

FULFILLMENT OF THE CONTRACTUAL OBLIGATIONS IN WARTIME

UKRAINE'S EXPERIENCE

ANATOLIY KOSTRUBA

Contractual researcher **IRJS**
Professor of Civil Law of Ukraine, Dr. habil.

LECTURE COURSE



01

WHAT IS FORCE MAJEURE ?



I. FORCE MAJEURE IN WARTIMES

The introduction of the martial law by the Presidential Decree as of 24th February, 2022 [No. 64/2022](#) significantly affected the traders, in particular, the opportunity of due and timely fulfillment of obligations

Force majeure



Force majeure is a contractual term that exempts the party from the liability to fulfill its obligations, if an extraordinary event prevents directly from fulfilling the obligations

According to **sec. 141 of the Ukrainian Act on Chambers of Commerce and Industry of Ukraine**, the force majeure (Act of God) shall include, in particular:



hostilities, declared and undeclared war, general military mobilization, etc

This means that the person **shall not be liable** for the violation of the contractual obligations, separate tax and/or other obligations within the martial law period

THE FOLLOWING ELEMENTS ARE SIGNS OF FORCE MAJEURE



they are not contingent upon the will of participants' civil (business) relations



holds an extraordinary character



make the fulfillment of the obligations under the given conditions of business activity impossible



are irreversible

(Resolution of the Supreme Court in case №904/3886/21 dd. 25th January 2022)

THERE MUST BE:



However, simple impossibility or unforeseen difficulties in fulfillment is not enough to justify non-fulfillment



a causal connection between the force majeure and the impossibility of fulfilling the contractual terms

02

WHAT DOES **FORCE MAJEURE** ACKNOWLEDGMENT MEANS?

Acknowledgement of the fact that non-fulfillment of the contract took place due to force majeure circumstances **shall not exempt from the liability whatsoever**

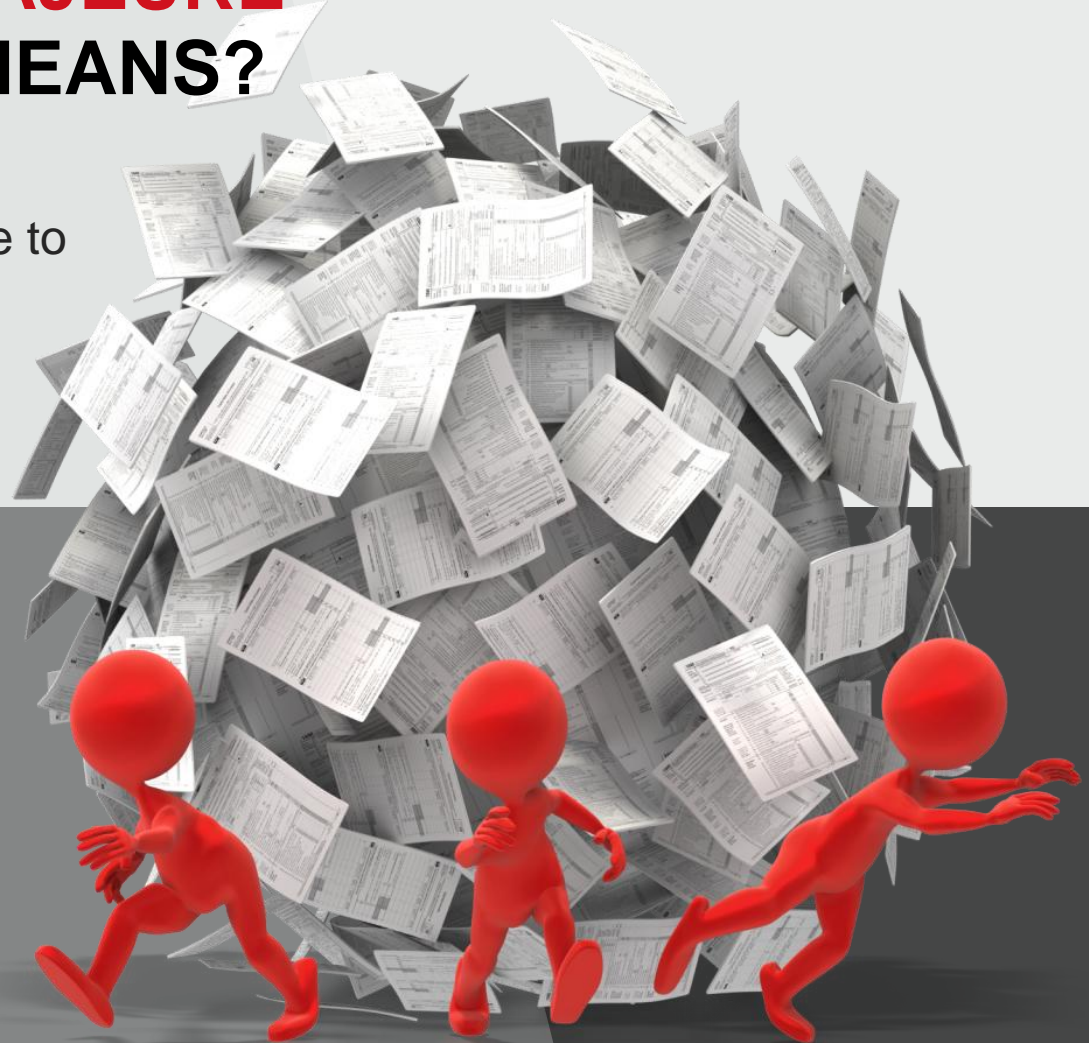
THIS ONLY:



exempts from paying the penalties under the contract: penalty, fine, fee etc.



may be the reason for contract termination



WHAT IS THE EVIDENCE OF **FORCE MAJEURE**?



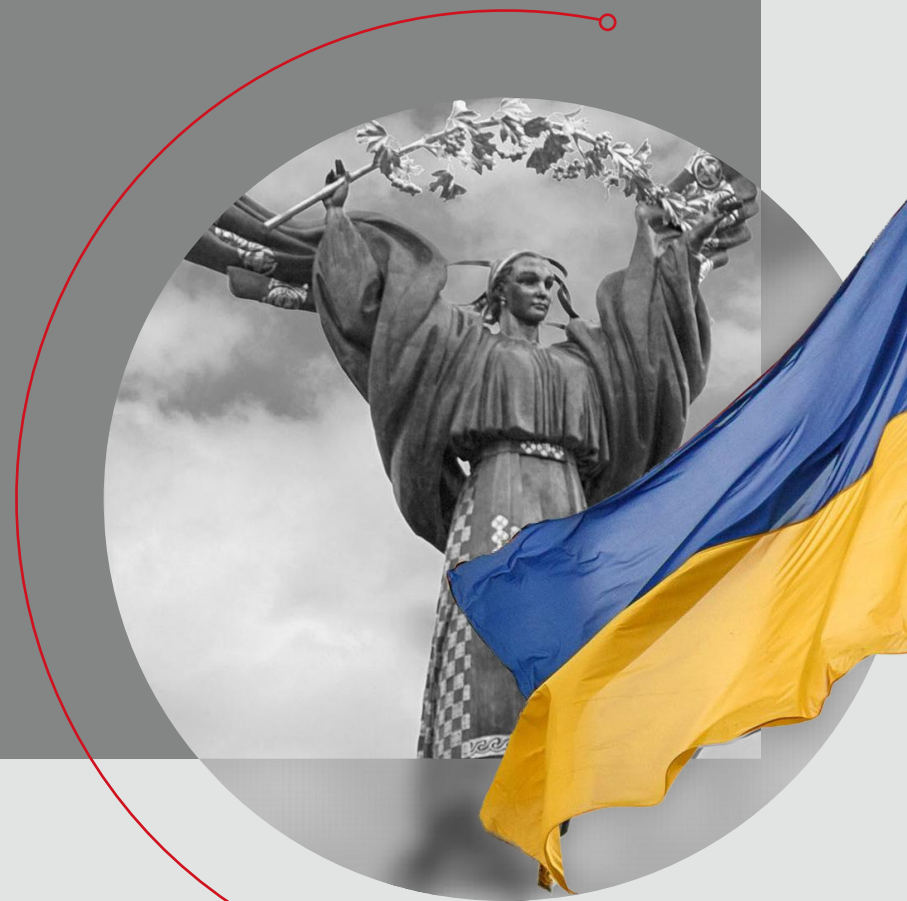
Force majeure circumstances shall be acknowledged by the certificate of the **Chamber of Commerce and Industry of Ukraine (CCI)**



