

Force Majeure in Ukraine: Legal Aspects

On 17 March 2020, the Parliament of Ukraine adopted Law of Ukraine No. 530-IX On Amendments to Certain Legislative Acts of Ukraine aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19). The Law also provides for interpreting the "quarantine" as the force majeure.

The force majeure circumstances (events of insuperable force) mean the extraordinary and inevitable events, which objectively make it impossible to comply with the obligations, as stipulated by the terms of an agreement (contract, deed, etc.), and duties under the legislative and other normative acts. They include the epidemics, wars or armed conflicts, hostilities, acts of terrorism, revolution, enterprise seizure, strikes, emergencies, fires, explosions, restrictions on exports and imports, natural disasters, or otherwise.

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The force majeure circumstances may also include the events other than listed in the Law On Chambers of Commerce and Industry of Ukraine, but complying with the force majeure criteria, not contravening the laws and being agreed upon by and between the parties to the agreement as exempting them from the civil liability.

Usually, the force majeure clause, as contained in agreements, is purely formal and unclear: for what period the party, unable to comply with its obligation due to the force majeure circumstances, should notify the other party thereof; how and in what form such a notice should be served; what are the consequences of the failure to notify the other party of the force majeure; how the force majeure circumstances should be confirmed. Therefore, when entering into an agreement, the parties should provide for in the agreement, in addition to the circumstances interpreted as the force majeure, a detailed procedure (a phone call, a messenger, an e-mail, an official letter, etc.) to inform the other party thereto of such circumstances, and foresee the consequences resulting from the parties' failure to comply with this procedure.

Also, when entering into an agreement, the parties thereto are entitled to independently determine in which circumstances they will be released from the liability for their failure to comply therewith. Article 219 of the Commercial Code of Ukraine stipulates that the parties may envisage certain circumstances, being the reasons due to their extraordinary nature for releasing the party from the economic liability if the party's obligation is violated due to these circumstances, and the procedure for confirming such circumstances.

It should be noted that the mere circumstance (a fire, an epidemic, a natural disaster, quarantine, etc.) is not the force majeure. Such a circumstance will become the force majeure only if it is proven that the inability to comply with the party's obligations, as stipulated by the terms and conditions of an agreement, has been caused by the force majeure.

Another important point is that the force majeure circumstances release a party to

the agreement from the liability for non-performance or improper performance of its obligation, but do not release such a party from its duty to comply with such an obligation upon the force majeure cessation.

Moreover, one should not confuse the force majeure with the substantive changes in contractual circumstances. The substantive changes in contractual circumstances are a specific category of unforeseen circumstances, upon the occurrence of which (unlike the force majeure) an agreement may be properly executed, but its execution is significantly complicated due to their unpredictability. Pursuant to Article 652 of the Civil Code of Ukraine, unless the parties agree on bringing such an agreement in line with the circumstances, which have substantially changed, such an agreement may be terminated or amended by a court decision. The change in circumstances is significant if they have changed so much that, if the parties could have foreseen it, they would not have entered into the agreement or concluded it on the other terms and conditions. In case of material change in the circumstances, whereby the parties were being guided when entering into the agreement, it may be amended or terminated by the parties' consent.

One of the possibilities of confirming the force majeure (inability to fulfill obligations) is the respective certificate to be issued by the Chamber of Commerce and Industry of Ukraine. The Rules of the Chamber of Commerce and Industry of Ukraine have set a number of requirements as to the documents to be submitted by a party to contractual relations to obtain the force majeure certificate. They should attest to:

- unpredictability of circumstances (their occurrence or consequences could not have been foreseen, in particular on the date of the respective agreement, before the maturity date of an obligation or before the relevant duty incurrence);
- inevitability (irresistibility) of circumstances (inevitability of the event and/or its consequences);
- extraordinary nature of circumstances (they are of an exceptional nature and are beyond the parties' influence);
- a causal link between the circumstance / event and the applicant's inability to fulfill the specific obligations (under an agreement, contract, deed, etc.).

The Chamber of Commerce and Industry of Ukraine has now simplified the procedure for filing the documents and applying for the force majeure certificate. Now, you will need the following documents to obtain the force majeure certificate:

- an application to be signed by the company head and affixed upon with the company seal;
- a copy of an agreement;
- a copy of an order (directive) whereas it is necessary to cease activities based on the relevant regulatory legal acts;
- a notice (notification of the other party on the force majeure occurrence).

It should be also noted that not all events should be interpreted as the force majeure. The legislation of Ukraine defines a list of the circumstances, being not considered the force majeure, in particular:

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- an increase in official and commercial foreign exchange rates;
- absence in the market of the goods required to fulfill an obligation, and lack of necessary funds in the debtor's disposal;
- a financial and economic crisis;
- default;
- the debtor counterparty failure to comply with the obligations;
- circumstances relating to commercial risk, etc.

Summarizing the above, upon the force majeure occurrence, first of all, we recommend you to try to negotiate with the counterparty and appropriately amend the agreement in respect of release from the liability or excused performance for this period, and then consider other options. If it is still impossible to agree with the counterparty, then it is worthwhile studying the available documents and evidence (including the force majeure interpretation, as contained in the agreement, the procedure for informing the other party about the force majeure occurrence), to analyze the causal link between the circumstances and inability to comply with specific obligations, and to prepare for a possible court hearing in order to efficiently defend your interests in this situation. It should be borne in mind that the burden of proving the force majeure occurrence is imposed on the applicant.