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## A PRIMER ON UKRAINIAN CONTRACT LAW VIEWED THROUGH THE PRISM OF CISG AND DCFR

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**Abstract.** The article is devoted to the analysis of DCFR and CISG, assessment of them as legal principles and social values, and thus establishing their importance for adapting the understanding of the essence of contract law of Ukraine to the European concept of private law.

The article analyzes as topics of special interest the problems of contract formation, a doctrine on culpa in contrahendo, and standard terms or interchangeably general conditions.

In this article, the author provides specific suggestions for improving the provisions of the Art. 650-1 UKR-CC concerning the liability for pre-contractual negotiations contrary to fair dealing.

The application practice of UKR-CC is currently assessed positively, but the legal mechanisms of its action are subject to revision considering the experience of law enforcement and the interpretation of civil law by courts. Modern realities (economic, social, technical, informational) require legal certainty, because UKR-CC, like any codified act, possesses gaps and shortcomings in the presentation of legal material.

**Key words:** CISG, DCFR, contract, offer, acceptance, culpa in contrahendo, standard terms, interchangeably general conditions.

**Introduction.** Since Ukraine was granted EU candidate status in June 2022, the process of incorporating the body of EU rules and regulations into the civil law of Ukraine has acquired special importance. In Ukraine, such a process began by signing an Association Agreement with the EU. According to the Law of Ukraine "On the National Program for the Adaptation of the Legislation of Ukraine to the Legislation of the European Union" (Law of Ukraine № 1629-IV, 2004), Ukraine has made a number of commitments to bring its national legislation into line with EU law), but now the process of implementation should change to a new quality, which consists, in particular, in achieving a more complete harmonization, value filling of the norms of the Ukrainian concept of contract law.

**Analysis of recent research and publications.** Content and meaning of CISG AND DCFR, the issue of harmonization on this basis of Ukrainian and European law was studied by many scientists (Toshkov, 2010; Mastenbroek, 2005; Schimmelfennig, Sedelmeier, eds., 2005; Hharytonov, Sucha, Heiko, 2014), however, the problems of adaptation of the contract law of Ukraine to the concepts of CISG AND DCFR at the same time have not yet been investigated, which, together with the intensification of discussions in the state on this issue in the context of the European integration, has led to the need for comprehensive study.

**The aim of the article** is to perform the analysis of DCFR and CISG, assessment of them as legal principles and social values, and thus to establish their importance for adapting the understanding of the essence of contract law of Ukraine to the European concept of private law.

**Methodology.** In scientific research were used a system of both general scientific (dialectical, logical, system-structural, etc.) and special methods of scientific knowledge (historical-legal, comparative-legal, modeling, etc.). In particular, the historical method has allowed the investigation of legal norms' emergence, formation and development. The analysis of the concept and content of the contract law, the dynamics of the legal relationship arising from the formation of a contract were

carried out using the dialectical method. The formal logical method is used to clarify the mechanism of implementation of the general principles of DCFR and CISG. The system-structural method was used to clarify the content of the contract and its place in the system of obligations of Ukraine. The comparative legal method was used for the comparative analysis of the relevant provisions of the contract law in the Civil Code of Ukraine, as well as in the comparative study and analysis of norms of civil law of some European countries. The modeling method was used to develop proposals and recommendations to improve the civil legislation of Ukraine and the practice of its implementation.

### **A. The place of contract law within the Civil Code of Ukraine**

#### ***A.1. Codification of civil law in Ukraine: history and modern perspectives***

At the time of Ukraine's independence in 1991, civil relations in the country were governed by the legislation of the former USSR and Ukrainian SSR, which remained in force insofar as they did not contradict Ukrainian law. The Civil Code of the Ukrainian SSR 1963 (The Civil Code of the Ukrainian SSR, 1963) continued to be fully in force till 2004.

As the Civil Code of Ukrainian SSR of 1963 reflected the outdated legal doctrine, in the early '90s, Ukraine adopted a significant number of legislative acts aimed to regulate civil relations, particularly the status of participants in business relations, trade, property rights, etc. The change of the legal paradigm consisted in returning to humanistic values: legal ensuring individual sovereignty, a guarantee of personal rights, equalization of the legal status of a person and the state, ensuring the opportunity to freely dispose of personal rights, except as in cases restricted by law.

During codification work, the Romano-Germanic legal system was chosen as a reference point for the creation of the draft Civil Code of Ukraine to use everything valuable that was included in the treasury of civil law. In the process of codification in Ukraine, the expediency of direct reception of some provisions of Roman law was repeatedly emphasized (Haritonov, 1997, p. 269; Vasilchenko, 1996, p. 85.).

