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Non-performance doctrines and Regulation 2026/261

Contractual remedies in the context of the EU Regulation phasing out Russian gas imports

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Contents

Abstract

Regulation 2026/261 is an economic sanction package banning imports of natural gas from the Russian Federation into the European Union. Given that there are many long-term gas supply agreements between EU importers and Russian exporters, the Regulation creates a legal problem: parties can no longer perform their contractual obligations, yet the applicable law may not offer them a clear exit route. This thesis examines whether the non-performance doctrines of force majeure, hardship, and frustration can serve as grounds for excusing non-performance under English law and international contract law. The thesis finds that none of the three doctrines is available to parties affected by the Regulation. The doctrine of force majeure fails because the phase-out period had already been announced to companies since March 2022, making the unforeseeability and unavoidability criteria impossible to satisfy. The doctrine of hardship is also unavailable because the Regulation makes any adjusted or new contracts entirely unlawful. The doctrine of frustration under English law fails for the same foreseeability reasons, and additionally because the phase-out exemptions under Article 4 keep performance lawful throughout the phase-out period.

Keywords: force majeure, hardship, frustration, non-performance, Regulation 2026/261, Russian gas, English contract law, international contract law.

Abbreviations

CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
EU	European Union
GAI	Generative Artificial Intelligence
GATT	General Agreement on Tariffs and Trade 1994
GSA	Gas Supply Agreement
ICC	International Chamber of Commerce
LNG	Liquefied Natural Gas
LNG SPA	Sale and Purchase Agreement for LNG
PECL	Principles of European Contract Law
QMV	Qualified Majority Voting
SCC	The Stockholm Chamber of Commerce
TEU	Treaty on European Union
TFEU	Treaty on Functioning European Union
UK	United Kingdom
UNIDROIT	The International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
VIAC	The Vienna International Arbitration Centre

1 Introduction

1.1 Background

Global trade is built on economic transactions, regulated by contract law. However, economic transactions do not always function the contract as intended by parties and may fail to perform. In legal terms this is called non-performance: "failure by a party to perform any of its obligations under the contract."[1] Such failure can be caused by supervening events like a pandemic, war or economic sanctions. Although these events may not be caused by the parties, the risks must still be allocated between the parties. The doctrines of force majeure, hardship, and frustration could be used for this allocation, depending on which supervening event took and place under what kind of circumstances.[2]

The doctrine of force majeure generally refers to an event beyond the control of the parties, which happens unexpectedly and implies hinderance to performance of the contract.[3] Hardship concerns situations in which performance remains possible but has become hard due to a fundamental change in circumstances, potentially justifying renegotiation or adaptation of the contract.[4] Although hardship is a doctrine of soft law, it is a doctrine often used.[5] The doctrine of frustration applies where an unforeseen event makes performance impossible, illegal, or radically different from what was originally agreed, subject to a high threshold which, however, excludes mere economic difficulty.[6]

In 2022, Russia invaded Ukraine. This led the European Union (EU) to adopt extensive economic sanctions from 2022 and onwards. One of these sanctions is Regulation 2026/261.[7] Given the heavy dependence of several Member States on Russian gas imports, since 2022 the EU has published research and studies on how to get rid of the dependency on Russian gas, with Regulation 2026/261 as the result. In short, it gives Member States a phase-out period to find other suppliers. However, considering that most gas contracts are long-term contracts, non-performance will follow between contractors since many of the contracts will end after the phase-out

[1] Christoph Brunner, *Force Majeure and Hardship under General Contract Principles* (Kluwer 2008) 59.
[2] Liu Chengwei, *Remedies for Non-Performance* (2003) 250, 306.
[3] ICC, *Force Majeure and Hardship Clauses* (2020) art 1.
[4] Marcel Fontaine, 'The Evolution of the Rules on Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 11.
[5] *Ibid.*
[6] Daniel Greenberg, 'Contracts: Frustration' (Westlaw UK, 2026) para 1.
[7] Regulation (EU) 2026/261 of the European Parliament and of the Council, recital 1.

deadline in 2027.[8] This raises the legal question if, and which ones of the non-performance doctrines could be applied because of the Regulation.

1.2 Purpose and research questions

The purpose of this thesis is to clarify if any of the non-performance doctrines applies as the result of the imposing sanctions on Russian gas imports in the EU. The different non-performance doctrines will be discussed and analysed according to international contract law and English contract law. The differences between the doctrines will be discussed. In light of this outcome, the EU Regulation phasing out Russian gas imports will be discussed and analysed to determine whether any of these non-performance doctrines apply as a result of the imposition of sanctions on Russian gas imports into the EU. This research is highly topical, since the effects of sanctions on long-term gas contracts are important to assess and the uncertainty of their impact on global trade creates a lot of legal disputes.

The thesis addresses the following research question:

Can the Regulation phasing out Russian natural gas imports qualify as a ground for invoking the non-performance doctrines of force majeure, hardship and frustration under international- and English contract law?

1.3 Delimitations

This thesis adopts a focused scope to ensure analytical clarity and depth. The analysis is limited to the effects of the sanctions under Regulation 2026/261 phasing-out Russian natural gas imports into the EU. In terms of the legal framework, English contract law and international contract law are under investigation. Although the United Kingdom (UK) is no longer a Member State of the EU and has not ratified the CISG, English contract law remains frequently applied in international gas supply agreements.[9] As a result, the Regulation phasing out Russian gas imports may also affect contracts governed by English law. English legal sources and case law are furthermore widely accessible and extensively developed in the field of commercial contracts, making English contract law particularly suitable for analysis alongside international contract law. Within these frameworks, the main discussion is restricted to the doctrines of force majeure, hardship, and frustration, as these represent the principal legal mechanisms for addressing non-performance in situations of external disruption. The scope is further limited to long-term gas contracts, concluded before the war between Ukraine and Russia broke out in 2022 (legacy contracts), as these are most directly affected by the EU's phase-out measures and are most likely to give rise to claims of non-performance due to the Regulation. Due to the confidentiality that characterizes the gas industry, particularly

[8] 'Should Europe Use More Long-Term LNG Contracts?' (*Reuters*, 7 February 2022) https://www.reuters.com/business/energy/should-europe-use-more-long-term-lng-contracts-2022-02-07/.

[9] Agnieszka Ason, *International Gas Contracts* (OIES Paper NG 175, Oxford Institute for Energy Studies 2022) 9.

in contracts involving Russian and EU entities, gas contracts are not publicly accessible. The analysis therefore relies on standard industry contracts, model clauses and case law to assess the non-performance doctrines in combination with the Regulation.

1.4 Method and materials

This thesis approaches its subject through a legal-doctrinal method. The primary legal sources are Regulation 2026/261, English contract law, and international contract law.

Before the non-performance doctrines can be analysed, Chapter 2 establishes the general contractual framework within which gas supply agreements operate. It draws primarily on the CISG and UPICC as the leading instruments of international contract law, supplemented by the comparative contract law scholarship of Hein Kötz, whose work on offer, acceptance, good faith, and contractual interpretation provides the analytical backbone of that chapter, and by Jill Poole on the requirements for a valid offer.[10] This chapter is included for a general audience of readers who may not be familiar with the foundational principles of international contract law, as these principles bear directly on how gas supply agreements function when circumstances change.

