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Force Majeure and Hardship in Cross-Border Commercial Contracts: A Comparative Legal Analysis of German and Anglo-American Doctrines

Davronbek Abdugaffarov,
Toshkent davlat yuridik universiteti doktoranti
Huquqshunos
e-mail: davronbekabdugaffarov@gmail.com

Аннотация. Mazkur maqola xalqaro tijorat shartnomalarida yuzaga kelishi mumkin bo‘lgan kutilmagan holatlar – fors-major va qiyinchiliklar (hardship) tushunchalarining huquqiy tartibga solinishiga bag‘ishlangan. Muallif Germaniya fuqarolik qonunining §275 va §313-moddalari orqali shartnomaning adolatli qayta ko‘rib chiqilishi imkoniyati mavjudligini ko‘rsatadi, bu anglo-amerika huquq tizimida (AQSh va Buyuk Britaniya) mavjud bo‘lmagan yondashuvdir. Angliya va AQSH huquqi shartnomaviy majburiyatlarni uzrli holatlarda bajarmaslikni cheklangan hollardagina tan oladi, bunda asosiy e’tibor shartnoma erkinligi va aniqlikka qaratilgan. Shu bilan birga, maqolada fors-major va qiyin ahvol tushunchalarining amaliy va nazariy farqlari, hamda huquqni tanlashning shartnoma riski va majburiyatlarga ta’siri chuqur tahlil qilingan.

Калит сўзлар. fors-major, qiyin ahvol, shartnoma huquqi, Germaniya huquqi, anglo-amerika huquqi, xalqaro tijorat, huquqni tanlash, shartnoma majburiyatlari

Аннотация. Настоящая статья посвящена правовому регулированию непредвиденных обстоятельств–форс-мажора и чрезмерных трудностей (hardship)–в международных коммерческих контрактах. Автор рассматривает, как §275 и §313 Гражданского кодекса Германии позволяют справедливо пересматривать условия договоров при радикальном изменении обстоятельств, в отличие от англо-американских систем (США и Великобритания), которые допускают освобождение от обязательств только в исключительных случаях и преимущественно на основе явно прописанных условий. Особое внимание уделяется теоретическим различиям между форс-мажором и hardship, а также влиянию выбора применимого права на распределение рисков и обязательств сторон в трансграничных контрактах.

Ключевые слова. форс-мажор, чрезмерные трудности, договорное право, германское право, англо-американское право, международная торговля, выбор применимого права, договорные обязательства

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Annotation. This article examines the legal treatment of unforeseen events–force majeure and hardship–in international commercial contracts. The author contrasts the German Civil Code's §§275 and 313, which permit judicial adaptation or termination of contracts when circumstances have fundamentally changed, with the stricter doctrines of Anglo-American systems (UK and US), which provide relief only under narrow grounds such as frustration or impracticability, and typically require explicit clauses. The article highlights the theoretical and practical distinctions between force majeure and hardship, and analyzes how the choice of governing law affects risk allocation and contractual remedies in cross-border agreements.

Keywords. force majeure, hardship, contract law, German law, Anglo-American law, international commerce, choice of law, contractual obligations

International commercial contracts routinely allocate risks of unforeseen events through doctrines like *force majeure* and *hardship*. These doctrines address disruptions to contractual performance caused by events outside the parties' control, but the scope and remedies they provide differ markedly between legal systems. In US and English common law, relief for disruptions typically depends on narrow doctrines of impossibility, impracticability, or frustration, unless the parties have expressly agreed to broaden the relief via contract clauses [1]. By contrast, German civil law (like many continental systems) explicitly recognizes the *Wegfall der Geschäftsgrundlage* (disturbance of the basis of contract) under Bürgerliches Gesetzbuch ("BGB") §313, permitting courts to adapt or terminate contracts when the foundation of the deal has fundamentally changed [2]. Thus, governing-law choice in a cross-border supply contract – whether English, US, or German law – profoundly affects the available remedies and risk allocation if, say, a pandemic, war, or new tariffs disrupt performance. This article analyzes the scholarly and doctrinal debate on force majeure and hardship across these systems, and how the choice of law influences contractual obligations, remedies, and risk in international supply agreements [3].