Codification work was difficult and conducted with some losses. In the final version of the draft Civil Code of Ukraine, in particular, there is no book on Family law, which was codified in a separate piece of legislation – the Family Code of Ukraine (Family Code of Ukraine, 2003).

The purpose, principles and features of the codification process of civil law in Ukraine can best be revealed based on the proposed by Y. Kharitonov methodological basis of the division of codification acts by their nature and meaning into codes of the passionate (fr. *passionner* – “to captivate, excite, kindle passion”) and the orthodox type (Haritonov, 2002, p. 18).

The orthodox codes reflect the specifics of regulating social relations for a certain period, “they fix the position that was formed on a certain orthodox basis or in any case is a compromise of “preserved” ideas and requirements of developing society” (Haritonov, 2001, pp. 239-247). Examples of such codifications are the Twelve Tables (Goodwin, 1886), the German Civil Code 1896 (Bürgerliches Gesetzbuch, 1896) (German: Bürgerliches Gesetzbuch, BGB), etc. But sometimes even the orthodox codes serve as a model to follow, as in the case of BGB, which became a model to follow due to the authority of German jurisprudence and the political power of the state) (Haritonov, 2001, pp. 239-240).

Codes of the passionate type, in contrast to the orthodox ones, radically change the approach to the regulation of social relations, translating it into a new quality. Codes of the passionate type, such as the French Civil Code 1804 (French Civil Code, 1804), the Austrian Civil Code 1812 (Allgemeines Bürgerliches Gesetzbuch, 1812) (German: *Allgemeines bürgerliches Gesetzbuch*, ABGB), the Swiss Civil Code 1907 (The Swiss Civil Code, 1907) (German: *Schweizerisches Zivilgesetzbuch* (ZGB)), the Dutch Civil Code 1992 (Dutch. *Burgerlijk wetboek*, BW) (Dutch Civil Code, 1992), etc., serve as a model for the codification of civil law in other countries.

The Civil Code of Ukraine (UKR-CC) (Civil Code of Ukraine, 2003) was adopted on January 16, 2003, and entered into force on January 1, 2004. It was created by considering the best achievements of prominent codifications of civil law using a systematic approach to its structure.

The formation of the civil law system of Ukraine after independence in 1991 was undoubtedly influenced by the fact that the Austrian Civil Code of 1811 was directly in force in Ukraine for a long time, in particular in Galicia and Bukovina, until the collapse of the Austro-Hungarian Empire (German. *Österreichisch-Ungarische Monarchie*) in 1918. With some changes, the Austrian Civil Code of 1811 continued to be in force until 1933 in Galicia even during its accession after the First World War to Poland under the Riga Peace Treaty of 1921. In Bukovina, after the invasion of Romania, the Austrian Civil Code remained in force until 1938 (Boyko, 2016).

Also, a significant impact on UKR-CC has made the Dutch Civil Code of 1992, which is characterized by the ‘leaf’ structure (general rules are preceded by more detailed provisions in the form of ‘layers’) and the presence of ‘correspondent provisions’ (rules of certain sections apply by analogy to legal relations to which they are not directly applicable).

### ***A.2. Structure of the Civil Code of Ukraine***

UKR-CC embodies all the existing achievements of the codes of passionate type connected to ideas of natural private law, the rule of law, the division of law into public and private, etc. The structure of UKR-CC is built according to the so-called “pandect system”, which is a product of the work of medieval German glossators (commentators on Roman law). In particular, BGB consists of the following five parts (books): General Part, Obligatory Law, Property Law, Family Law and Inheritance Law.

The structure of UKR-CC is somewhat different from the construction of BGB, but it is a pandect (Haritonov, Haritonova, 2007). In particular, UKR-CC consists of 6 books. Book one – “General Provisions”, the second book – ‘Personal intangible rights of a person, book three – “Property rights and other proprietaries rights (rights in rem)”, book four – “Intellectual Property Law” deals with a special area of civil relations related to the creation and use of the results of intellectual, creative activities of persons, book five – “The Law of Obligations”, covers a wide range of civil relations in both the contractual and non-contractual spheres, to which almost 40 chapters are devoted (Chapters 47-83), book six – “Inheritance Law”.