Chapter 3 then examines Regulation 2026/261 itself. The primary source is the Regulation, read alongside its recitals, which contain the legislative reasoning on foreseeability, the phase-out structure, and the treatment of legacy contracts. Legacy contracts are contracts that were already in existence before the EU's political commitment to phase out Russian gas. This will prove to be decisive in the later analysis.

Chapter 4 analyses the three non-performance doctrines and draws on two distinct bodies of law. For force majeure and hardship, the analysis is grounded in international contract law: Article 79 CISG, Articles 6.2.2 to 6.2.3 and Article 7.1.7 UPICC, and the ICC model clauses of 2020. The CISG Advisory Council Opinion No. 7 is used as interpretative guidance by analogy, given that it is not directly binding on the Regulation but illuminates what qualifies as a legal impediment caused by an act of public authority. Brunner's comparative study of force majeure across international instruments and Da Silveira's contribution to the ICC dossier on sanctions, hardship, and force majeure provide the scholarly framework.[11] For frustration, which is a doctrine of English law, the analysis relies on English case law and primarily the work of Chen-Wishart, whose account offers an authoritative and updated treatment of supervening events and illegality.[12] Liu's work on remedies

[10] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017); Jill Poole, *Contract Law* (13th edn, OUP 2016).
[11] Mercedeh Azeredo Da Silveira, 'Economic Sanctions, Force Majeure and Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018); ICC, *Force Majeure and Hardship Clauses* (2020).
[12] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019).

for non-performance under the CISG, UPICC, and PECL adds further comparative depth.[13] Although neither Liu nor Chen-Wishart represent the most recent publications, the information about the principles they address is still relevant today.

Applying these doctrines to the Regulation in Chapter 5 requires reading the Regulation's own recitals closely, particularly Recitals 10-17, and article 3 and 4, which contain the legislative reasoning on foreseeability and unavoidability that is decisive for each doctrine. The work of Yafimava, Ason and Fulwood on the contractual implications of the EU gas ban supports the analysis, particularly on the question of whether force majeure could realistically be invoked given the publicly announced phase-out timeline.[14] Da Silveira's reasoning on the relationship between sanctions and hardship is also carried into this chapter by analogy, to explain why renegotiation cannot circumvent a sanction.[15]

As a final note, we wish to address our use of Generative Artificial Intelligence (GAI) tools in the writing of this thesis. In accordance with the Department of Business Law's Policy for GAI in Teaching and Assessment, GAI tools have been used only for language enhancement and brainstorming purposes. Specifically, we have made use of ChatGPT-Plus and Claude AI to assist with reformulating complex sentences, generating ideas for summarising difficult passages, and brainstorming chapter titles. Additionally, these tools were made use of for technical guidance on OSCOLA citation formatting. All legal analysis, argumentation, and conclusions are based entirely on our own independent work, and the primary and secondary sources are referenced throughout the thesis.

1.5 Outline

This thesis has five more chapters. Chapter 2 starts with an introduction to contract law, drawing primarily on the CISG, to establish the foundational principles of contract formation that a general reader needs to understand before diving into the more specific analysis. Chapter 3 then turns to Regulation 2026/261 itself, examining its background, scope, phase-out structure, and enforcement mechanisms, and placing it within the broader EU legal framework.

Chapter 4 analyses the three non-performance doctrines that are the basis of this thesis. Force majeure is addressed first, with reference to Article 79 CISG, the UPICC, and English case law. Hardship follows, examined through Article 6.2.2 UPICC and the ICC model clauses. The chapter closes with frustration under English contract law, with particular attention to the category of supervening illegality most directly relevant here.

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[13] Liu Chengwei, *Remedies for Non-Performance* (2003); Christoph Brunner, *Force Majeure and Hardship under General Contract Principles* (Kluwer 2008).
[14] Katja Yafimava, Agnieszka Ason and Mike Fulwood, 'The EU Proposal to Ban Russian Gas Imports: Roadblock More than Roadmap' (Oxford Institute for Energy Studies, 2025).
[15] Mercedeh Azeredo Da Silveira, 'Economic Sanctions, Force Majeure and Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018); ICC, *Force Majeure and Hardship Clauses* (2020).

Chapter 5 tests each of the doctrines against the specific features of Regulation 2026/261, most critically its phased structure and publicly announced timeline. The thesis ends with a conclusion that answers the research question by summarising the findings across all chapters.

2 General contract law

Before discussing gas supply contracts, it is essential to understand how they are formed, the process involved, and their general structure. Among the instruments that are most helpful in providing the framework for drafting a valid contract are the CISG and UPICC. For a contract to be formed and take effect, the contracting parties must adhere to the principle of *pacta sunt servanda*. Article 1.3 of the UPICC (2016) describes the binding nature of a contract: "A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles".

2.1 The concept of freedom of contract

Freedom of contract is the organising principle from which any analysis of contractual obligations must start. The doctrine holds that parties keep full autonomy over whether to contract, with whom, and on what terms, free from external compulsion. This autonomy finds explicit legislative expression in Article 6 CISG, which permits parties to disapply the Convention altogether, and in Article 1.1 UPICC, which treats freedom of contract as self-evident in international commercial dealings. However, the principle is not without limits. Hein Kötz, Professor in international private law, notes that mandatory rules inevitably constrain party autonomy where weaker parties require protection or where the public interest is at stake.[16] That tension between autonomy and constraint is directly relevant to the present analysis: it is what gives force majeure and hardship clauses their legal weight as recognised grounds for excusing non-performance.[17]

2.2 Offer

According to Commercial law Professor Jill Poole, an offer is: "an expression of willingness to contract on the specified terms without further negotiation, so that it requires only acceptance for a binding agreement to be formed".[18] There are two requirements that the offer must meet to be considered valid. Indeed, the communication must be:

1) "Sufficiently specific in terms of the main obligation and price to be capable of immediate acceptance";[19]

[16] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 34.
[17] *Ibid.*
[18] Jill Poole, *Contract Law* (13th edn, OUP 2016) 37.
[19] *Ibid.*

2) "Made with an intention to be bound by the mere fact of acceptance".[20]

Kötz also reaches a similar conclusion: an actual offer is constituted only if it is sufficiently defined and indicates the offeror's intention to be bound by acceptance.[21] The mere act of communicating the offer does not in itself constitute an offer. For a offer to be valid, all the essential elements of the transaction must be provided with sufficient precision.

To clarify, according to article 14 CISG, for an offer to be sufficiently defined and to indicate an intention to bind itself, it must contain three elements: a description of the goods, the quantity, and the price (whether stated or determinable). However, article 14(2) CISG states that an offer made to the public is generally not deemed to have been made unless otherwise indicated.

