



Quarantine as a force majeure
in Ukraine: what does this mean
for business?

GOLAW

Quarantine as a force majeure in Ukraine: what does this mean for business?

On March 17, 2020 a law (bill No. 3219) came into force that included quarantine established by the Cabinet of Ministers of Ukraine in the list of force majeure events. Will this be a tool that allows Ukrainian businesses to drop their obligations without any consequences? In most cases – no, because force majeure is not as easy as it might seem at first glance.

Is quarantine always a force majeure event?

The Law on Chambers of Commerce in Ukraine provides the following definition:

“Force majeure events (circumstances of insuperable force) are extraordinary and inevitable circumstances that objectively make it impossible to fulfill the obligations stipulated in the agreement (contract, transaction, etc.) and obligations under legislative and other normative acts.” After this definition the law provides the list of circumstances that may be considered as force majeure. **This list has recently been supplemented by quarantine.**

It should be noted that this list is not exhaustive – **It ends with the word “etc.”**. That is, the absence of a direct reference to “quarantine” does not mean that any event which is not explicitly stated in the law cannot be declared as force majeure. In addition, circumstances such as the “epidemic” and “long-term interruptions in transport, governed by the relevant decisions and acts of state authorities”, were previously included in this list. However, a clear statement in the law that quarantine can be recognized as a force majeure is likely to make it easier for businesses to confirm this fact.

We knowingly write that quarantine “may be recognized” instead of “is recognized” as force majeure. **The mere rule that quarantine is in the list of force majeure events is not enough to apply it to your business and your contracts.**

How to confirm force majeure?

The only admissible evidence to confirm the existence of force majeure is a **certificate** issued by the **Ukrainian Chamber of Commerce and Industry** and regional chambers of commerce and industry. Such a certificate **must be obtained separately for every contract** regarding which force majeure event has arisen.

A certificate of force majeure is **not automatically issued**. As can be seen from the definition of force majeure, these circumstances **must objectively prevent the fulfillment of contractual or any other obligation**. This means that in order to obtain a certificate of force majeure, an entity must prove that it cannot fulfill its particular obligation(s) because of the quarantine. In other words, if there were no quarantine, there would be no obstacle to fulfill this obligation. The burden of proving such causation rests with the applicant.

What does the case law say?

A certificate of force majeure, although mandatory, is not sufficient. There are court rulings where the Supreme Court did not declare the occurrence of force majeure event despite having a certificate issued by Chamber of Commerce (Case No. 926/2343/16, Case No. 902/368/16, Case No. 904/1224/18). In addition, the Supreme Court [concluded](#) last year that there is no provision about force majeure in tax legislation, therefore even a certificate of force majeure will not help in disputes with tax authorities (case no. 804/15246/15).

What is in practice?

Imagine that someone's business was badly affected by the quarantine and that person was able to obtain certificates of force majeure regarding its contracts. However, this is not a permit for non-performance of the contractual obligations. The most interesting thing about force majeure is that it releases from liability for non-performance, **but does not absolves from the performance of the obligation itself**. In other words, force majeure is an exemption from fines and penalties, but not from the payments stipulated in the contract. Moreover, provided for in Art. 625 of the Civil Code of Ukraine “compensatory” 3% per annum and inflationary losses are maintained regardless of the presence of force majeure – in this regard the Supreme Court of Ukraine [spoke](#) in 2017 (Case No. 913/869/14).

On the other hand, we recommend reviewing your contracts where the force majeure clause may absolve not only from liability but also from the obligation itself.

Also, in some cases **the law may also exempt from the obligation. An example is the obligation to pay rent**. At present, all shopping and entertainment centers in Kyiv are closed which makes it impossible for tenants to conduct business activities, that is, to use the leased premises for the intended purpose.

In this case, tenants can take advantage of the provisions of Part 6 of Art. 762 of the Civil Code of Ukraine, under which the tenant is exempted from the obligation to pay the rent for the whole period during which the tenant was deprived of the opportunity to use the premises due to circumstances beyond its control. Thus, the tenant does not even need to obtain a certificate of force majeure – it is sufficient to record the fact that it is impossible to use the leased premises.

Conclusions

Undoubtedly, a certificate of force majeure is a very useful business tool. It allows to get rid of fines and penalties, as well as to delay the fulfillment of the obligation until the force majeure expires. But obtaining it is not an easy procedure. It is important to think carefully about whether this is applicable to your business. Consideration should also be given to modifying existing contractual agreements with counterparties. And, of course, **there is no need to fear that all agreements suddenly became unenforceable due to the inclusion of quarantine into the list of force majeure events**.

Take care and stay safe!

If you have additional questions, please contact:

Iryna Kalnytska
Partner, Attorney at law

i.kalnytska@golaw.ua

COVID-19

Legal Support Team

With the need to effectively manage the business crisis caused by the COVID-19 spread, GOLAW created a team to support you on any related legal issues in Ukraine. Keep up to date with the recent changes our government makes to deal with COVID-19 and mitigate its consequences.

We are stronger together. Stay safe.



Max Lebedev
Partner, Attorney at law

m.lebedev@golaw.ua
+38 066 485 00 03

Force majeure | Issues of Corporate law |
Migration issues



Iryna Kalnytska
Partner, Attorney at law

i.kalnytska@golaw.ua
+38 096 131 87 67

Taxation issues and tax audits |
Financial Restructuring | Lease and rent payments during quarantine



Kateryna Manoylenko
Partner, Attorney at law

k.manoylenko@golaw.ua

+38 063 435 77 93

Litigation risk management | Consultations regarding insolvency
and corporate recovery issues



Kateryna Tsvetkova
Counsel, Attorney at law

k.tsvetkova@golaw.ua

+38 067 444 02 85

Labour issues during quarantine

© 2020 GOLAW. All rights reserved. This report has been prepared by GOLAW for information purposes only. Although the information in this report comes from sources we believe to be reliable, and although we have made every effort to ensure its accuracy at the time of publication, we make no warranty, express or implied, of this report's usefulness in predicting the future performance. Please, be advised that this report is not a legal advice and may be used only for obtaining general overview about this subject matter. In order to avoid risks of upholding any decision based on information contained in this document, please, consult a qualified specialist of our firm in each particular case. GOLAW shall not bear responsibility if information from this report was used without consulting a qualified specialist regarding each particular matter. Any investment decision made on the basis of this digest shall be made at the investor's sole discretion, and under no circumstances shall GOLAW or any of its employees or related parties be liable in any way for any action, or failure to act, by any party, on the basis of this report. This report, or any part of it, is free to reproduce, distribute and quote, referencing GOLAW is required.