Force Majeure and Hardship: Conceptual Framework

"Force majeure" and "hardship" are related but distinct concepts in contract law. Broadly, force majeure refers to supervening events (war, natural disaster, etc.) that render contractual performance impossible or illegal [4]. By contrast, hardship (also called "clausula rebus sic stantibus" or *Störung der Geschäftsgrundlage*) covers events that make performance excessively onerous but not strictly impossible [5]. Under civil-law systems like Germany, hardship typically triggers adjustment (renegotiation or judicial adaptation), whereas force majeure excuses or suspends performance (and may lead to termination) [6]. In international practice, these ideas often overlap: for example, the UNIDROIT Principles and ICC model clauses cover both

impossibility and hardship events. As Christoph Brunner observes, even when a contract's force majeure clause extends to economic hardship, "the specific legal consequences of the hardship concept will usually prevail": the affected party will seek contract adaptation rather than mere discharge [7]. In sum, force majeure and hardship are twin doctrines for unforeseen events, but their application and consequences (discharge vs. adaptation) vary with the legal system [8].

Common Law (US/UK) Approach

Under Anglo-American law, there is no general statutory "hardship" doctrine; relief for changed circumstances must be sought under narrow judicial doctrines or by contract. In English law, *frustration* discharges the contract when a supervening event destroys the contract's foundation [9]. Frustration applies only in extreme cases (e.g. the contract's purpose is wholly defeated or performance is impossible) and is "not lightly to be invoked" [10]. Without a clause, English and US courts will not excuse mere onerousness or increased cost. For example, in the classic cases like *Taylor v Caldwell* [11], the destruction of the essential subject excused performance, but higher expenses or reduced profitability do not. Likewise, the US Uniform Commercial Code §2-615 excuses sellers only when an unforeseen contingency renders performance impracticable – even more stringent than German hardship – and parties may contractually allocate risk [12]. Therefore, in common-law contracts, parties usually include force majeure clauses (often listing events like "pandemic" or "sanctions") to define permitted excuses [13]. Courts interpret these clauses strictly: for English-law contracts, if an event is not on the clause's list it will not qualify as force majeure [14]. In practice, Brexit and COVID litigation shows frustration rarely applies [15]. Absent a clause, an English or US court will typically enforce the bargain ("pacta sunt servanda") and leave "hardship" to contract terms [16-17].

German Civil Law Approach

German law explicitly balances pacta sunt servanda with good faith. The BGB does not use the term "force majeure" per se, but covers impossibility in §275 and hardship ("Störung der Geschäftsgrundlage") in §313. Under §275, if performance becomes objectively impossible (e.g. goods destroyed), the duty to perform is excused and the contract is discharged as to that obligation [18]. More controversially, §313(1) provides that if circumstances fundamental to the contract have changed so unreasonably that a party cannot be expected to adhere to the terms, the disadvantaged party may demand adaptation (renegotiation) [19]. If adaptation is impossible or inequitable, either party may terminate [20]. These provisions stem from post-WWI inflation cases (the "Spinnerei-Fall") and reflect a flexible approach: German courts have long granted contract adaptation in hardship cases where common-law courts would not [21]. For example, if raw material costs skyrocketed unforeseeably and upset the contract's balance,

§313 could allow price adjustment rather than total excusal. German doctrine treats §313 as subsidiary: parties are expected to allocate risks (e.g. through clauses) first, but the courts will "step in" if the equilibrium of the deal is fundamentally upset [22]. In short, under German law a court may modify or dissolve a contract for hardship, whereas English law would simply terminate by frustration or enforce original terms [23].