In the former case, an offer not addressed to specific individuals is generally considered a mere invitation to negotiate (*invitatio ad offerendum*).[22] An *invitatio ad offerendum* is completely different from an offer, as it lacks the intention to be binding; therefore, it is simply an invitation to enter negotiations.[23]

2.3 Acceptance and conclusion of contract

Acceptance occurs through a direct declaration to the offeror or through behaviour that manifests the will to bind oneself and therefore through conclusive behaviour.[24] Instead, a declaration constitutes acceptance only if it expresses the acceptor's intention to be bound by the exact conditions of the offer.[25]

Nevertheless, Article 18(1) CISG defines the acceptance of contracts as a statement or conduct indicating assent. By contrast, "Silence or inactivity does not in itself amount to acceptance". Furthermore, paragraph 2 of Article 18 CISG specifies the point at which the contract is concluded, stating that the contract is concluded when the acceptance reaches the offeror (not at the time of dispatch). Article 18(2) CISG deviates completely from the mailbox rule, which applies in common law, as Kötz notes.[26]

Article 19 of the CISG sets out a number of substantive amendments which constitute counteroffers and must therefore be reviewed by the other party. Non-substantive amendments, on the other hand, are subject to valid acceptance unless a timely objection is raised. If the differences between the offer and the acceptance are only minor, the contract is concluded on the terms of the acceptance, unless the offeror immediately objects.[27]

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[20] Jill Poole, *Contract Law* (13th edn, OUP 2016) 37.
[21] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 19-21.
[22] *Ibid.*
[23] *Ibid*.
[24] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 25-26.
[25] *Ibid.*
[26] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 22-23.
[27] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 29-30.

Furthermore, Article 19 of the CISG provides for the possibility of a belated acceptance of contracts, as the offeror may still consider it valid if they notify the other party without undue delay. Finally, Article 23 of the CISG provides that a contract is concluded when: "an acceptance of an offer becomes effective in accordance with the provisions of this Convention".

2.4 Good faith

The legal principle of good faith is of fundamental importance in every international trade contract and, above all, in gas supply contracts. The founding principle of good faith is found in Article 7(1) CISG, which requires that the CISG is interpreted taking into account the need to promote good faith in international trade. It means that in entering into the contract, the contracting parties must act correctly throughout all stages of entering into and concluding agreements (but also after the contract enters into force and produces its effects). Furthermore, Article 1.7 UPICC establishes an explicit obligation for each party to act in accordance with good faith and fairness in international trade. It is therefore an obligation that the parties cannot exclude or limit, as well as a non-derogable standard in international commercial practice.

Kötz notices that there is no principle in English law that the parties must fully respect good faith and fairness during the negotiation phase, nor is it required to provide relevant information, or to take into account the interests of the other party.[28] Rather, English law addresses these issues through specific rules on tort, misrepresentation, and implied clauses.[29] This aspect is linked to gas supply contracts, since where they are governed by English contract law, then they do not benefit from a general obligation of good faith during performance.[30] Therefore, the parties must rely exclusively on the express terms of the contract when circumstances change, as in the case of the situation created by Regulation 2026/261.

2.5 Interpretation

The interpretation of contracts raises the fundamental question of whether contractual declarations should be understood according to the actual subjective intention of the party who made them.[31] Subjective interpretation, in fact, attributes to contractual declarations the meaning that a reasonable person would have provided them. Article 8(1) CISG proposes a multifaceted approach to the phenomenon of interpretations of statements, explaining how they are interpreted based on the actual intention of the party who made them, where the other party was aware of or could not ignore that intention. Where no common definition of intentions is reached, then Article 8(2) CISG comes into operation. The latter requires that statements be interpreted according to the understanding of a reasonable

[28] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) p. 34
[29] *Ibid.*
[30] *Ibid.*
[31] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 92.

person, placed in the same circumstances as originally stated them. Finally, Article 8(3) further broadens the vision of the field, since in order for a party's intention to be reconstructed, it is therefore necessary to take into account all relevant circumstances, such as: negotiations, consolidated practices between the parties and the specifics of the sector.

Kötz notes that the text in Articles 8(1)-8(3) CISG, concerning the interpretation of statements, can be summarised in the meaning that a reasonable person would attribute to the words used, in light of all the relevant circumstances.[32] Article 9 CISG gives support to such an approach, as it stipulates that the parties are bound by the widely known and regularly observed commercial uses in the relevant sector. Kötz also remarks that in long-term contracts, especially multi-year supply contracts (as in gas in gas supply contracts), the parties often lack the will or practical capacity to foresee every eventuality when drafting the contract.[33] Consequently, commercial usages and constructive interpretation play an essential role in integrating contractual gaps.[34] Indeed, commercial uses and constructive interpretation are particularly exploited in gas supply contracts, where procedures for notifying force majeure events and take-or-pay obligations form an integral part of the contractual framework even where they are not expressly provided for.[35]

[32] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 94.
[33] Hein Kötz, *European Contract Law* (2nd edn, OUP 2017) 101.
[34] *Ibid*.
[35] Agnieszka Ason, *International Gas Contracts* (OIES Paper NG 175, Oxford Institute for Energy Studies 2022) 8-13.

3 Regulation 2026/261

3.1 Content of the Regulation

3.1.1 Background and purpose

Regulation 2026/261 entered into force on 3 February 2026. Articles 194(2) and 207 TFEU are the legal basis, concerning the EU's energy policy and common commercial policy.[36] The Regulation consists of 14 articles and two annexes, preceded by recitals that explain the purpose of why the Regulation was created.

The objectives pursued by the Regulation are stated in Article 1, which establishes three purposes: a stepwise prohibition on imports of natural gas from the Russian Federation, rules to implement and monitor that prohibition alongside the preparation of an oil import phase-out, and provisions to better assess the security of energy supplies within the Union. The reason for this is Russia's full-scale invasion of Ukraine in February 2022. As Recital 1 states, the invasion revealed the dramatic consequences of the existing dependencies on Russian natural gas for markets and security, prompting EU heads of state through the Versailles Declaration to commit to gradually eliminating Russian energy dependency entirely. This commitment was not only political: Recital 4 notes how state-controlled Gazprom deliberately manipulated EU energy markets before and after the invasion, leaving underground storage at unprecedentedly low levels and intentionally disrupting gas flows for the EU. Recital 6 further explains the economic consequences, noting that the resulting energy price crisis caused economic disruption across Member States, while Russian revenues from gas trade still amounted to EUR 15 billion in 2024, directly financing the ongoing war in Ukraine. Recital 8 further establishes the legal justification for the Regulation's trade restrictions, stating the consistency with the EU's external competence under Article 21(3) TEU and with WTO security exceptions under Article XXI General Agreement on Tariffs and Trade 1994 (GATT), which allow the EU to depart from the most-favoured-nation treatment, meaning the principle requiring a WTO member to grant all trading partners the same trade conditions it grants to its most favourable partner.[37] This is only the case when measures are necessary to protect essential security interests.

3.1.2 Scope

The prohibition of importing Russian gas is described in Article 3, extending it to both pipeline gas and LNG that "originates in or is exported, directly or indirectly, from the Russian Federation". This covers not only direct imports, but also indirect flows routed through third countries and mixed cargoes containing Russian gas. This is strengthened by the definition of "country of production" in Article 2(29), which provides that gas extracted from Russia remains subject to the prohibition even when

[36] Regulation (EU) 2026/261 of the European Parliament and of the Council.
[37] *Ibid.*

it is liquefied or mixed elsewhere, ensuring that transshipment through Azerbaijan, Turkey, or other transit states cannot be used to circumvent the Regulation. The Regulation covers both short-term as long-term supply contracts, defined in Article 2 (5 & 6). A short-term supply contract is one with a duration of one year or less; a long-term supply contract exceeds one year. This distinction is important for the phase-out structure of the Regulation, as it treats short-term and long-term contracts differently in terms of both the transitional deadlines.