It was further confirmed that as of 24th February, 2022 the above circumstances shall be considered as force majeure, irreversible und objective for business entities and/or natural persons under the contract

The Letter of 28th February 2022

No. 2024/02.0-7.1 of CCI has acknowledged force majeure circumstances – the military aggression of the Russian Federation against Ukraine, which has become a reason for introduction of the martial law



RESOLUTION OF THE SUPREME COURT IN CASE NO. 904/3886/21 DD. 25th January 2022

point out that:



Force Majeure circumstances have nonprejudicial (established in advance) character, and the concerned party shall prove the fact of their occurrence and led the fact that the circumstances are force majeure for the certain case

⚡ *Based on force majeure features, it is necessary to prove their exceptionality and irreversibility as well*

✘ *Force majeure cannot be an automatic reason for exemption from the obligations, a party to the contract shall confirm the fact of occurrence of such circumstances, specifically their ability to affect the real possibility of fulfilling the obligations*

(The Supreme Court made the similar conclusions in its Resolutions dd. [16th July 2019 in case No. 917/1053/18](#) and [dd. 09th November 2021 in case No. 913/20/21](#)).



At the same time, the certificate of the Chamber of Commerce and Industry confirming the existence of force majeure circumstances cannot be considered as an indisputable proof of their existence, but shall be estimated by the court critically taking into account the established particulars of the case and together with other evidences

(Resolutions of the Supreme Court dd. [21st September, 2022 in case No. 911/589/21](#), dd. [14th February 2018 in case No. 926/2343/16](#), dd. [16th July 2019 in case No. 917/1053/18](#), dd. [25th November 2021 in case No. 905/55/21](#)).

1

FOR INCTANCE

The Commercial Court for Khmelnytsk Region in its Ruling dd. 13th May, 2022 in case No. [924/183/22](#) did not take into account the defendant's arguments in Respect to force majeure circumstances certified by The CCI Letter No. 2024/02.0-7.1 dd. 28th February 2022

“... Since this evidence in no way confirms the fact that specifically due to the military aggression of the Russian Federation against Ukraine, and this is the reason why the martial law was introduced, the defendant was unable to fulfill its contractual obligations...”



2

The Commercial Court for Dnipropetrovsk Region in its Ruling dd. [29th July 2022 in case No. 904/1250/22](#), indicated that the martial law in Ukraine does not mean that the defendant cannot carry out its business activity und acquire funds

“... The defendant did not provide any evidences that the company stopped working due to martial law, that the employees (or their part), company director, other officials are mobilized and are in the Armed Forces of Ukraine, temporarily do not perform their professional obligations due to military actions, entire or part of the company's movable property is used during certain activities that would prevent the business entity from carrying out business activities under martial law...”