### ***A.3. System of obligations in the Civil Code of Ukraine***

The system of obligations in Ukraine is built with the allocation of general and special parts. The general part of the law of obligations contains common to all types of obligations provisions on the concept and types of obligations, the basis for their occurrence, their performance and termination. The special part of the law of obligations in Ukraine consists of:

- Chapters 55–57: obligations intended to transfer property (e.g., sale, delivery, barter, donation, etc.);
- Chapters 58–60: obligations to create a right to use the property of another person (e.g., rent, lease, etc.);
- Chapters 61, 62: obligations to perform work, e.i., it is an institution of the law of obligations, the rules of which regulate the process of creation and transfer of certain objects of civil rights (e.g., contract on building, contracts for design and survey work, contract on carrying out project and exploration works, etc.);
- Chapters 64-74: obligations to provide services e.i., it is an institution of the law of obligations, the rules of which regulate the procedure of providing specific actions that are consumed in the process of their commission or in the process of carrying out certain activities (e.g., transportation, freight, storage, insurance, commission, property management, loan, credit, etc.);
- Chapters 75, 76: obligations to create a right to use intellectual property rights, i.e., it is an institution of the law of obligations, the rules of which regulate the procedure of creation, use and dispose of intellectual property rights (e.g., license, commercial concession (franchising), etc.);
- Chapter 77: obligations from multilateral transactions (e.g., joint activities, general partnership, etc.);

- Chapters 78, 79: obligations under unilateral transactions (e.g., a public promise of awards, public announcement of the competition, actions in the interests of another person without his authorization, etc.);
- Chapter 80: obligations to save the health and life of a person, property of an individual or legal entity;
- Chapter 81: obligations to eliminate the threat to life, health, property of a person or damage to the property of a legal entity;
- Chapter 82: damage obligations (torts);
- Chapter 83: unjust enrichment (the acquisition and/or preservation of property without a sufficient legal basis).

Art. 509 UKR-CC defines civil obligation as a legal relationship in which one party (a debtor) is obliged to perform in favor of the other party (a creditor) a certain action (transfer property, perform work, provide services, pay money, etc.) or refrain from certain actions, and the creditor has the right to require the performance by the debtor.

#### ***A.4. Definition of a contract in the Civil Code of Ukraine: translation difficulties and the search for common terminology***

The contract is one of the recognized bases for the emergence of obligations in modern civil law. It should be made remarks on the translation and use of the terms: ‘transaction’, ‘juridical act’, ‘agreement’ and ‘contract’ in modern civil law of Ukraine.

According to Art. 202 (1) UKR-CC, the action of a person aimed at acquiring, changing or terminating civil rights and obligations is called a transaction (Ukrainian. *Pravochin*). Art. 202 (2) UKR-CC states that a bilateral or multilateral legal transaction is a contract (Ukrainian. *Dogovir*). In the civil law of Ukraine, the term ‘contract’ refers to the legal facts on the basis of which the obligations arise (Art. 11 (2) UKR-CC and Art. 509 (2) UKR-CC). Since, according to Book II ‘Contracts and other juridical acts’ of Draft Common Frame of Reference (DCFR, 2009) contracts are treated as a type of juridical acts, in this research we will use the terms ‘legal transactions’ and ‘juridical acts’ as the equivalent.

By Art. 626 (1) UKR-CC, a contract is recognized as an agreement of two or more persons aimed at establishing, changing or termination of civil rights and responsibilities. So, the terms ‘agreement’ and ‘contract’ also can be used as the equivalent.

Since in the framework of this study it is not possible to consider the features of the legal regulation of a contract in all legal systems of Western Europe and compare them with corresponding Ukrainian legislation, we will then limit ourselves to the characteristics of the contract by universal codification – United nations convention on contracts for the international sale of goods (CISG, 1980) and DCFR.

### **B. Topics of special interest**

#### ***B.1. Contract formation: offer & acceptance***

A contract can be defined as a legally binding agreement (Art. II. – 1: 101(1) DCFR). DCFR when describing a contract uses the conception of a juridical act when CISG is not familiar with it. Art. II. – 1: 101(2) states a juridical act as a statement or agreement (express or implied from conduct) which has legal effect. A juridical act may be unilateral, bilateral, or multilateral but a contract – only bilateral or multilateral.

DCFR states the mere agreement of the parties as the sole requirement for the conclusion of a contract. Art. II. – 4: 101 DCFR provides that the basis for the conclusion of a contract is the intention of the parties to enter into a binding legal relationship/some other legal effect and reach an agreement (consensus) by one party’s acceptance of the other’s offer or in other ways. But only sufficient content on at least the essential terms of the contract (*essentialia negotii*) might be enough for an agreement to be a contract (Art. II. – 4: 103 DCFR).