3.1.3 Phase-out exemptions

The prohibition under Article 3 does not instantly apply to all gas imports. Given the heavy dependence of several Member States on Russian gas and the long-term nature of existing gas contracts, the Regulation recognises that an immediate absolute prohibition would risk gas supplies in the EU. Therefore, Article 4 establishes a timeline of transitional exemptions exclusively for contracts concluded before 17 June 2025. The importance of this end-date is explained in Recital 17, which states that it was no longer appropriate to consider contracts concluded after that date as legitimate contracts, since the political commitment to phase out Russian gas had already been publicly established since the Versailles Declaration of March 2022. Recital 10 reinforces this by confirming that the Commission had conducted and published preparatory work and detailed analyses since 2022, concluding that a stepwise and coordinated phase-out is likely to have limited impact on energy prices in the Union. Recital 12 further notes that many importers had already voluntarily reduced Russian gas supplies, demonstrating that diversification was practically achievable.

Article 4 differentiates between short-term and long-term contracts, and between LNG and pipeline gas, resulting in four distinct exemption categories. Under Article 4(1), short-term pipeline gas contracts concluded before 17 June 2025 are permitted until 17 June 2026, and short-term LNG contracts under the same conditions until 25 April 2026. Under Article 4(2), long-term pipeline gas contracts have phase-out protection until 30 September 2027, with a limited extension to 1 November 2027 available where the Commission identifies by implementing decision that a specific Member State risks not meeting its underground storage filling target for 2027. Under Article 4(3), long-term LNG contracts remain permitted until 1 January 2027. Article 4(4) provides an additional specific exemption for landlocked countries that can no longer receive gas at the original delivery point due to changes in supply routes, allowing continued short-term imports until 30 September 2027 or 1 November 2027 where the Commission has adopted an implementing decision. Recital 15 explains the rationale for granting a longer transition to pipeline gas customers: unlike LNG, which can be sourced globally, diversification for pipeline gas customers in landlocked countries without LNG infrastructure is more complex.

Importantly, not all contractual amendments disqualify a contract from transitional protection. Article 4(5) provides that exemptions continue to apply where existing contracts are amended only in limited ways, such as lowering contracted quantities or prices, amending confidentiality or operational clauses, changing addresses of contract parties, transferring obligations between affiliated undertakings, or making

changes required by judicial or arbitration procedures. Any other amendment is treated as a new contract under Recital 18.

3.1.4 Monitoring and enforcement

Article 5 requires importers to obtain prior authorisation from national authorising authorities before any planned gas import from Russia. Importers must submit detailed information at least one month in advance, including the date and duration of the contract, contracted quantities, the identity of all parties, delivery points, and any contractual amendments. Where the authorising authority deems the information insufficient, Article 5(5) permits it to request the full text of the supply contract, excluding price information. Imports must be refused where authorisation is not granted. Article 8 requires Member States to establish dissuasive penalties for infringements, with maximum thresholds for legal persons set at 3.5% of worldwide annual turnover, EUR 40 million, or 300% of the estimated transaction value, whichever is highest.

Article 9 requires each Member State to submit a national diversification plan to the Commission by 1 March 2026, identifying existing Russian gas volumes under contract, alternative supply options, and technical or regulatory barriers to diversification. Finally, Article 13 grants the Commission emergency powers to temporarily suspend the prohibition for one or more Member States in cases of sudden and significant threats to security of gas supply, subject to a maximum of four weeks at a time.

4 Non-performance doctrines under English- and international contract law

4.1 Force majeure

This first section analyses the doctrine of force majeure, as established in international legal practice, particularly regarding the impossibility of importing Russian gas due to EU regulations. Although the doctrine of force majeure is widely recognised in international contract law, it also has recognition in few civil law systems, including France. Article 1218 of the French Code Civil provides the following definition of force majeure: "In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor..".[38]

At the international level, the national codification of force majeure is reflected in key instruments such as Article 79 CISG, or Article 7.1.7 of the UPICC, and Articles 8:108 and 8:101 of the Principles of European Contract Law (PECL).[39] To clarify the concept defined above, with the exception of Article 7.1.7 of the UPICC (which specifically refers to force majeure), the other existing sources of law do not contain a provision that is explicitly titled 'force majeure'. Nevertheless, the provisions mentioned above effectively have the same content as Article 7.1.7 of the UPICC.[40]

In 2020, the ICC has introduced model contracts containing force majeure clauses, in the form of long-form and short-form clauses.[41] The main difference between the two lies in the fact that the long-form clause is a precise and detailed version, tailored to each individual contract, whilst the short-form clause is a more generic version that can be applied more quickly to contracts.[42] These model contracts are only binding once they are incorporated into contracts; they also have the advantage of defining a range of circumstances that may constitute an impediment, such as wars, natural disasters, explosions, strikes and acts of authority.[43]

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[38] Code Civil (France) art 1218.
[39] Christoph Brunner, 'Principles on Force Majeure in the CISG, UPICC, PECL, the TLDB-Principles and ICC Force Majeure Clause 2003' in Christoph Brunner (ed), *Force Majeure and Hardship under General Contract Principles* (Kluwer 2008) 563–567.
[40] Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39(4) Victoria University of Wellington Law Review 713–714.
[41] ICC, *Force Majeure and Hardship Clauses* (2020) 1–4.
[42] *Ibid*.
[43] Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39(4) Victoria University of Wellington Law Review 714.

Article 79 CISG is one of the most authoritative sources on the subject and reads: "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".[44] In support of this doctrine, in the case of *Elephant Corporation v Trafigura Beheer BV ("The Crudesky") (2013)* the UK Court of Appeal stated that a force majeure clause does not generally apply if the event was not "beyond the reasonable control" of the party.[45]

Article 79 CISG therefore serves as a gap-filling mechanism for the concept of force majeure, acting as a default rule where the contracting parties have not included a force majeure clause in their contract.[46]

In English contract law, however, force majeure, like hardship, does not exist as a general doctrine, meaning that parties must explicitly include these doctrines in the contract or have applied law from a country where they do exist.[47]

It is interesting to note that CISG Advisory Council stated that the impediment referred to in Article 79 of the CISG may be not only of a purely physical nature, but also of a legal nature.[48] This proves particularly relevant in the case of EU sanctions that prevent the import of Russian gas. These sanctions may therefore be regarded as obstacles arising from an act of authority or government. Furthermore, it should be noted that the force majeure clause cannot be invoked, and thus no protection is afforded, in cases of "party at fault," that is, when a party's own actions give rise to an insurmountable impediment.[49]

To invoke force majeure, three essential conditions must be met simultaneously:

1) Any obstacle or impediment to the performance of the contract that falls outside the contractor's sphere of influence;[50]

2) The obstacle must have been unforeseeable;[51]

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[44] Christoph Brunner, 'Principles on Force Majeure in the CISG, UPICC, PECL, the TLDB-Principles and ICC Force Majeure Clause 2003' in Christoph Brunner (ed), *Force Majeure and Hardship under General Contract Principles* (Kluwer 2008) 563–567.
[45] Neil Andrews, *Contract Law in Practice* (1st edn, OUP 2021) 563 & Great Elephant Corporation v Trafigura Beheer BV (The Crudesky) [2013] EWCA Civ 905.
[46] CISG Advisory Council, Opinion No 7, 'Exemption of Liability for Damages Under Article 79 of the CISG' 1–2.
[47] Mercedeh Azeredo Da Silveira, 'Chapter 7: Economic Sanctions, Force Majeure and Hardship', in Fabio Bortolotti and Dorothy Udeme Ufot (eds), ICC Dossier No. 17: Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World Dossiers of the ICC Institute of World Business Law, Volume 17 (2018) 182.
[48] *Ibid*.
[49] Neil Andrews, *Contract Law in Practice* (1st edn, OUP 2021) 563.
[50] Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39(4) Victoria University of Wellington Law Review 714.
[51] Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39(4) Victoria University of Wellington Law Review 714.

