

IS COVID-19 A FORCE MAJEURE?

WHEN THE OBLIGATIONS OF THE CONTRACT MAY NOT BE FULFILLED UNDER REFERENCE TO THE FORCE MAJEURE?

What's going on?

Against the backdrop of global turbulence, caused by the COVID-19 pandemic, panic in international stock markets and oil prices, businesses think about tightening their belts. During this period, companies do not always cope with their responsibilities and often refer to force majeure. In order to avoid manipulation and to explain the action plan, First Chair Legal tells in a simple language what a force majeure is and when it can be referenced to.

What is force majeure?

Force majeure is the circumstance, which objectively prevents contractual obligations from being fulfilled. Such circumstances should have three characteristics – AUI:

- **appearance:** is not an internal factor to the company and the company cannot influence it
- **unpredictability:** it was not evident when the parties took obligations under the contract
- **inevitability:** this could not be avoided

A very important condition is that force majeure shall have a direct and obvious impact on the inability to fulfill specific contractual obligations.

What circumstances can be recognized as force majeure?

Force majeure may be (but not necessarily):

- **natural phenomena**, including pandemics (WHO has recognized COVID-19 as a pandemic), epidemics, cyclones, hurricanes, tornadoes, storms, floods, etc.
- **public events**, including general military mobilization, hostilities, declared and unannounced war, acts of terrorism, blockades, revolutions, revolts, uprisings, etc.
- **actions of the public authorities**, including curfew, established by public authorities quarantine, expropriation, forced removal, seizure, requisition, etc.

How does it work? Does it work the same in all countries

The liability exempt is the main result of a correct reference to force majeure. However, what should be the action plan for such a reference to be correct? The action plan / checklist is the following:

- Does the circumstance have three features of force majeure (AUI) and whether there is a direct correlation between the circumstances and the inability to fulfill specific contractual obligations?
- What is the governing law of the contract? The application of the force majeure condition has distinctive features in different countries. Depending on the country, the following may or may not matter:
 - whether there is a general force majeure regulation in the legislation (some countries do not have regulation and rely on agreement of the parties)?
 - how detailed the force majeure clause is in the contract (in some countries the force majeure clause may apply regardless of whether it is stipulated in the agreement. On the contrary, in other countries, if the epidemic is not specified in the agreement as a force majeure circumstance. the application of this condition will be much harder)?
 - what is the case law interpretation of force majeure?
- Is there a force majeure clause in the contract and whether the order stipulating such a condition was followed? If the order is violated - there will be no exempt. If the procedure is not provided by the contract, you should inform the other party about such circumstances in due order
- Is there any confirmation of the force majeure? E.g., under Ukrainian and British law, the relevant confirmation will be:
 - certificate of the Chamber of Commerce and Industry of the country concerned
 - regular notice of efforts to fulfill the obligations and / or mitigate the consequences of non-compliance

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The contract of our dreams

- A list of circumstances, which the parties have defined as force majeure, is established (general and inexhaustible)
- Procedure for notifying the other party about force majeure and the consequences of improper notification are established
- Force majeure confirmation documents (e.g., chamber of commerce certificate)
- Conditions of contract termination in case of long-term force majeure and procedure for further cooperation

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The COVID-19 quarantine, established by the Cabinet of Ministers of Ukraine from March 12, 2020 to April 3, 2020, is a force majeure. However, this does not mean that herewith business in Ukraine is allowed not to follow the contract obligations. It is necessary to prove that force majeure has influenced a particular business - therefore specific obligations cannot be fulfilled. States may establish a general force majeure that does not require individual case-by-case confirmation. The introduction of quarantine and COVID-19 are NOT A GENERAL FORCE MAJEURE RECOGNITION by default. Exempt from liability due to force majeure is to be established and confirmed in each particular case

The Chamber of Commerce and Industry of Ukraine and its territorial divisions may certify particular failure to perform contractual obligations due to force majeure. If you would like to obtain a certificate, please contact the CCI (is possible by email) with attached:

- a copy of the contract
- a copy of the suspension order in whole or in part
- the other party's notification confirmation

My partner refuses to fulfill his obligations under the contract, referring to COVID-19/quarantine. Does he have a right to?"

It depends on the specific circumstances, but in general HE HAS FOR SURE IF:

- the contract regulates force majeure in detail and includes epidemics / pandemics as force majeure
- partner has duly advised that it cannot fulfill specific contractual obligations due to force majeure
- partner has demonstrated that COVID-19 is the direct reason why he is unable to fulfill his obligations (e.g., he is ill with the entire team with COVID-19)
- the partner has provided you with an official document, confirming the force majeure in this particular case (e.g., Chamber of Commerce certificate)