

Force majeure in agreements during the war in Ukraine

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Russian aggression and hostilities on the territory of Ukraine make important adjustments to contractual relations, both in Ukrainian and international business. Ukrainian companies and their foreign counterparties in practice have faced a number of issues previously considered exclusively theoretical. Now they have become critically important for maintaining existing business relationships and establishing new ones.

1. How to fulfill agreements under war conditions in Ukraine

The procedure for executing contracts during war in Ukraine remains unchanged. However, some peculiarities due to wartime threats should be considered. Among them:

- possible difficulties in communication (correspondence, keeping a record of the counterparty's receipt of messages, etc.);
- possible logistics difficulties (supply routes, storage facilities, bank transactions);
- possible sanctions against the participants of the logistics or settlement chains (transport companies, chartered ships belonging to the sanctioned companies may not be allowed into the ports, banks of the recipients or payers);
- possible trade restrictions (a ban on exports of certain categories of goods).

Considering these peculiarities, one should analyze and in part predict the possibility of proper performance of the concluded contracts.

Related article: Force Majeure in Ukraine: Legal Aspects

This will allow to:

- adjust the structure of the transaction under the contract to minimize the likelihood of circumstances that may prevent the execution of the contract (change the payment details, switch to banks not associated with sanctioned persons, reorient logistics chains);
- amend agreements with regard to force majeure events (this is critical, for example, for contracts governed by English law – in the English legal doctrine the mechanism of release from liability under agreements applies only if it is

- spelled out in the contract);
- identify counterparties – the participants in the logistics chains, which are necessary for the performance of the contract. If their failure to perform their obligations would jeopardize the performance of the agreement (carriers operating in a war zone, suppliers of spare parts or components at risk), such circumstances should also be included in force majeure;
- identify contracts the fulfillment of which is already threatened or impossible (warehouses or goods have been destroyed, export restrictions have been imposed, ports have been blocked, the counterparty has been hit by sanctions).

Concerning the contracts, the execution of which is already impossible or potentially threatened, it is necessary to be prepared for the application of force majeure clauses.

2. What can be done when it is impossible to fulfill an agreement?

It is obvious that the war in Ukraine and its consequences are, and will remain, the cause of non-performance or improper performance of contracts by many Ukrainian companies, as well as by their foreign counterparties. In such cases, force majeure clauses should be invoked as a tool of regulating crisis contractual relations.

Circumstances that may be considered as force majeure in conditions of war in Ukraine include combat operations themselves and related security restrictions and limitations (for example, military operations in the territory where production facilities or warehouses are located, destruction of production facilities or crops during the fighting, supply routes passing through the occupied territories or combat action zones, blockade of ports, threat to a personnel's life).

Additionally, they also include as follows:

- trade restrictions imposed by the state (e.g., restrictions on grain exports from Ukraine, fixed prices for certain groups of goods);
- sanctions applied to parties to the agreement or participants of logistics and commercial chains (e.g., seizure of ships belonging to the sanctioned legal entities, restriction of bank settlements, freezing of funds);
- obligations to the state under martial law (mobilization of workers and equipment).

It should be noted that the mere existence of such circumstances does not constitute grounds for a force majeure clause. To be exempt from liability for failure to fulfill obligations, the circumstances must meet the following criteria:

- such circumstance must be unforeseeable at the time of the conclusion of the contract;
- the occurrence of such circumstance is beyond the control of the parties to the contract;
- the consequences or effects of such circumstance cannot be avoided or resolved;
- such circumstances must constitute force majeure under the treaty or the law;
- a causal connection must exist between the circumstances and the impossibility of performance of the contract;
- there is a specific obligation that has to be fulfilled in the presence of such

circumstances (the delivery or payment deadline has come or is due).

Not all circumstances rendering the performance of obligations impossible can be attributed to force majeure. There are also circumstances related to commercial risk which cannot be considered force majeure, e.g.:

- breach of obligations by the counterparties of the affected party;
- lack of goods on the market that are necessary to fulfill the obligations;
- the debtor's lack of necessary funds.

In conditions of war, these restrictions must be applied with caution. On the one hand, some of them must be attributed to force majeure (for example, the failure to fulfill obligations by counterparties critical to the business scheme may also be caused by force majeure). But on the other hand, war creates a new business reality in which some previously unpredictable risks become commonplace and, thus, foreseeable commercial realities (economic downturn, inflation risks). It should be remembered that business is part of global or regional logistics, components of which can vanish for objective reasons and lead to failure to fulfill obligations.

Force majeure circumstances are not of a predetermined nature. The party of the contract, which refers to such circumstances, must prove their existence, their compliance with the criteria of force majeure circumstances, as well as the causal link between them and the non-performance of the contract.

The necessity to prove force majeure circumstances does not exclude the fact that their existence can be confirmed by the relevant competent authority.