3) the event or its consequences must have been unavoidable.[52]

This test is essential to enable the party invoking force majeure to demonstrate that the failure to perform was caused by events beyond their control and which could not have been foreseen.[53] With regard to the EU, individual buyers could invoke force majeure to justify their failure to fulfil their contractual obligations to import Russian gas, if and only if they were able to satisfy the criteria set out above. It should be noted, however, that force majeure may only be invoked by the party directly affected, and cannot extend to cases where only one party suffers a severe financial downturn, such as changes in market profitability, financial crashes or increased costs.[54]

These events do not fall within the scope of the doctrine of force majeure, as established under English contract law in the case of *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC (2010)* (UK High Court).[55] Similarly, in the case of *Thames Valley Power Ltd v Total Gas & Power Ltd (2015)* (UK High Court), it was held that a contract, which has become financially unattractive or excessively onerous, does not constitute a valid ground for invoking the force majeure clause.[56] And even if an event of *force majeure* were to occur, the party seeking relief must use all 'reasonable endeavours to remedy the situation', as held in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd (2018)*.[57]

The time factor is another crucial aspect when invoking force majeure, as it is not so much a matter of whether the impediment arose after the contract was concluded or during the conclusion of the contract itself, but rather it is essential that the impediment be sudden and unexpected.[58] Furthermore, according to Art. 79(4) CISG the defaulting party must notify the other party of the impediment and its consequences; otherwise, it shall be liable for any damages arising from the other party's failure to receive such notification.[59]

With regard to duration, the Opinion No. 7 specifies that the exemption from the performance of contractual obligations remains in force for as long as the impediment persists.[60] Once the impediment has ceased to have effect, the obligation to perform resumes, unless the delay has altered the nature of the contract itself.[61]

This approach finds a parallel under English law, where Neil Andrews expands on the concept of force majeure in his book *Contract Law in Practice* (2021) by

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[52] *Ibid*.
[53] CISG Advisory Council, Opinion No 7, 'Exemption of Liability for Damages Under Article 79 of the CISG' 2.
[54] Neil Andrews, *Contract Law in Practice* (1st edn, OUP 2021) 564.
[55] Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2010] EWHC 40.
[56] Thames Valley Power Ltd v Total Gas & Power Ltd [2005] EWHC 2208, [2006] 1 Lloyd's Rep 441.
[57] Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640.
[58] *Ibid*.
[59] CISG art. 79(4).
[60] CISG Advisory Council, Opinion No 7, 'Exemption of Liability for Damages Under Article 79 of the CISG' 2–4.
[61] *Ibid*.

introducing new elements (UK legal system).[62] If an unexpected event of such magnitude occurs that its burden is insurmountable, the primary force majeure clause will apply, and the failure to perform will generally not constitute a breach of contract.[63] On a completely secondary note, and while it is not certain that it will occur, the force majeure clause could allow for:

a) contractual suspension, putting the contract or part of it on hold, as in the case of *The Super Servant Two (1990)*;[64]
b) cancellation right, granting a party the right to terminate the contract, as in the case of *Tennats (Lancashire) Ltd v. CS Wilson & Co Ltd (1917)*;[65]
c) and, finally, cessation without notice, causing the contract to end automatically without prior notice (mutual termination).[66]

In the Case of *Gemcorp Commodities Trading SA v Zeefacto Oil & Gas Company [2018]* the UK High Court examined the force majeure clause (14) of the contract, which was worded in such a way as to exclude the buyer's obligation to pay for the goods supplied.[67] Judge Popplewell interpreted the force majeure clause as being drafted narrowly; the parties could not invoke force majeure to avoid payment.[68] In this case, the court ruled out the possibility of invoking the hardship doctrine.[69]

The reasoning behind this is that if performance becomes more onerous but the contractual terms remain essentially unchanged, the force majeure clause does not apply.[70]

Similarly, if European sanctions block the flow of payments between the EU and Russia for gas supplies, but the contract stipulates that force majeure does not exempt the parties from their payment obligations, then, according to Judge Popplewell's decision, the buyers are obliged to fulfil their contractual obligations (*pacta sunt servanda*).[71]

4.2 Hardship

Hardship differs from the doctrine of force majeure both in terms of the nature of the impact and the rules governing its application.[72] Whilst force majeure focuses primarily on the impossibility of performance, hardship, on the other hand, concerns situations in which performance becomes excessively onerous.[73] In other words,

[62] Neil Andrews, *Contract Law in Practice* (1st edn, OUP 2021) 566–567.
[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.
[67] Gemcorp Commodities Trading SA v Zeefacto Oil & Gas Company [2018] Case No: CL-2018-000007 [2018] EWHC 3938 (Comm) 2-5 (Queen's Bench Division (Commercial Court)) (Judge Popplewell).
[68] *Ibid*.
[69] Neil Andrews, *Contract Law in Practice* (1st edn, OUP 2021) 566–573.
[70] *Ibid*.
[71] *Ibid*.
[72] Marcel Fontaine, 'The Evolution of the Rules on Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 15–18.
[73] *Ibid.*

performance is still possible, yet the contractual and economic balance has been disrupted.[74] Force majeure is non-performance of the contract, whilst for hardship it is renegotiation.[75] If that were not enough, a judge can rule for the termination or adaptation of the contract in the case of hardship.[76]

One of the most authoritative sources on the subject is Article 6.2.2 of the UNIDROIT Principles, which provides a clear and detailed definition of the concept of hardship: "as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements which are laid down in sub paragraphs (a) to (d)".[77] Da Silveira examines the concept of hardship as a substantial change in circumstances leading to significant prejudice for the parties.[78] Such prejudice may arise either from an increase in the costs associated with the performance of the contract or from a decrease in the value of the performance provided by the other party.[79] This view favours the approach based on the excessive onerousness of the contract and is therefore consistent with the French legal principle of *imprévision*.[80] At this point, the aggrieved party may request an amendment to the contract in order to restore the original balance.[81] If this is not possible, the aggrieved party may withdraw from the contract.[82] The second relates to interference with the fundamental terms of the contract. In other words, if the initial circumstances on which the contract was based have changed radically and in a manner that was entirely unforeseeable to the parties at the time the contract was entered into, then the parties may request that the contract be adjusted, taking into account all the specific circumstances.[83]

Only if it proves impossible to adapt the contract may the disadvantaged party rescind it.[84] The doctrine of hardship is also recognised in various national legal systems, such as those of France, Germany, and the Netherlands, each of which contains provisions designed to protect the disadvantaged party from a fundamental change in circumstances, although the precise conditions and remedies differ from those established under the UPICC.[85] Some legal systems may allow the weaker