Although a form is in principle not important for the binding effect of a contract, sometimes further requirements besides the mere agreement must be fulfilled, as in Art. 12 CISG about the required form of a contract. At the same time, both CISG and DCFR don't require for concluding a contract that the property contracted has been handed over to a person authorized to receive it.

The agreement is usually reached through the exchange of "offer" and "acceptance". The offer and acceptance model is used in both civil law and common law jurisdictions by courts and academics. An analysis of the provisions of DCFR and CISG regarding the formation of a contract presents what in those international acts has been reflected as the common approach when defining an offer and acceptance.

Article II. – 4: 201 (1) DCFR provides that a proposal amounts to an offer if it is intended to result in a contract if the other party accepts it, and contains sufficiently definite terms to form a contract. Article 14 (1) CISG provides that a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

According to Article II. – 4: 201 (3) DCFR a proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalog, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted. Article 14 (2) CISG contains another concept according to which a proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers unless the contrary is clearly indicated by the person making the proposal.

Once a binding offer was made, the question of revocation of the offer before the offeree's acceptance emerges. Revocation of an offer means canceling the offer by the offeror. According to Art. II. – 4:202(1) DCFR an offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded. Under paragraph (3) of Art. II. – 4:202 DCFR there are three exceptions to the general rule on the revocation (Art. II. – 4: 202(1) DCFR): (a) if the offer indicates that it is irrevocable; (b) if it states a fixed time for its acceptance; (c) if the offeree had reason to rely on the offer as being irrevocable, and has acted in reliance on the offer. *So, the fixing of a time for acceptance makes the offer irrevocable for that period.*

In CISG an offer is generally revocable. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before an acceptance has been dispatched (Art. 16 (1) CISG). However, an offer cannot be revoked: (a) if it indicates whether by stating a fixed time for acceptance or otherwise that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance of the offer (Art. 16 (2) CISG). *The offer can be made irrevocable, but the provision has not cleared the controversy as to whether the mere fixing of a time for acceptance makes the offer irrevocable.*

When rejection of an offer reaches the offeror, the offer lapses, even if the offer is irrevocable and even if the time for acceptance has not yet run out (Art. II. – 4: 203 DCFR, Art. 17 CISG).

The acceptance can be made by a statement or by conduct and must be unconditional (Art. II. – 4: 204 DCFR, Art. 18 CISG).

The contract law of Ukraine, contained in the UKR-CC in Book 5 on "Obligations", is very similar but, in some respects, different from the provisions of CISG and DCFR. By Art. 638 (2) UKR-CC, contracts are concluded by an offer followed by an acceptance. The time of conclusion of the contract is the moment of reaching an agreement regarding the essential terms of the contract. The contract is considered concluded when the person who sent the proposal to conclude the contract (offeror) receives the response of the other party about the acceptance of this proposal (acceptance). This rule applies to consensual contracts, which are concluded at the time of reaching the agreement of the par-

ties. A real contract is considered concluded at the time of the transfer of property or the performance of a certain action.

The contract can be concluded in any form if the requirements regarding the form of the contract are not established by law. If the parties have agreed to conclude a contract in a certain form, it is considered concluded only in this form, even if this form is not required by law for this type of contract. If the parties agreed to conclude the contract using information and communication systems, it is considered to be concluded in writing (Art. 639 (1)(2) UKR-CC). In contracts for which notarial approval is required by law or by agreement of the parties, the time of conclusion of the contract is associated with the moment of notarization (Art. 640 (3) UKR-CC).

By Art. 641 (2) UKR-CC, an offer to conclude a contract can be made by any party to the potential contract. An offer must contain the essential terms of the contract and express the intention of the person who made it to consider himself bound in case of its acceptance.

The main features of an offer are the following:

- must be addressed to one or more specified persons. Therefore, advertising and other offers addressed to an unspecified circle of persons are invitations to make offers for the conclusion of contracts, unless otherwise indicated in the advertising or other offers;
- must contain essential terms of the potential contract;
- must express the intention of the offeror to be bound in case of acceptance of his offer.

But in some cases, an offer may be directed to the public. Invitations to enter into negotiations before concluding contracts addressed to an unspecified circle of persons in advertisements placed in catalogs, mass media, etc. should be distinguished from public offers. Offers placed in advertising or otherwise addressed to an unspecified circle of people usually do not contain essential terms of the contract at all or give an incomplete list of them. Such offers should be considered as an invitation to enter into negotiations when an offer may come from another person and be accepted by the person who placed the advertisement (Art. 641 (2) UKR-CC). At the same time, if an offer is addressed to an undefined circle of persons, but contains all essential terms of the contract, it is recognized as a public offer. Thus, regarding retail sales contracts, the offer of goods in advertising, catalogs, and other product descriptions addressed to an unspecified circle of persons is a public offer, if it contains all essential terms. Display of the product, demonstration of its samples or provision of information about the product (descriptions, catalogs, photographs, etc.) in the places of its sale is a public offer, regardless of whether the price and other essential terms of the sales contract are indicated, except in cases where the seller clearly determined that the relevant product is not intended for sale.