In Ukraine, the existence of force majeure is evidenced by the Chamber of Commerce and Industry of Ukraine (hereinafter, the "CCI") and its authorized regional chambers of commerce and industry by issuing a certificate. It should be kept in mind that the competence of regional chambers of commerce and industry of Ukraine is limited. For instance, they cannot issue certificates for foreign economic contracts.

It is necessary to prepare in advance for the implementation of the force majeure clause for those agreements that are in the risk zone.

For this purpose, it is necessary to:

- introduce force majeure clauses into at-risk agreements or supplement the existing ones;
- realistically assess the current means of communication (e.g., correspondence and receipt of proof of delivery are ineffective in war settings);
- adjust force majeure clauses so that they are not subject to commercial risk restrictions (e.g., if a participant of the supply chain breaches its obligations due to force majeure and this in turn causes non-performance of the contract);
- evaluate the possibility of gathering information and supporting documents necessary to prove the existence of force majeure and the causal link to the non-performance of a contractual obligation.

3. Protection against unjustified non-performance of the contract

The occurrence of force majeure, among other things, can be used by a dishonest counterparty to avoid the performance of obligations under the agreement. To protect yourself from such actions, it is necessary to pay attention to the following:

- confirmation of the existence of force majeure (e.g., the availability of a certificate of the CCI of Ukraine. The certificate must be issued by the authorized CCI; regional chambers of commerce and industry cannot issue certificates for foreign economic contracts);
- the link between force majeure and the ability of the affected party to fulfill its obligations under the agreement (e.g., if there are military actions in the east of Ukraine, the ports are blocked, but the agreement provides for the delivery of goods by rail, and the goods themselves are in warehouses outside the war zone and are not subject to export restrictions. The existence of military action in Ukraine will not be considered grounds for postponing the performance of obligations on the grounds of force majeure);
- observance of procedures for application of force majeure clauses (terms of notification of such circumstances, procedure for such notifications, and terms of postponement, which may be applied under relevant clauses).

4. How to formulate force majeure clauses in agreements

The main prerequisite for the effective application of force majeure clauses is their clear and correct wording in agreements. Furthermore, such wording should not only secure business transactions, but should also not impede the normal conduct of those transactions.

Usually, force majeure clauses in agreements have no more than a formal character. Such clauses do not allow the determination of a number of critical issues (e.g. within what time period the party that cannot fulfill its obligations because of force majeure circumstances should inform the other party; the procedure and the form of the following notice; the consequences of failure to inform the other party about the force majeure, the manner of confirming the fact of force majeure circumstances).

Therefore, when concluding an agreement the parties should, in addition to the circumstances considered as force majeure, provide in the contract a detailed procedure for informing (phone call, messenger, e-mail, official letter, etc.) the other party about the occurrence of such circumstances, as well as to specify the consequences of non-compliance with this procedure.

In addition, in agreements with foreign companies it is important to describe in detail the circumstances that may be considered force majeure. The fact is that, for example, English law does not contain legally defined force majeure circumstances. Therefore, the parties must elaborate their list and definition criteria in agreement with each other.

Considering the current situation in Ukraine, when formulating the description of force majeure, it is necessary to:

- detail the definition of war as a force majeure circumstance. The traditional definition of war may not be sufficient, given today's hybrid forms of aggression. For example, it should be noted that "war" is not only a state where

war is officially proclaimed, but also the conduct of hostilities by irregular and unidentified military formations, invasion without a declaration of war, military operations, etc. (e.g., in the international legal sense, war between Ukraine and Russia has not been declared, but there is the fact of invasion, hostilities and occupation);

- to take into account the latest methods of warfare – cyberattacks, disinformation operations, and local acts of sabotage;
- to specify that military actions will also be considered as force majeure if they materially affect the fulfillment of obligations in territories other than those of actual hostilities. In this case, the basic qualifying attribute should be the material impact of hostilities on the ability of the affected party to fulfill its obligations;
- to exclude from the procedures of application of the force majeure clause any additional negotiations and agreements between the parties – this may be objectively impossible in conditions of war;
- to simplify the channels of communication; the exchange of letters and confirmation of their receipt may be physically inaccessible to the parties in time of war;
- to detail the list of force majeure circumstances arising as a result of war: sanctions, disruptions in settlement systems, trade restrictions;
- exclude from the list the circumstances that have become a new commercial reality in war. Some circumstances that were previously theoretical are now expected and assumed: the deterioration of the economic situation, inflationary processes, and the economic downturn. If they are all included in the list of force majeure circumstances, you may find yourself in a situation where the contract will not have to be fulfilled in principle – everything will be covered by force majeure, and business will simply stop;
- clearly define procedures for notification, postponement of performance, termination of obligations, and determination of compensation.

If you have further questions about the circumstances of force majeure during the war in Ukraine, please contact us at info@dlf.ua or via the contact form.

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