



# **War in Ukraine, a challenge for legal normality**

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FORCE MAJEURE AND EXTRAORDINARY MECHANISMS FOR THE IMPLEMENTATION OF  
CONTRACTS: UKRAINE'S EXPERIENCE IN THE WAR WITH RUSSIA.

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**Abstract.** The article examines force majeure as a ground for exemption from liability for breach of contractual obligations. The relevant events (acts, phenomena) are caused by objective factors independent of the will of the parties and are of an extraordinary and inevitable nature.

The institution of force majeure is of great scientific and practical importance, and these issues are particularly relevant due to the military actions resulting from the armed aggression of the Russian Federation, which caused the destruction of industrial facilities, suspension of operations of enterprises, restrictions on export/import and settlement operations, etc.

The author analyses the concept and signs of force majeure and notes that such circumstances differ from the grounds for termination of a contract or reduction of penalties in the course of court proceedings. The legal positions on the qualification of force majeure are presented, taking into account the case law of the Supreme Court. The article focuses on the procedure for documenting force majeure and the consequences of violating the established procedure, noting the need for proper documentation of each case of such circumstances and proof of a direct causal link between the relevant events and the failure to fulfil a specific contractual obligation.

The author examines the mechanisms of state intervention in the economic sphere with the aim of protecting the most vulnerable sections of the population. One such mechanism is the presumption of force majeure for certain consumer contracts.

**Keywords:** force majeure, force majeure, extraordinary circumstances, termination of the contract, certificate of force majeure, Russian military aggression against Ukraine.

The ongoing situation in Ukraine has made it impossible for us to fulfill our contractual obligations due to the military actions of the Russian Federation against Ukraine. In this context, the concept of 'force majeure' arises, which is commonly referred to as 'force majeure' in the Ukrainian legal system.

The presence of the force majeure provision allows for the balancing of contractual obligations. The legal construct of force majeure allows a party to claim that there has been a material change in circumstances in the contractual relationship, which is the basis for termination, amendment of the contract, or release of the party from liability for breach of contract<sup>63</sup>.

It is worth noting that the term 'force majeure' is not defined in the civil legislation of Ukraine. As per Article 617 of the Civil Code of Ukraine, it is possible for a person to be exempted from liability for breaching an obligation if they can demonstrate that the breach was due to an accident or force majeure.

The definition of force majeure is elaborated in Article 218 of the Commercial Code of Ukraine. As per this article, a business entity may not be held responsible for violating a business obligation if it can prove that the obligation's proper performance was impossible due to extraordinary and unavoidable circumstances under the circumstances of the business activity, as defined by law or contract.

According to Article 14-1 of the Law of Ukraine 'On Chambers of Commerce and Industry in Ukraine'<sup>64</sup>, force majeure is defined as exceptional and inevitable circumstances that objectively render it impossible to fulfil obligations under the terms of an agreement, contract, or other regulatory acts. Force majeure may result in a significant change in circumstances, which serves as the basis for the termination or amendment of the agreement, and ultimately leads to the termination of the obligation or its modification.

It has been observed that in some foreign jurisdictions, modifications to a contract may be permitted in cases where the original terms would lead to unfair outcomes due to unforeseen circumstances<sup>65</sup>.

The Ukrainian government is currently exploring options to adapt the standard methods of fulfilling contractual obligations in light of the ongoing conflict with Russia. The legislation underwent several amendments at the legislative level in order to align the country's economy with military requirements.

For example, the Law of Ukraine No. 2120-IX of 15 March 2022 "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine with Respect to the Validity of Provisions for the Period of Martial Law"<sup>66</sup> supplemented, inter alia, the section "Final and Transitional Provisions" of the Civil Code of Ukraine with paragraph 18.

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<sup>63</sup> Kostruba, A. (2023). Fulfillment of Civil Obligations During War: Empirical Findings from Ukraine. Theory and Legal Practice. Osnabruck Research Forum 2023, Osnabruck, Germany. <https://doi.org/10.5281/zenodo.10250844>

<sup>64</sup> On Chambers of Commerce and Industry in Ukraine: Law of Ukraine of 02 December 1997, No. 671/97-VR. Access: <https://zakon.rada.gov.ua/laws/show/671/97-VR#Text>. (Accessed 01.12.2023).

<sup>65</sup> Fulfilment of the terms of the contract due to force majeure during martial law. Scientific Bulletin of Uzhhorod National University 2022. Issue 74 (1). 98-102.

<sup>66</sup> On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine on the Validity of Norms for the Period of Martial Law: Law of Ukraine dated 15 March 2022 No. 2120-IX. Access: <https://zakon.rada.gov.ua/laws/show/2120-20#Text> (Accessed 01.12.2023).