In particular, documents (information) placed in public access on the Internet, which contain essential terms of the contract and an offer to conclude a contract on the specified terms with anyone who applies, regardless of the presence of an electronic signature in such documents (information), are treated as an offer to conclude a contract (Art. 641(1)(3) UKR-CC).

We can conclude, that DCFR regards an advertisement, the display of goods in a shop as an offer unless the circumstances indicate otherwise and until the supply is exhausted. CISG and UKR-CC do not accept that an advertisement or the display of goods in a shop which do not contain essential terms of the contract can amount to an offer but only as an invitation to treat. An advertisement to bring about a bilateral contract merely invites potential clients to make an offer to sell or buy the goods.

UKR-CC, DCFR and CISG weigh the revocation in the same way. In Ukrainian law offer is revocable. Art. 641 (3) UKR-CC provides that the withdrawal of a declaration of will communicated to another person is only effective if it arrives simultaneously with or before this declaration. If the agreement has not yet been concluded, the offer may be revoked if the revocation is delivered to the addressee before the addressee sends an acceptance. The offer cannot be revoked during a period stipulated for its acceptance unless a right to revoke it even before the lapse of this period follows from the content of the offer. *The offer can't be made irrevocable by the mere fixing of a time for acceptance.*

The rejection can be unexpressed but implied, for instance, if the offeree makes a counter-offer (Art. 646 UKR-CC).

The rule of Art. 642 (1)(2) UKR-CC regarding the acceptance of the offer is similar to DCFR and CISG. The acceptance must be complete and unconditional. Assent to the offer can be made by a notice to the offeror or when the offeree begins to do the act.

### ***B.2. Culpa in contrahendo***

Under a doctrine on culpa in contrahendo, contractual negotiations create for parties a special legal relationship that imposes on each party a duty of care and gives the right to claim damages (Bar, Clive, 2009, p. 273.; Kessler, Fine, 1964, pp. 401, 401).

According to Art. II. – 3:301 (1) DCFR, parties are free to negotiate and are not liable for failure to reach an agreement. Art. II.-3:301 (2) DCFR imposes upon the parties a duty to act in accordance with good faith and fair dealing when conducting negotiations and concluding contracts. This duty may not be excluded or limited by contract. Each party in negotiations also is obliged not to break off negotiations contrary to good faith and fair dealing. For instance, it is contrary to good faith and fair dealing to enter into or continue negotiations with no real intention of reaching an agreement with the other party (Art. II. – 3: 301 (4) DCFR).

It should be emphasized that this is a duty and not an obligation of the party to negotiate in accordance with good faith and fair dealing (Bar, Clive, 2009, p. 271). The remedies for the non-performance of an obligation are not enforceable in this situation. As it can be assumed also from Art. II. – 4: 103 (2) DCFR that the court can't enforce parties of negotiations to conclude a contract if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter. So, it is practically impossible to compel the party to negotiate fairly and in good faith.

However, breach of the duty may give rise to a liability for damages under Art. II. – 3: 301 (3) DCFR. The question of damage compensation can arise in the contract conclusion process if a person breaches the duty (commits fraud or makes a misleading account of the nature of something or threats). The liability of the person for damages as a consequence of such behavior doesn't depend on whether there is a valid contract or not. There may be a liability for: 1) entering into negotiations contrary to good faith and fair dealing; 2) continuing negotiations after one has decided not to conclude the contract, and 3) breaking off negotiations contrary to good faith and fair dealing.

The liability of the party based on misrepresentation may be imposed on non-contractual liability arising out of damage caused to another (Book VI DCFR) or because a party gave promises during the negotiations. Such promises can be a basement for the occurrence of informational duties according to Art. II. – 3: 101 DCFR. The business has a duty before the conclusion of a contract to disclose to the other person information about goods, other assets, and services to be supplied. The injured party can expect compensation for the expenses incurred, loss on preparation work and, in some cases, lost profit.