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[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid*.
[77] UNIDROIT Principles of International Commercial Contracts 2016 (UNIDROIT 2016) art 6.2.2, 268.
[78] Mercedeh Azeredo Da Silveira, 'Economic Sanctions, Force Majeure and Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 161–211.
[79] Marcel Fontaine, 'The Evolution of the Rules on Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 28.
[80] Marcel Fontaine, 'The Evolution of the Rules on Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 28.
[81] *Ibid*.
[82] *Ibid*.
[83] Marcel Fontaine;'The Evolution of the Rules on Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 29.
[84] *Ibid*.
[85] Code Civil (France) art 1195; Bürgerliches Gesetzbuch (Germany) § 313; Burgerlijk Wetboek (Netherlands) art 6:258.

party to terminate the contract, whilst others would give that same party the option to adapt the contract to the changed circumstances.[86] In order to harmonise approaches and address this situation, the ICC has provided a standard model hardship clause for inclusion in contracts.[87] Should the two parties fail to agree on the change in circumstances, the hardship clause provides for two possible solutions: adaptation or termination.[88]

The overriding principle underlying the doctrine of hardship is that parties must act in good faith and take every possible measure to ensure that the contract remains in force, adapting its terms to the new reality in accordance with the principles of international trade.[89] This is confirmed by Articles 6.2.1 (Performance of the contract), 6.2.2 (Definition of hardship) and 6.2.3 (Effects of hardship) of the UNIDROIT Principles.[90] Similarly, the ICC emphasises that the primary objective of the hardship clause is to ensure the "adaptation of the contract to the changed circumstances".[91] In fact, the principle established in Article 6.2.3 of the UNIDROIT Principles is the "quest for renegotiation," under which the disadvantaged party may seek to renegotiate the contract.[92] This right does not authorise the "weaker" party to fail to fulfil the agreed-upon contractual obligations.[93] Should renegotiation fail, the court or arbitrator has the power to terminate the contract or to adjust the contract, in order to restore the initial balance.[94]

This view stands in contrast to the approach adopted under international contract law, where a court may adapt the contract to restore its equilibrium. Under English law, no such judicial intervention is permitted. Indeed, the UK Supreme Court, in the recent case of *RTI Ltd v MUR Shipping BV [2024] UKSC 18*, firmly held that the principle of 'reasonable endeavours' to overcome a contractual impediment does not consequently impose an obligation on the other party to accept a contractual term different from the original one.[95]

Thus, in the absence of a hardship doctrine, English law firmly protects the original terms of the contract, leaving no room for judicial adaptation where circumstances have changed.[96]

As a result of the sanction packages due to the war in Ukraine, trade relations between the EU companies and Russian companies have broken down from what

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[86] Marcel Fontaine, 'The Evolution of the Rules on Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 29.
[87] ICC, *Force Majeure and Hardship Clauses* (2020) 5.
[88] *Ibid*.
[89] Ercüment Erdem, 'Revision of the ICC Force Majeure and Hardship Clause' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 129–130.
[90] UNIDROIT Principles of International Commercial Contracts 2016 arts 6.2.1–6.2.3, 267–273.
[91] ICC, *Force Majeure and Hardship Clauses* (2020) 5.
[92] UNIDROIT Principles of International Commercial Contracts 2016 art 6.2.3, 273.
[93] *Ibid*.
[94] *Ibid*.
[95] *RTI Ltd v MUR Shipping BV [2024] UKSC 18 [29]-[30].*
[96] *Ibid*.

they normally were. The decision to cease purchasing Russian gas supplies in order not to finance the aggressor has consequently led to a gradual phase-out of Russian gas, which will be completed in September 2027.[97]

Considering the above, the hardship doctrine does not appear to apply, as the ban on importing Russian gas under European legislation does not constitute an increase in costs, but rather an absolute legal impediment. Where there are sanctions prohibiting performance, the appropriate remedy is exemption from liability on the grounds of force majeure (Art. 79 CISG), as contractual renegotiation cannot conflict with sanctions.[98]

Therefore, neither companies from the EU Member States nor in Russia may invoke the renegotiation of gas contracts (Art. 6.2.3 of the UNIDROIT Principles), considering that such performance would be unlawful under Regulation 2026/261.[99]

4.3 Frustration

The doctrine of frustration, unlike force majeure and hardship, is a historically recognised legal principle in English law. When looking at case law, an often-used description of frustration is: "Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from what was undertaken by the contract".[100] When the criteria of this description are met, we can speak of a frustrating situation. Unlike in many civil law countries, frustration itself is a general principle of English law. The consequences of frustration are described in the Law Reform (Frustrated Contracts) Act 1943, stating in Article 1: "Where a contract governed by English law has become impossible of performance or been otherwise frustrated…".

Frustration requires the following:

1. An event occurs after the contract is formed;

2. No party could possibly have done something to prevent the event occurring (unforeseeable);

3. The event creates such different circumstances that it is impossible for (one of) the parties to still fulfil the obligation of the contract.[101]

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[97] Regulation (EU) 2026/261 of the European Parliament and of the Council p. 11-18.
[98] Mercedeh Azeredo Da Silveira, 'Economic Sanctions, Force Majeure and Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 174–181.
[99] Regulation (EU) 2026/261 of the European Parliament and of the Council, p. 5
[100] David Thomas, 'Frustration and Force Majeure: A Hard Line in English Law' (2011) 6 Construction Law International 21; *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL).
[101] Felicia A Grey, 'The English Law Doctrine of Frustration in the Context of the COVID-19 Pandemic' (2020) 45(1) Business Law International 31.

Foreseeability plays a big role in the doctrine of frustration. It is not whether the event was foreseeable, but whether the contract can be interpreted as having allocated the risk of that event happening to one of the parties.[102] In the case *The Eugenia* for example, the court held that the contract was not frustrated when the Suez Canal closed in 1956, because performance was still possible via an alternative route, even though it was more difficult and costly.[103] This illustrates that even though the event was unforeseen, if there are still other options to perform the contract, the contract is not frustrated.[104]

This case shows the narrow scope of the doctrine frustration in English law.[105] The doctrine is not designed to help parties to get out of bad bargains or economic hardship, but only to address situations where the contractual obligation has been fundamentally transformed.[106] An increase in expense or difficulty is therefore insufficient, because performance must be radically different in substance rather than just more severe to perform. Within this strict framework, English case law has identified specific categories in which such a radical transformation may arise, most notably where performance is rendered unlawful by a supervening act of authority.

A first relevant category is frustration by supervening illegality, where performance becomes unlawful due to acts of public authority.[107] English law recognises that a contract is frustrated where legislation or governmental measures prohibit the agreed performance. In such cases, the illegality operates automatically to discharge the contract, as continued performance would violate mandatory law.[108] This is very relevant in the context of sanctions. When sanctions prohibit the import of Russian gas, contractual obligations requiring such imports would become unlawful and therefore incapable of performance in law.[109] This aligns with case law like *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, where trading with the enemy was classified as an illegal performance, and *Metropolitan Water Board v Dick Kerr*, where government intervention changed the contractual obligation.[110] In both cases, the supervening event created a "radical difference to the contractual obligations originally undertaken", thereby satisfying the core test of frustration.[111]

However, through sanctions that allow phase-out, the analysis becomes more complex. During the phase-out period, performance is still legally permitted, meaning that frustration cannot yet be invoked. Only once the prohibition takes effect does the threshold of illegality arise. In the situation discussed here, where contracts were concluded before both the war and the sanctions, the supervening nature of the event is clearly satisfied, since both developments occur after contract formation and fall outside the parties' control. At the same time, the phased structure

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[102] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019) 306.
[103] *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia) [1964] 2 QB 226.*
[104] *Ibid*.
[105] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019) 286.
[106] *Ibid*.
[107] *Ibid*, p. 295, 296.
[108] *Ibid*.
[109] Regulation (EU) 2026/261 of the European Parliament and of the Council art 4.
[110] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32; Metropolitan Water Board v Dick Kerr [1918] AC 119.*
[111] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019) 295.

of Regulation 2026/261 introduces a forward-looking element that does not fit easily within the traditional framework of frustration. While the initial imposition of sanctions may be regarded as unforeseen, the gradual phase-out until 2027 makes the eventual illegality increasingly predictable. This creates tension within the doctrine, since English law does not recognise anticipatory frustration based on future impossibility or illegality. As long as performance remains lawful at the relevant moment, the doctrine does not apply, even if it is clear that performance will become unlawful at a later stage.