In particular, this clause currently stipulates that during the period of martial law or a state of emergency in Ukraine and within thirty days after its termination or cancellation, in case of a delay in the performance by the borrower of the monetary obligation under the agreement under which the borrower was granted a loan by a bank or other lender, the borrower is released from liability for breach of the term of performance, as well as from the obligation to pay a penalty (fine, penalty) for such delay in favour of the lender. The said clause also stipulates that the penalty (fine, penalty) and other payments provided for in the relevant agreements that have accrued until 24 February 2022 inclusive for delayed performance (non-performance, partial performance) under such agreements shall be written off by the lender (creditor).

In addition, the Law No. 2120-IX added paragraph 6 to Section IV "Final and Transitional Provisions" of the Law of Ukraine "On Consumer Credit"<sup>67</sup>.

This clause stipulates that during the period of martial law or state of emergency in Ukraine and within thirty days after its termination or cancellation, in case of the consumer's delay in fulfilling his obligations under a consumer credit agreement, the consumer is exempted from liability to the creditor for such delay.

If such a delay is allowed, the consumer is released, in particular, from the obligation to pay the lender a penalty (fine, penalty) and other payments stipulated in the consumer loan agreement for the delay (non-fulfilment, partial fulfilment) of the consumer's obligations under such an agreement.

In addition, Law No. 2120-IX also amended Section VI "Final Provisions" of the Law of Ukraine "On Mortgage"<sup>68</sup>.

This clause suspends certain provisions of the Law of Ukraine "On Mortgage" concerning the exercise of the mortgagee's right to acquire ownership of the mortgaged property, the exercise of the mortgagee's right to sell the mortgaged property and the eviction of tenants from residential buildings and premises mortgaged. During the period of martial law and within 30 days of its termination (cancellation), the lender's rights are significantly restricted. In particular, the lender is not entitled to

- ✓ *Increase the interest rate (except when the variable interest rate is fixed in the contract);*
- ✓ *impose fines, penalties, 3% per annum, inflation losses or other types of liability in the event of late payment;*
- ✓ *demand repayment of the debt in full or, even worse, in advance (if the agreement provides for certain specific repayment terms);*
- ✓ *prevent the mortgagee from taking possession of the mortgaged property, selling the property or evicting the tenants during this period.*

In effect, the borrower is given the option of defaulting on the loan (not making payments according to the schedule) and there are no penalties for doing so.

The outbreak of armed aggression against Ukraine and the imposition of martial law throughout the country have had a significant impact on the regulation of labour relations.

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<sup>67</sup> On consumer lending: Law of Ukraine of 15 November 2016 No. 1734-VIII. Access: <https://zakon.rada.gov.ua/laws/show/1734-19#Text> (Accessed 01.12.2023).

<sup>68</sup> On mortgage: Law of Ukraine of 05 June 2003, No. 989-IV. Access: <https://zakon.rada.gov.ua/laws/show/898-15#Text>. (Accessed 01.12.2023).

In particular, in order to adapt labour legislation to the realities of war, Law No. 2136 of 15 March 2022 "On the Organisation of Labour Relations under Martial Law"<sup>69</sup> was adopted. As a general rule, the Labour Code of Ukraine stipulates that an employee has the right to terminate an employment contract concluded for an indefinite period by giving two weeks' written notice to the employer (Article 38), whereas during martial law, according to Law No. 2136, an employee may terminate an employment contract at any time on his or her own initiative. During the period of martial law, an employee may be dismissed at the employer's initiative during the period of his temporary incapacity to work, as well as during the period of leave. The new concept of suspension of an employment contract is introduced.

Suspension of an employment agreement is a temporary cessation by the employer of providing the employee with work and a temporary cessation by the employee of performing work under the concluded employment agreement in connection with armed aggression against Ukraine, which excludes the possibility of both parties to the employment relationship performing the duties stipulated in the employment agreement.

Based on the analysis of the above amendments, it can be concluded that the consequences of delaying the performance of an obligation in the area of high public interest are now sufficiently clearly regulated.

In addition to the above-mentioned legal structures, there are a large number of other civil law contracts: sale and purchase agreements, lease agreements, contractor agreements, etc. The situation in legal relations under such contracts is quite different. The legislator has not created a special mechanism for such contracts in times of war. Therefore, unlike in the case of loan agreements, in the case of other agreements the parties must apply the general principles of proving the facts to which the party refers in support of its position. In other words, the party to the agreement has to prove that the obligation was not fulfilled because of martial law, which can be the basis for exemption from liability. In this case, however, there is no presumption of force majeure.