It should be mentioned that the doctrine of culpa in contrahendo has not been adopted in CISG<sup>1</sup> and UKR-CC. There are significant differences between Ukrainian law and DCFR regarding the procedure for resolving disputes about pre-contractual liability for the breaking-off of negotiations between parties to a potential contract (Art. 649 UKR-CC). The doctrine of culpa in contrahendo can't be used in Ukrainian law due to the lack of the concept of good faith. In Ukraine, the court procedure for the resolution of pre-contractual disputes is established for the settlement of disagreements that arose between the parties during the conclusion of the contract, which is based on a legal act of the state authority, the authority of the Autonomous Republic of Crimea, the local self-government body and in other cases established by law.

Such legal acts are, in particular, state orders, based on which procurement contracts are concluded.

<sup>1</sup> CISG does not contain correspond to DCFR provisions on negotiations contrary to good faith and fair dealing.

According to Art. 1 (1) (6) of the Law of Ukraine on Public Procurement (Law of Ukraine 25.12.2015 № 922-VIII, 2025), a procurement contract is an economic contract concluded between a customer and a participant as a result of the procurement procedure/simplified procurement of goods, works and services to meet the needs of the state, territorial communities and united territorial communities. Also according to Art. 633 UKR-CC business entities that sell goods, perform work or provide services to anyone who addresses them (retail trade, transportation by public transport, communication services, medical, hotel, banking services, etc.) are required to conclude contracts with all consumers of their products (services).

However, if the contract is not based on the specified acts, then disputes between the parties are resolved by the court only if the parties have concluded a special contract about the use of a court procedure for the settlement of the dispute or in cases established by law.

While resolving a pre-contractual dispute in Ukraine, the court may decide the disputed clause of the contract in the wording of one of the parties, or state it in its wording, considering the interests of the parties and public interests. In court, it is possible to enforce a party to conclude a contract only if such a contract is based on a legal act of state authority, an authority of the Autonomous Republic of Crimea, a local self-government body and in other cases established by law.

It should be noted that civil legislation of Ukraine does not provide for such a way of protecting rights as recognizing the contract (agreement) as concluded or not concluded based on the results of consideration of the relevant claim in court. In case of evasion of one of the parties from concluding the contract, the interested party may not file a claim for enforcing the other party to conclude the contract on the terms of the project proposed by the plaintiff.

At the same time, according to Art. 16 (2)(12) UKR-CC the court may protect a civil right or interest in another way established by the contract, law or by the court in cases determined by law. However, the use of such a method of protection as enforcement to conclude a contract (when the court makes a decision according to which a person who evades the conclusion of a contract is obliged to conclude it) is impractical and ineffective. The impracticality of making such a decision is explained by the fact that it will lead to the emergence of an 'additional' obligation to conclude the relevant contract along with the primary similar obligation to conclude the contract, which was not fulfilled due to the obligee's evasion of its fulfillment. Therefore, the adoption of such a decision will lead to the emergence of an illogical situation, in which there will be two obligations between the subjects with a similar content, which will differ only based on their origin. The ineffectiveness of such a court decision is that the fact of its adoption does not guarantee that the unfair party will not continue to avoid concluding a contract. Therefore, despite the possibility of an expansive interpretation of Art. 16 (2)(12) UKR-CC, the mechanism used by the Supreme Court of Ukraine to resolve civil disputes related to the obligee's evasion of the contract is debatable. In particular, the adoption of decisions by the Supreme Court of Ukraine in civil cases on the recognition of a contract concluded by its legal nature is the establishment of a fact that has legal significance. This conclusion follows from the fact that the Supreme Court of Ukraine in the decisions dated 02.06.2021 in case No. 910/6139/20 (The decision of the Supreme Court of Ukraine 02.06.2021 in case № 910/6139/20), dated 02.09.2015 in case No. 6-226ц14 (The decision of the Supreme Court of Ukraine 02.09.2015 in case № 6-226ц14) indicated the absence of such a method of protection as the establishment of a legal relationship in civil legislation, however, the court recognized the existence of the contract by recognizing such a contract as concluded. Thus, the Supreme Court did not establish a new legal relationship but recognized the existence of the contract as a legal fact.

The problem of resolving a dispute about the obligee's evasion from concluding a contract by recognizing this contract as concluded based on Art. 16 (2)(12) UKR-CC, is connected with an important condition of the presence of the legal fact that the court should establish. However, in case of evasion of the obliged person from concluding the contract, i.e. not sending to the offeror of acceptance or



any other response regarding the content of the contract, it is not possible to talk about the emergence of a contract as a legal fact. Therefore, the mechanism developed by judicial practice for the implementation of such a method of protection as enforcement to conclude a contract is subject to revision.