Governing Law Selection in International Contracts

In cross-border supply agreements, the chosen governing law determines which doctrines apply. If a contract is governed by English or New York law, parties cannot rely on any statutory hardship rule; they must explicitly draft any force majeure or hardship clause, and any relief will flow from frustration or contractual provision [24]. In contrast, if governed by German law, even absent an express clause the civil code's principles will apply, potentially giving a court power to adjust the contract under §313 [25]. Governing law choice also interacts with international conventions: for example, sales under German law (excluding CISG by contract) rely on BGB provisions, whereas under US contracts parties might invoke CISG Article 79 (force majeure) if CISG is chosen [26-27]. Scholars debate whether doctrines like hardship should be implied under international instruments; notably, the UNIDROIT Principles 2004 and revised ICC clauses explicitly recognize hardship and judicial adjustment [28]. Thus, parties from different legal traditions often negotiate governing law as a way to control remedies: an Anglo-American seller might prefer English law for predictability and finality, while a German buyer might insist on German law to preserve adaptation relief. Governing law clauses may also inadvertently import foreign doctrines through choice of forum or lex contractus, further complicating risk allocation [29].

Comparative Remedies and Risk Allocation

The choice between English/US and German law has tangible effects on remedies and allocation of unforeseen risk. Under German law, if hardship is proved, performance duties can be rebalanced rather than simply excused [30]. In practice, this means a German court might mandate renegotiation (and adjust price or quantities) rather than leaving one side with a windfall. By contrast, English law leaves risk allocation to the contract: a force majeure clause typically suspends or excuses performance (sometimes allowing termination), but courts will not adjust terms unless expressly authorized. For example, under the ICC 2020 hardship clause (inspired by civil law), parties can seek judicial adjustment of the equilibrium [31]. In English law without such a clause, a similar situation might result only in termination and damages, or no remedy at all if hardship is foreseeable [32]. US law is similar: outside of detailed clauses, US courts rarely oblige renegotiation and will limit relief to excuse or strict damages under impossibility doctrines [33]. Thus, under German law the aggrieved party shares the risk of hardship with the other side by contract adaptation, whereas under

common law the entire unforeseen burden often falls on the aggrieved party unless contractually provided for. As one practitioner notes, many English-law agreements explicitly avoid hardship clauses precisely because predictability is prized, while civil-law contracts rely on statutory mechanisms to reallocate risk [34].

Scholarly and Doctrinal Debates

Academic debate centers on whether flexibility or certainty should prevail. Civil-law scholars emphasize *Vertrauensschutz* (protecting the parties' reliance) and see adaptation as a good-faith measure when change is extreme [35]. Common-law commentators counter that contract autonomy and risk allocation should be determined by the parties, warning that open-ended hardship can undermine certainty [36]. These tensions are visible in CISG and UNIDROIT reforms: CISG Article 79 (force majeure) was not extended to hardship due to such debates [37], whereas the UNIDROIT Principles (and updated ICC clauses) adopted a more balanced approach with renegotiation and adaptation [38]. Empirical and pandemic-related studies also illustrate the divide: English commentators after COVID-19 have noted "little effect" of frustration and urged learning from "flexible response of civil law systems" [39]. In sum, modern doctrine grapples with balancing sanctity of contract against fairness – a debate playing out differently in each tradition. For parties drafting cross-border supply agreements, understanding these theoretical positions is crucial: choice of law may silently allocate the risk of price spikes, delivery delays, or supply failures to one side or invite judicial rebalancing [40].

Conclusion

In global commerce, the interplay of force majeure, hardship, and choice of law is critical. German civil law embraces a good-faith balance that can modify or rescind contracts under hardship (§313 BGB), whereas US/UK law upholds stricter pacta sunt servanda, excusing performance only under narrow doctrines or explicit clauses [41]. Consequently, a German-law contract may shift risk more evenly through adaptation, while an English-law contract will often leave the aggrieved party to contractually-specified remedies or strict discharge. Scholars continue to debate these models: some argue for the efficiency of predictability, others for the equity of flexibility. Ultimately, in cross-border supply contracts the choice of governing law – and the drafting of force majeure/hardship clauses – will determine who bears the burdens of globalization's unforeseen shocks.

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