In summary, it is worth recalling the following. The national legislation of Ukraine provides for extraordinary rules for the operation of special agreements, the subject matter of which is related to the high public interest and the need to protect human rights. This exceptional character is based on the presumption of force majeure and the unilateral adjustment of the content of the agreement in the interests of the individual. This is done through the legislative influence of the State on private relations.

On the other hand, there is a reasonable limit to state intervention in the economic processes of society. This limit is exclusively the public interest. For this reason, the majority of agreements do not contain any relevant exceptional provisions. This means that the parties must prove the existence of force majeure.

It can be observed that while loan agreements automatically relieve the borrower of any liability in the event of default, regardless of whether it was directly affected by the military operations, other agreements require the party to prove not only the inability to fulfil its obligations but also the causal link between the inability to fulfil the obligation and the military operations.

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<sup>69</sup> On the organisation of labour relations under martial law: Law of Ukraine of 15 March 2022 No. 2136-IX. Access. <https://zakon.rada.gov.ua/laws/show/2136-20#Text>. (Accessed 01.12.2023).

In this context, not only the completeness of the legal consolidation of the fact of establishing force majeure (*force majeure*), but also the practice of applying the relevant legal provision becomes relevant.

In its practice, the Supreme Court has identified the following elements of force majeure

- ✓ *they are independent of the will of the participants in civil relations and are of an extraordinary nature;*
- ✓ *unavoidable;*
- ✓ *make the impossibility of fulfilment of obligations under the given conditions of economic activity.*

An important detail is that even the occurrence of an event of force majeure does not release the other party forever from fulfilling its previous contractual obligation, but only for a certain period of time while the extraordinary or insurmountable circumstance is in force.

In other words, force majeure is considered to be a circumstance beyond the control of the obligor. The national legal system recognises armed conflict, hostilities and undeclared war as force majeure. Accordingly, the improper performance of the contract is not a consequence of unlawful acts and excludes the existence of fault as a prerequisite for liability. Notice of force majeure must be given in writing and in accordance with the procedure laid down in the contract.

In accordance with its Rules of Procedure, the Ukrainian Chamber of Commerce and Industry, as an authorised institution, decided in February 2022 to simplify the procedure for certifying force majeure during martial law and published a general official letter on the certification of force majeure on its website. This populist decision certainly draws attention to the existence of extraordinary circumstances in the Ukrainian economy. At the same time, it cannot in itself be a proper proof of force majeure in a particular case. We can explain our opinion by the fact that the relevant letter does not specify the persons, the subject of the agreements and the conditions of force majeure in a particular case.

**This leads to the first conclusion. Military aggression alone cannot serve as an unconditional condition for exemption from liability on the grounds of force majeure.** In other words, the debtor must prove not only the existence of such circumstances of force majeure per se, but also that these circumstances constituted force majeure for the particular contract.

The correctness of the idea of individualising the issue of exemption from liability and determining whether the impossibility of performance is conditioned by specific force majeure circumstances is confirmed by the court's reasoning.

In the period from March to November 2023, the courts issued about 300 decisions in cases related to the subject of the discussion, about 50 of which were reviewed by the appellate courts, with 90% of the cases in which the first instance and appellate courts confirmed the arguments based on the following criteria<sup>70</sup>.

- ✓ *lack of direct causal link between the war and the breach of obligations (court decisions in cases No. 910/4001/22, No. 910/7967/22, No. 910/7141/22, No. 910/7134/22);*

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<sup>70</sup> Martsenko N. S., Hera V. O., Force Majeure in the Private Law of the European Union and Ukraine: Comparative Legal Analysis. Problems of Civil and Commercial Law 2022. Issue 4 (2). 149- 156.

- ✓ *the reference of the Ukrainian Chamber of Commerce and Industry does not meet the requirements for force majeure certificates according to the legal criteria (court decisions in cases No. 910/4879/22, No. 917/353/22, No. 912/2427/21);*
- ✓ *lack of proper notification of force majeure (court decision in case 912/507/22).*

Such legal conclusions were summarised by the Supreme Court over several years and formed in the form of the legal position of the court in 2018-2022<sup>71</sup> in the resolution of the Supreme Court of 14 February 2018 in case No. 926/2343/16, the resolution of the Supreme Court of 16 July 2019 in case No. 917/1053/18<sup>72</sup>, the resolution of the Supreme Court of 17 December 2020 in case no. 913/785/17, the resolution of the Supreme Court of 25 November 2021 in case no. 905/55/21, the resolution of the Supreme Court of 25 January 2022 in case no. 904/3886/21<sup>73</sup>, the resolution of the Supreme Court of 19 August 2022 in case no. 908/2287/17, etc.

