

Ruslana Abramovych

Advocate, Senior Lecturer, Ph.D.

National University of Kyiv-Mohyla Academy

FORCE MAJEURE DURING THE WAR. REVIEW OF JURIDICAL PRACTICE

Abstract

This review covers the judicial practice of Ukrainian courts of general jurisdiction related to the issue of force majeure. The question becomes especially relevant in the current war realities, in which not only the citizens of the country, but also business entities find themselves. Under the conditions of martial law, counterparties often resort to abuses, citing force majeure, and refuse to fully or partially fulfill their contractual obligations. This publication examines the main legal positions of courts of general jurisdiction on this topic.

Key Words

Force majeure, Business entities, Legal positions, Judicial practice

Introduction

The relevance of this topic is based on the peculiarity of the use of force majeure circumstances by certain participants in business processes to avoid fulfilling their obligations in contractual relations. In this article, special attention will be paid to the judicial practice of courts of general jurisdiction, devoted to the issue of force majeure during war.

The legal definition of force majeure is contained in Article 14 of the Law of Ukraine "On Chambers of Commerce and Industry of Ukraine". In accordance with the provisions of

this law, force majeure circumstances are extraordinary and unavoidable circumstances that objectively make it impossible to fulfill the obligations stipulated in the terms of the contract, obligations according to legislative and other regulatory acts.

According to the Resolution of the Supreme Court of Ukraine dated 25.01.2022 in case No. 904/3886/21, force majeure includes the following elements:

- they do not depend on the will of the participants in civil (economic) relations;
- have an extraordinary character;
- are unavoidable;
- make it impossible to fulfill obligations under these conditions of economic activity.

On February 24, 2022, the Russian Federation launched a full-scale military invasion of the territory of Ukraine, which became the basis for the introduction of martial law throughout the territory of Ukraine by Decree of the President of Ukraine No. 64/2022 dated February 24, 2022. By letter dated February 28, 2022 No. 2024/02.0-7.1, the Chamber of Commerce and Industry of Ukraine certified force majeure circumstances - the military aggression of the Russian Federation against Ukraine from February 24, 2022 until their official end. The specified circumstances are extraordinary, unavoidable and objective circumstances for subjects of economic activity and natural persons under the contract.

1. Judicial practice of the Supreme Court of Ukraine

In this context, judicial practice is quite unambiguous, therefore, in this article, special attention will be paid to it. Over the past few months, several cases in my practice were precisely in the plane of force majeure during the war. Case subjects are practically identical. Goods not delivered on time or not in full, rent not paid, fines imposed. In short, the entire portfolio for a confident appeal to the court. What does court practice say in this context?

- The Resolution of the Supreme Court of Ukraine dated 16.07.2019 in case No. 917/1053/18 clearly states that force majeure circumstances are not prejudicial in nature, and in the event of their occurrence, the party that refers to them as the basis for the impossibility of proper fulfillment of the obligation must prove their existence not only by themselves, but also that they were force majeure for this particular case. It follows from this that with such a legal arrangement, the lessee, for example, when the lessor provides unimpeded access to the leased object, cannot appeal to force majeure, and on this basis not pay the rent or other related payments. Of course, it is necessary to take into account all the specifics of the situation in each individual case, however, it is more likely an exception to the rule than the rule itself. The stated position of the Court is also duplicated in the recently adopted Resolution of the Commercial Cassation Court as part of the Supreme Court dated 17.08.2022 in case No. 922/

854/21, which states that a formal reference to the letter of the Chamber of Commerce and Industry is not sufficient, and the court must examine and evaluate all the evidence in full.

2. Force majeure is not a mechanism for non-fulfillment of contractual obligations

It is also worth assessing in this context the decision of the Economic Court of the Dnipropetrovsk Region dated 29.07.2022 in case No. 904/1250/22, where the Court drew attention to the fact that the state of war in the territory of Ukraine does not mean that the defendant cannot carry out business activities and receive funds. The defendant did not provide evidence that the enterprise stopped work due to martial law, that all employees or a separate part of them, the head of the enterprise, other officials are mobilized and are in the Armed Forces of Ukraine, temporarily do not perform professional duties in connection in connection with military operations, all or part of the company's movable property is used during certain measures that would prevent the business entity from carrying out business activities during the state of war.

So, it can be concluded that reference to force majeure circumstances for the purpose of deliberate non-fulfillment or partial non-fulfillment of contractual obligations, in view of the above-mentioned judicial practice, is unlawful.

- The second important issue to be considered within this assessment is whether the occurrence of force majeure circumstances could be considered a basis for changing the terms of the contract? The answer is obvious in the Ruling of the Commercial Cassation Court as part of the Supreme Court of Ukraine dated 21.08.2022 in case No. 910/15264/21, in which the Court drew attention to the fact that the occurrence of force majeure is not a reason to change the terms of the contract and release from performance obligation. In other words, if your company cannot fulfill its obligations under the contract, this definitely cannot be interpreted as a reason to change the terms of the contract. The maximum that a party can get in this legal position is exemption from paying fines. However, you still need to assemble a strong argumentative base in favor of your position.

Conclusion

Military aggression, as a circumstance of irresistible force, is indeed a force majeure, however, it is not exactly an automated mechanism for avoiding the fulfillment of contractual obligations by counterparties. In turn, the letter of the Chamber of Commerce and Industry cannot be considered an absolute argumentative proof of exemption from legal responsibility for non-fulfillment or improper fulfillment of obligations. Force majeure is circumstances beyond our control, beyond our control, unavoidable and of an extraordinary nature, which make it impossible to properly fulfill the obligations stipulated in the terms of the contract. Summarizing what has been said, I would like to note that today, given the current realities,

almost every business entity finds itself in this legal topic. Timely and effective resolution of these issues can be of significant importance for the stable course of the company's business processes and their development in the future, therefore, it is definitely not worth delaying the solution, and in general, practice shows that the vast majority of such disputes are successfully resolved in a pre-trial procedure.

Bibliography

Maksymov Mykola, "Case law on the use of force majeure for business during wartime. "Ligazakon resource", 2022, https://biz.ligazakon.net/analitycs/217823_sudova-praktika-shchodo-zastosuvannya-fors-mazhoru-dlya-bznesu-pd-chas-vyni.

Ruslana Abramovych is author of more than 30 publications in the field of rule of law. She mostly focuses on constitutional, civil and informational law. Dr Abramovych has founded the legal community "Legal style", and also has her own blog on the information resource: Liga.net.

Руслана Абрамович

Адвокатка, старша викладачка, кандидатка юридичних наук

Національний університет «Кієво-Могилянська академія»

ФОРС МАЖОР ПІД ЧАС ВІЙНИ. ОГЛЯД СУДОВОЇ ПРАКТИКИ

Цей огляд охоплює судову практику українських судів загальної юрисдикції щодо питання форс мажору. Особливої актуальної даний огляд набуває під час війни, яка стосується як фізичних, так і юридичних осіб. В умовах воєнного стану, сторони часто зловживають своїм правом на звернення до аргументу про форс мажор. Огляд охоплює основні позиції судів з даної тематики.

Ключові слова:

Форс мажор, бізнес-суб'єкти, правові позиції, судова практика