The use of such a method of protection of rights as enforcement to conclude a contract is possible only when the parties have provided for such a method of protection in the previous contract, which corresponds to the provisions of Art. 16 and Art. 6 (3) UKR-CC.

The issue of compensation for damages incurred during the pre-contractual process is also ambiguously resolved in the civil legislation of Ukraine. This mechanism is very important because in the pre-contractual process a person relies on the information provided to him/her about the status of the counterparty and the object of the contract. An example of assurance can be information about the full payment of a share in the joint capital of the company, providing information about the absence of property encumbrances, the availability of permits and licenses for conducting business, etc.

According to Art. 650-1 UKR-CC the parties to the contract may agree on a list of assurances (warranties) provided by the party or parties regarding the circumstances that are important for the conclusion, execution or termination of such a contract. In the event of the falsity of assurances and fault or negligence of their presentation, damages caused by the falsity of such assurances shall be compensated by the person who assured the party who relied on such assurances, unless otherwise stipulated by the contract. The introduction of the concept of ‘assurance’ into the legislation of Ukraine only partially solves the problems of liability of the parties to the pre-contractual negotiations for damages caused by non-fair dealing.

Ukrainian law employs delictual liability under Art. 1166 (1) UKR-CC in case of a wrongful breaking of negotiations. Liability is delictual unless the parties have concluded a separate negotiation contract – previous contract (Art. 635 UKR-CC).

We believe that assurances provided out of negligence cannot be the basis for the delictual liability of the party that caused pre-contractual damage. Therefore, we suggest leaving in Art. 650-1 UKR-CC only fault (*culpa*) as a basis of liability for violation of the duty to conclude a contract by the principle of fair dealing.

The amount of damages that can be claimed as a result of a breach of pre-contractual negotiations is included losses incurred in anticipation of a potential contract. It is not possible to award the full damage, including the loss of opportunities. So, the court can’t award lost benefits that a party would have gained in case the final contract had been concluded (expectation damages).

We propose to change Art. 650-1 UKR-CC and publish the article in the next edition:

‘Article 650-1. Liability for pre-contractual negotiations contrary to fair dealing

1. A party who entered into or continued negotiations contrary to fair dealing is liable based on culpability for losses caused to the other party as a result of that party’s reliance that a contract will be concluded.

2. Damages are not cover the expectation damages.’

It can be concluded that UKR-CC and DCFR provide that parties must cooperate in accordance with fair dealing (also by good faith in DCFR) during the conclusion of a contract and respect each other’s legitimate interests. In case of non-fulfillment of this duty, the sanction can be a liability for damages. In UKR-CC and DCFR damages are limited to the reliance interest, and do not cover lost opportunities.

### ***B.3. Standard terms***

Standard terms, or interchangeably general conditions, is a concept familiar to a civil, not common law system. As mandatory laws, standard terms are used for consumer protection even in commercial contracts. The definition of general conditions of contract is provided in Art. 2.209(3) of Principles of European Contract Law (PECL) (Lando, Beale, 2000) as “terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties”.

When parties to the potential contract are negotiating its terms and each side wants to contract based on its own terms the “battle of forms” (conflicting standard terms) arises. The mechanism for dealing with the enforceability of standard terms provides in Art. II. – 4:208 and Art. 19 CISG. The offerer’s standard form creates a contract only if it gives a definite assent to an offer unless it states or implies additional or different terms which materially alter the terms of the offer. So, standard terms of an acceptance that do not materially alter the standard terms of the offer become part of the contract. According to Art. 19 (3) CISG material alterations of the terms are “additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, the extent of one party’s liability to the other or the settlement of disputes”. That list is not comprehensive and could only have been illustrative (Bar, Clive, 2009, p.351).

The control over a battle of forms can be included in an offer by the offeror by incorporation of a clause to the result that “the offer expressly limits acceptance to the terms of the offer” (Art. II. – 4:208(3)(a)) or in case that ‘the offeror objects to the additional or different terms without undue delay’ (Art. II. – 4:208(3)(b)). Also, a conditional acceptance will be treated as a rejection of the offer if the offeror’s assent to the additional or different terms ‘does not reach the offeree within a reasonable time’ (Art. II. – 4:208(3)(c)).