II. ALTERATIONS IN THE TERMS OF SPECIFIC CONTRACTS



LOAN CONTRACTS

The most significant changes among contractual legal relations during the legal regime of martial law were relations under loan contracts

The Act No. 2120-IX dd. 15th March 2022 introduced a number of amendments to the Civil Code of Ukraine, as well as Acts on Banks and Banking Operations, on Consumer Crediting and on Mortgages



During the martial law and within 30 days after its termination (cancel), **the creditor is significantly limited in its rights.**

In fact, the borrower is given the option of not servicing its loan (not making scheduled payments), and there will be no penalties for this

In particular, the creditor shall **NOT**



increase the interest rate

(except for cases when the variable interest rate is fixed by the contract)



charge penalties, fines, 3% per annum, inflationary losses or impose other types of liabilities in case of late payments



demand full or, even worst, early debt settlement

(when the contract provides certain specific settlement terms)



the mortgagee shall not acquire title to the mortgaged property, sell the respective real estate property, or evict its tenants during this period



EMPLOYMENT CONTRACT

The outbreak of armed aggression against Ukraine and introduction of the martial law throughout its territory significantly affected the regulation of labor relations

In particular, in order to adapt labor laws to the realities of war, the Act on the Organization of Labor Relations under Martial Law No. 2136 of 15th March 2022 was adopted



As a general rule, the Code of Labor Laws of Ukraine specifies that an employee may terminate an employment contract concluded for an indefinite period by providing two weeks' written notice to the employer (section 38)



Whereas *during martial law*, **according to Act No. 2136**, an employee may terminate an employment contract at his/her own initiative **at any time**

During the martial law period, an employee may be dismissed at the initiative of the employer during the period of his/her temporary disability, as well as during vacation period



A NEW DEFINITION OF EMPLOYMENT CONTRACT SUSPENSION

is a temporary termination by an employer of providing an employee with work and a temporary cessation by the employee of performing work under the concluded employment contract due to armed aggression against Ukraine that excludes the possibility of both parties to the labor relations to perform their obligations stipulated by the employment contract



The employment contract may be suspended at the initiative of either party for the period not exceeding the period of martial law.

*If the employer decides to cancel the suspension of the employment contract before the termination or cancellation of martial law, the employer shall notify the employee of the need to return to work **10 calendar days before the resumption of the employment contract***



Suspension of the employment contract shall not entail the termination of labor relations



REAL ESTATE CONTRACTS

Since the beginning of the war, the access to the state registers, including to the State Register of Real Property Rights has been blocked, which is used to certify real estate contracts in Ukraine. Taking into account the fact that title to real estate by its alienation or acquisition are subject to registration in the above register, it has become impossible to sell, buy or otherwise dispose of an apartment or other real estate



Resolution of the Cabinet of Ministers of Ukraine No. 480 dated 19th April, 2022 introduced a number of amendments to the laws aimed at opening the real estate market in Ukraine with the specific features established for wartime



As long as martial law is in force and within one month after its termination, contracts involving real estate (including sales and purchase, donation, life estate, exchange, division, mortgage contracts, lease contracts of a building for a period of at least 3 years) may not be certified by all notaries, just by those included in the **List of Notaries who may perform notarial acts in respect of valuable property under martial law**

PLACE OF CONTRACT



In peacetime, you have a choice of which notary to apply to for notarial certification of the transaction – at the property location or at the place of residence of one of the parties

At the time of war, this procedure will remain unchanged only for Kyiv and Kyiv Region. For other settlements, the contracts may be certified only at the place of property location.

Some administrative units expressly prohibit notarial acts in relation to valuable property

IS THE **RESALE** OF REAL ESTATE ALLOWED

Among new changes aimed at exclusion of illegal real estate fraud during the war is a ban on certifying contracts if less than 1 month has passed since the acquisition and registration of title to the property by the alienator

1 month

Exception thereof are the cases when the alienator (seller, donor etc.):

***** *In other words, this means that if you purchased or otherwise acquired an apartment, you can resell it (donate, etc.) no sooner than a month later*



inherited real estate



allocated a share in the joint property

(most often this means the division of the spouses' joint property under agreement or under court decision)