In the Resolution of the Supreme Court of 28 October 2022 in case No. 904/3910/21<sup>74</sup>, the Resolution of the Supreme Court of 14 September 2022 in case No. 420/143/22<sup>75</sup> assessed the introduction of martial law in Ukraine and the existence of force majeure in relation to the validity of the grounds for failure to meet procedural deadlines.

The Court stated that the mere introduction of martial law, without the participant in the proceedings proving a causal link between its introduction and the missed procedural deadline, does not indicate the validity of the reasons for such a missed deadline and therefore does not constitute a basis for its extension.

In the resolution of the Supreme Court of 16 July 2019 in case No. 917/1053/18, the court stated that circumstances of force majeure are not prejudicial, and if they occur, the party relying on them as a basis for the impossibility of proper performance of the obligation must prove not only their existence, but also that they constitute force majeure in this particular case<sup>76</sup>.

The court did not take into account the defendant's arguments on the existence of force majeure, as evidenced by the letter from the Ukrainian Chamber of Commerce and Industry, because this evidence does not in any way confirm the fact that the defendant was unable to perform its obligations under the contract as a result of the military aggression of the Russian Federation against Ukraine, which led to the imposition of martial law.

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<sup>71</sup> Review of the case law of the Economic Court of Cassation as part of the Supreme Court (current case law 2022). Access: [https://supreme.court.gov.ua/userfiles/media/new\\_folder\\_for\\_uploads/supreme/oglyady/Oglyad\\_KGS\\_07\\_08.pdf](https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/oglyady/Oglyad_KGS_07_08.pdf) (Accessed 01.12.2023).

<sup>72</sup> Resolution of the Supreme Court of 16 July 2019 in case No. 917/1053/18. Access. <https://verdictum.ligazakon.net/document/83087003>. (Accessed 01.12.2023).

<sup>73</sup> Resolution of the Supreme Court of 25 January 2022 in case No. 904/3886/21. Access. [https://verdictum.ligazakon.net/document/102797678?utm\\_source=biz.ligazakon.net&utm\\_medium=news&utm\\_content=bizpress01&\\_ga=2.2224624.1717085491.1705755238-321090010.1700739015#\\_gl=1\\*6h50zt\\*\\_gcl\\_au\\*MzUwMjc5OTU2LjE3MDA3MzkwMTQ](https://verdictum.ligazakon.net/document/102797678?utm_source=biz.ligazakon.net&utm_medium=news&utm_content=bizpress01&_ga=2.2224624.1717085491.1705755238-321090010.1700739015#_gl=1*6h50zt*_gcl_au*MzUwMjc5OTU2LjE3MDA3MzkwMTQ). (Accessed 01.12.2023).

<sup>74</sup> Resolution of the Supreme Court of 28 October 2022 in case No. 904/3910/21. Access. <http://iplex.com.ua/doc.php?regnum=107049505&red=100003d28996ee81cdad7c6ff251784024d28a&d=5>. (Accessed 01.12.2023).

<sup>75</sup> Resolution of the Supreme Court of 14 September 2022 in case No. 420/143/22. Access. <http://iplex.com.ua/doc.php?regnum=106243160&red=1000030b0cb562d079d93031d03b24e3621010&d=5>. (Accessed 01.12.2023).

<sup>76</sup> Boyarchukov M., Force majeure during the war: judicial practice, Yurydychna Gazeta Online, 22 November 2022. Access: <https://yur-gazeta.com/dumka-eksperta/forsmazhor-pid-chas-viyni-sudova-praktika.html> (Accessed 01.12.2023).



**This leads to the second conclusion. Circumstances of force majeure must be proven in each case of their occurrence.**

The martial law on the territory of Ukraine does not in itself mean that the defendant is unable to carry out its business activities and raise funds. The defendant has not provided evidence that the company has ceased to operate as a result of martial law, that all (or part of) the employees, the head of the company, other officials have been mobilised and are part of the Armed Forces of Ukraine, that they are temporarily not performing professional duties in connection with military operations, that all or part of the movable property of the company is involved in certain activities, which would prevent the business entity from carrying out business activities during martial law.

Special attention should be paid to the importance of notifying the other party of the occurrence of force majeure in the manner prescribed by the contract. Failure to do so may result in the loss of all legal privileges of force majeure.

**The third conclusion to be drawn from the above is that, in order for force majeure to apply, it is important that there be a causal link between the force majeure and the impossibility of performing the contract.**

Thus, the imposition of martial law in Ukraine does not mean that a party to a legal relationship is deprived of the possibility of its proper performance.

Force majeure as a circumstance of force majeure requires proof and proper legal registration by the parties in court. The mere existence of such extraordinary and unavoidable circumstances does not exempt a party from liability for breach of its obligations.

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