DCFR in Art. II. – 4:209, unlike the CISG, contains provisions that deal with the issue of the battle of the forms. Even if there are conflicting boilerplate terms in the offer and acceptance, agreement about other terms means that “a contract is nonetheless formed”. So, only the general terms that ‘are common in substance’ (identical in the result and not in formulation) form the contract and conflicting standard terms would not become a part of the contract (“knock out” theory). The parties in any way remain free to state exactly what will not amount to offer and acceptance in their dealings. It can be no contract if one party has previously explicitly indicated, and not in the standard terms, refuse to be bound by a contract based on Art. II. – 4:209 (1). Later, after the exchange of the documents which purport to conclude the contract, the intention of the party not to be bound by a contract should be announced to another party without undue delay.

In CISG it is not so clear, but Arts. 18-19 seem to lead to the conclusion that both in cases of material and non-material alternation of the terms of the offer another theory of ‘last shot’ is used. In the case of the “last shot” theory, the performance by the offeror of obligations without raising objections to the new offer is considered as an acceptance of the standard terms contained in the new offer.

In Ukraine, the parties give a consent to use standard terms directly in the contract between them (Art. 630 (1) UKR-CC). Standard terms of contracts of a particular type in Ukraine are approved at the legislative level. Therefore, in Ukraine, not standard terms are subject to legal regulation, but rather standard types of contracts. A standard contract is a standardized document that defines the essential terms for a certain type of contract. For instance, the Standard land lease (Resolution of the Cabinet of Ministers № 220, 2004) provides for the procedure for calculating the amount of land rent, terms, etc. In the Standard land lease the specifics of a land lease during the war are defined. In particular, after the expiration of the land lease concluded for commercial agricultural production during the war, the lessee does not have a privileged right to renew it for a new period. In the Standard land lease, it is determined that the term of a land lease begins not from the moment of concluding the contract, but from the moment of transfer of the land plot and registration of the lease right.

The Standard contract for the supply of natural gas (Resolution of the National Commission on Energy № 2500, 2015) to household consumers contains not only provisions on the price of the contract, but also on the method of price announcement of natural gas to the consumer and the procedure for calculating delivery volume.

Standardized contracts in Art. 634 (1) UKR-CC are called “accession contracts”. An accession contract is a contract proposed by one of the parties in a standard form that can be concluded only by joining the other party to the proposed contract as a whole. It is important that, according to the civil

legislation of Ukraine, the other party does not have the right to propose the terms of the contract, but only can join it or refuse to conclude.

In Art. 634 (2) UKR-CC, the legislator tries unsuccessfully, as evidenced in practice, to establish restrictions on the discrimination of the weaker party to the contract that joined it on the proposed by the other party terms. In particular, it is allowed to change or terminate the accession contract, if it places the weaker party at an unreasonable disadvantage, as well as if the contract excludes or limits the liability of the other party for breach of obligation. An unreasonable disadvantage appears when the terms are not clear and comprehensive. Also, a party to a contract may suffer an unreasonable disadvantage when the term restricts essential rights that a person had before.

At the same time, the weaker party must prove in court that in the normal process of concluding a contract through negotiations, the conclusion of such a contract would never happen with the terms proposed by the other party.

However, Art. 634 (2) UKR-CC on the issue of regulating the change or termination of the accession contract because of an unreasonable disadvantage does not apply to business-to-business contracts (merchant contracts). In particular, in Art.634 (3) UKR-CC it is stated that the businessperson cannot demand a change or termination of the accession contract if the party that provided the contract for accession proves that the businessperson knew or could have known the terms of the contract. This provision of the law is an absolute absurdity, as it establishes the possibility of concluding a contract by a party that has joined without familiarizing itself with its terms. Changes to UKR-CC should provide for the exclusion of Art.634 (3).

In a situation where the parties did not provide for the application of standard terms in the contract, and one of the parties insists on their use, such standard terms may be applied as a custom of business turnover, if they are established in certain areas of civil relations (Art.630 (2) UKR-CC).

**Conclusions.** UKR-CC was created on a new conceptual basis as a code of private law, considering current European trends and experience. The application practice of UKR-CC is currently assessed positively, but the legal mechanisms of its action are subject to revision considering the experience of law enforcement and the interpretation of civil law by courts. Modern realities (economic, social, technical, informational) require legal certainty, because UKR-CC, as any codified act, possesses gaps and shortcomings in the presentation of legal material. Thus, by the Concept of updating the Civil Code of Ukraine, prepared by members of the Working Group, established by the Cabinet of Ministers of Ukraine “On the establishment of a working group on recodification (updating) of civil legislation of Ukraine”, July 17, 2019, № 6501, amendments to all books of UKR-CC are offered.

As a result of the investigation conducted in this article, it is proposed to change Art. 650-1 UKR-CC and publish the article in the next edition:

“Article 650-1. Liability for pre-contractual negotiations contrary to fair dealing

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