The doctrine also requires that the supervening event is not self-induced. A party cannot rely on frustration where the alleged impossibility is the result of its own decisions or allocation of resources. In *Maritime National Fish Ltd v Ocean Trawlers Ltd*, frustration was denied because the defendant had a choice in allocating limited licences and chose not to allocate one to the relevant contract.[112] A similar reasoning can be seen in *The Super Servant Two*, where the Court of Appeal held that a party who had a choice between alternative means of performance, but chose to use its resources elsewhere, could not rely on the doctrine of frustration.[113] In both cases, the existence of a choice breaks the causal link between the external event and the non-performance. This must be distinguished from situations of supervening illegality, where performance is prohibited by law and no such choice exists. In those cases, the impossibility follows directly from an external act of authority, rather than from the conduct of the parties.

Closely connected to this is the requirement of causation: the supervening event must be the operative cause of the non-performance. English law, however, adopts a so-called 'multi-factorial' approach, instead of causation. The multi-factorial approach analyses the terms of the contract, the parties' allocation of risk, and the nature of the supervening event *ex post* and *ex ante*.[114] With *ex ante* the court means the contract terms, and with *ex post* the court means the supervening event.[115] Where the inability to perform arises from a combination of external constraints and the party's own conduct, the doctrine will not apply. In the context of phased-out sanctions on gas imports, this means that a party cannot rely on frustration merely because future performance will become unlawful, if at the relevant time performance remains possible but is not carried out due to commercial or strategic considerations.

A further important limitation is that frustration does not apply where performance is merely more expensive or less profitable. Economic hardship does not meet the threshold required under English law.[116] This reflects the 'hard line' traditionally adopted by English courts, which prioritises contractual certainty over fairness in

[112] Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524.
[113] J Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1.
[114] A Goodman, C Holburd and R Malone, 'The Ukraine Crisis: Contractual Consequences under English Law for Facility Agreements and Financial Contracts' (2023) 38(4) Journal of International Banking Law and Regulation 117, 8–9.
[115] A Goodman, C Holburd and R Malone;'The Ukraine Crisis: Contractual Consequences under English Law for Facility Agreements and Financial Contracts' (2023) 38(4) Journal of International Banking Law and Regulation 117, 8–9.
[116] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019) 299.

changing circumstances.[117] This distinguishes frustration from hardship under international contract law, where a fundamental change of the contractual equilibrium may justify adaptation rather than discharge.

[117] Husam Botosh, 'Striking the Balance Between the Considerations of Certainty and Fairness in the Law Governing Letters of Credit' (2010) 59–61.

5 Application of the non-performance doctrines to Regulation 2026/261

5.1 Force majeure

Invoking force majeure requires three cumulative conditions: an impediment beyond the party's control, which was unforeseeable at the time of contracting and whose consequences could not be avoided. The first condition looks satisfied at first glance: Recital 19 explicitly characterises the prohibition as "a sovereign act of the EU beyond the control of gas importers ... making the performance of natural gas imports from Russia unlawful, with direct legal effect and without any discretion for Member States." With regard to this, the CISG Advisory Council confirmed in Opinion No. 7, an impediment under Article 79 CISG may be of a legal nature rather than only physical nature, and acts of public authority qualify as such.[118] While Opinion No. 7 relates to the CISG and cannot be directly applied to the Regulation, it serves as an analogy: the prohibition under Article 3 operates in a comparable manner to the type of legal impediment envisioned by Article 79 CISG, in that it is an act of public authority that removes the legal possibility of performance entirely.

However, the unforeseeability requirement is where force majeure fails in this context, and Recitals 10 and 17 are key on this point. Recital 17 states explicitly that the commitment from Heads of State or government to phase out Russian gas supplies was already made in March 2022, and that from the publication of the legislative proposal on 17 June 2025 it was no longer appropriate to consider contracts concluded after that date as legacy contracts. Legacy contracts are contracts that were already in existence before the EU's political commitment to phase out Russian gas, and which therefore qualify for transitional protection under Article 4. Recital 10 supports this by confirming that the Commission had conducted and published detailed analyses of a total phase-out of Russian gas imports since 2022, drawing on multiple stakeholder consultations, and concluded that a stepwise phase-out is feasible and manageable. Together, these recitals establish a foreseeable timeline: the prohibition was publicly announced in March 2022, provided with more public information throughout 2022 to 2025, and legislatively certain from June 2025. By the time the Regulation entered into force in February 2026, no company operating in the gas sector could reasonably claim ignorance of the coming prohibition. The unforeseeability requirement under Article 79 CISG therefore cannot be satisfied for contracts still running in 2026, meaning the doctrine of force majeure is unavailable for excusing non-performance.

The unavoidability condition further undermines any remaining force majeure claim. The phase-out timeline of Article 4 deliberately provided transition periods of up to

[118] CISG Advisory Council, Opinion No 7, 'Exemption of Liability for Damages Under Article 79 of the CISG' 2–4.

30 September 2027 for long-term pipeline gas contracts, giving importers time to find alternative gas suppliers. Recital 12 confirms that many importers had already voluntarily reduced Russian gas supplies, demonstrating that diversification was practically achievable. An importer who failed to act during this period cannot satisfy the unavoidability condition. Force majeure is therefore not applicable to the Regulation.

5.2 Hardship

Hardship under Article 6.2.2 UPICC applies where events fundamentally alter the equilibrium of the contract, making performance excessively onerous, entitling the disadvantaged party to request a renegotiation. The prohibition introduced by the Regulation does not satisfy this threshold. Hardship revolves around the assumption that performance remains possible but has become excessively burdensome. The prohibition under Article 3 does not make the import of Russian gas more costly, it renders it entirely unlawful. As Da Silveira argues, where sanctions prohibit performance entirely, the appropriate remedy is exemption from liability on grounds of force majeure, because contractual adaptation cannot override sanctions, in this case the sanction.[119] While force majeure has been shown in chapter 5.1 to be inapplicable in this context, Da Silveira's reasoning remains useful by analogy: if sanctions make the performance unlawful, renegotiating the contract cannot restore its equilibrium, because any renegotiated agreement would be subject to the same prohibition. Even if hardship were arguable during the transitional period under Article 4, the renegotiation remedy under Article 6.2.3 UPICC does not have any legally meaningful result. If parties would renegotiate and agree to continue gas imports, that agreement itself would be unlawful under Article 3, which has direct legal effect in all Member States as Recital 19 confirms. Renegotiation cannot circumvent the Regulation; the doctrine of hardship is therefore unavailable for excusing non-performance.

