Look at the Law of other Asian Countries, 1985, 96-97, Book: *Horn N. (ed.)*, Adaptation and Renegotiation of

Adjustment of the contract to the changed circumstances in the legal systems is recognized as one of the means of legal protection of the parties, for which the court has wide jurisdiction to decide in accordance with the interests of the contractors. A party may not be liable for a risk for which it has not consented. Therefore, contractual injustice is caused by the fact that neither the debtor deserves suffered losses nor the creditor the benefit, which they generate after the conclusion of the contract.²³³ Therefore, the intervention is appropriate in terms of preventing the injustice caused by imposing negative consequences only on the affected party. For in the presence of two equally innocent parties to the origin of the changed circumstances, the imposition of negative consequences on only one party undoubtedly leads to a violation of the principle of justice. Adjusting the contract to the changed circumstances based on the principle of good faith and redistributing the damage to the counterparties²³⁴ significantly protects the interests of those third parties who are dependent on the financial condition of the debtor.²³⁵ Therefore, strict compliance with the terms of the contract may be detrimental not only to the debtor but also to the interests of third parties, and it may lead to a breakdown in the stability of the entire economic system.

Adjustment of the contract to the changed circumstances is a necessary legal protection mechanism in case the agreement is no longer generating social benefits and efficiency.

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²³³ *Speidel R. E.*, Court-Imposed Price Adjustments under Long-Term Supply Contracts, *Nw. U. L. Rev.*, Vol. 76, 369, 1981-1982, 405-406, <http://heinonline.org/HOL/Page?handle=hein.journals/illlr76&div=19&g_sent=1&collection=journals> [10.10.2021].

²³⁴ *Scott R. E.*, The Death of Contract Law, *U. Toronto L.J.*, Vol. 54, 2004, 373, <<http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/utlj54&id=382>> [10.10.2021].

²³⁵ *Trakman L. E.*, Winner Take Some: Loss Sharing and Commercial Impracticability, *Minn. L. Rev.*, Vol. 69, 1984, 486, referred in: *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, *Comparative Perspectives*, *Intersentia*, 2011, 240.

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