5.3 Frustration

At first sight, it may appear illogical to analyse a doctrine of English contract law in the context of the Regulation, particularly since the UK is no longer a Member State of the EU. Nevertheless, the inclusion of frustration is justified by the frequent use of English law in international gas supply agreements. Such agreements are frequently governed by English law, regardless of whether the contracting parties are established within or outside the EU.[120] As a result, the Regulation phasing out Russian gas imports may directly affect contracts subject to English law, making an analysis of the doctrine of frustration relevant in this context. Frustration requires a

[119] Mercedeh Azeredo Da Silveira, 'Economic Sanctions, Force Majeure and Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 174–181.
[120] 'Should Europe Use More Long-Term LNG Contracts?' (*Reuters*, 7 February 2022) https://www.reuters.com/business/energy/should-europe-use-more-long-term-lng-contracts-2022-02-07/.

supervening event that renders performance radically different from what was originally undertaken, with supervening illegality being the most relevant category here.[121] While Article 3 of the Regulation says that Russian gas imports are unlawful, the transitional exemptions under Article 4 mean that performance remains entirely lawful for importers holding qualifying legacy contracts during the phase-out period. However, English law does not recognise anticipatory frustration: the doctrine cannot be invoked as long as performance remains lawful at the relevant moment, even where future illegality is certain.[122] The cases of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* and *Metropolitan Water Board v Dick Kerr*, where supervening illegality discharged the contract immediately, are therefore distinguishable: in those cases the illegality took effect at once, whilst here Article 4 explicitly keeps performance lawful for an extended transitional period.[123] Those cases define the boundary of supervening illegality under English law, and it is precisely because the Regulation's phased structure falls short of that boundary that frustration cannot be invoked during the phase-out period.

Even setting aside the problem with the phase-out period, frustration faces a further legal obstacle in the foreseeability of the Regulation itself. The foreseeability aspect fails to any frustration claim for gas contracts running in 2026. Recital 17 makes explicit that the political commitment to phase out Russian gas was made publicly in March 2022, and Recital 10 confirms that the Commission published detailed analyses and conducted multiple stakeholder consultations since that date. Given this four-year timeline, any court would very likely find that the risk of a legislative prohibition was foreseeable enough to have been contractually allocated.[124] Frustration is therefore also an unavailable doctrine for non-performance to long-term gas contracts still running in 2026.

[121] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019) 306.
[122] *Ibid*.
[123] *Ibid*, p. 295, 296.
[124] A Goodman, C Holburd and R Malone, 'The Ukraine Crisis: Contractual Consequences under English Law for Facility Agreements and Financial Contracts' (2023) 38(4) Journal of International Banking Law and Regulation 117, 8–9.

6 Conclusion

This thesis examines the question whether Regulation 2026/261, phasing out Russian natural gas imports into the EU, can qualify as a ground for applying the non-performance doctrines of force majeure, hardship, and frustration under international- and English contract law. The analysis leads to the conclusion that none of the three doctrines is available to parties affected by the Regulation.

The thesis starts from the principle that long-term gas supply agreements remain binding unless there is a valid legal basis for relief. The contractual principles in Chapter 2 show that long-term gas supply agreements are governed by the ordinary principles of contract law, including freedom of contract, *pacta sunt servanda*, good faith and interpretation, which together determine how contractual obligations and risks are allocated between the parties. The Regulation, as we discuss in Chapter 3, establishes the scope of the import prohibition, the transitional exemptions for legacy contracts, and the monitoring and enforcement system that governs compliance with the phase-out of Russian gas imports. This structure affects the assessment of foreseeability, avoidability and illegality, which are criteria for the doctrines of force majeure, hardship and frustration.

The doctrine of force majeure requires three cumulative conditions: an impediment beyond the party's control, unforeseeable at the time of contracting, and whose consequences could not be avoided.[125] The first condition is satisfied: Recital 19 characterises the prohibition as a sovereign act of the EU, which is beyond the control of gas importers. However, the unforeseeability requirement cannot be met. The political commitment to phase out Russian gas was publicly announced in March 2022, and the Commission published detailed analyses throughout 2022 to 2025, making the prohibition legislatively certain from June 2025.[126] The unavoidability condition fails for the same reason: Article 4 provides transition periods of up to 30 September 2027, giving importers sufficient time to diversify their supply. As Yafimava, Ason and Fulwood point out, if European importers were to invoke force majeure, the Russian side could argue that European legislation provided for a clear and publicly announced phase-out path, which would entirely undermine any such claim.[127]

The doctrine of hardship under Article 6.2.2 UPICC applies where events fundamentally alter the equilibrium of the contract, making performance excessively onerous.[128] The Regulation does not satisfy this threshold. The prohibition under Article 3 does not make the import of Russian gas more costly or burdensome; it renders it entirely unlawful. As Da Silveira argues, where sanctions prohibit

[125] Chapter 4.1.
[126] Chapter 5.1.
[127] Yafimava K, Ason A and Fulwood M, 'The EU Proposal to Ban Russian Gas Imports: Roadblock More than Roadmap' (Oxford Institute for Energy Studies, 2025) 12–13.
[128] Chapter 4.2.

performance entirely, contractual adaptation cannot override sanctions.[129] Even if hardship were arguable during the transitional period under Article 4, the renegotiation remedy under Article 6.2.3 UPICC would produce no legally meaningful result: any renegotiated agreement to continue gas imports would itself be unlawful under Article 3.[130] Renegotiation cannot circumvent a sanction, and hardship is therefore also unavailable.

The doctrine of frustration examines to the extent that long-term gas supply contracts between EU importers and Russian exporters are governed by English law, which remains the most commonly chosen law in international gas supply agreements.[131] Frustration requires a supervening event that renders performance radically different from what was originally undertaken, with supervening illegality being the most relevant category. However, the transitional exemptions under Article 4 mean that performance remains entirely lawful for legacy contract holders throughout the phase-out period.[132] English law does not recognise anticipatory frustration: the doctrine cannot be invoked as long as performance remains lawful at the relevant moment, even where future illegality is certain.[133] Furthermore, the foreseeability of the Regulation independently defeats any frustration claim. Given the four-year period between the Versailles Declaration of March 2022 and the Regulation entering into force in February 2026, a court would very likely find that the risk of a legislative prohibition was foreseeable enough to have been contractually allocated.[134]

The conclusion is therefore that, in relation to the long-term Russian gas supply agreements examined in this thesis, Regulation 2026/261 does not provide a successful ground for invoking the doctrines of force majeure, hardship or frustration.

[129] Mercedeh Azeredo Da Silveira, 'Economic Sanctions, Force Majeure and Hardship' in Fabio Bortolotti and Dorothy Udeme Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts* (ICC 2018) 174–181.
[130] Chapter 5.2.
[131] Chapter 4.3.
[132] Chapter 5.3.
[133] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2019) 295-296.
[134] A Goodman, C Holburd and R Malone, 'The Ukraine Crisis: Contractual Consequences under English Law for Facility Agreements and Financial Contracts' (2023) 38(4) Journal of International Banking Law and Regulation 117, 8–9.

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