

Force Majeure and Sanctions

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General Rule

Force majeure exempts an affected party from liability for failure to perform or improper performance of its obligations while carrying out business activity, where proper performance is *temporarily impossible*.¹

Accordingly, the starting point in application of force majeure is to determine whether the performance of an obligation has become impossible in full or in part. In the current circumstances, the "special operation in Ukraine" itself does not make it objectively impossible to carry out work, render services or perform other obligations in the Russian Federation. If any sanctions, countersanctions or any other restrictions imposed inside or outside Russia or their consequences make it impossible for a debtor to perform its obligations, such event may fall under force majeure.

A debtor has to be ready to prove the force majeure circumstances in court, subject to the previous explanations of the Russian Supreme Court, namely:²

1. Occurrence and duration of **extraordinary** and **unavoidable** circumstances. "Extraordinary" means that the circumstances are exceptional and their occurrence is not usual in the given conditions (i.e. for a reasonable person acting as debtor, with all information that was available to the debtor and that the debtor could have known, it was impossible to foresee such circumstances).³ "Unavoidable" commonly means that, any participant of civil law transactions, carrying out the same activities as the debtor, would not have been able to avoid occurrence of this circumstance or its consequences.
2. Existence of a **causal link** between the force majeure circumstances and the failure or delay in the performance of obligations. Although this is currently a key element, and courts often refused to apply Article 401 (3) of the Russian Civil Code due to failure to prove a causal link, the judicial practice has not elaborated any explicit standard to prove existence of a causal link. The following standard can be found in academic journals: "it is obvious from the circumstances of the case that absent said force majeure circumstances the non-performance would not have happened".⁴

¹ Article 401 (3) of the Russian Civil Code.

² See Paragraphs 8-10 of Ruling No. 7 dated 24 March 2016 of the Plenum of the Russian Supreme Court as amended on 22 June 2021; see also a similar answer to question 7 of Overview No. 1 of selected questions related to application of legislation and measures to control the spread of the novel coronavirus infection (COVID-19) in the Russian Federation as approved by the Presidium of the Russian Supreme Court on 21 April 2020 (**Russian Supreme Court's COVID Overview No. 1**). It is quite likely that the Russian Supreme Court will soon provide its explanations in connection with the circumstances resulting from the "special operation in Ukraine".

³ A.G. Karapetov (ed.). Contract and Tort Law (General Part): Article-by-Article Comments to Articles 307-453 of the Civil Code of the Russian Federation (M-Logos, 2017), Section 3.4(a) to Article 401 of the Civil Code of the Russian Federation.

⁴ D.A. Arkhipov. Modification of Obligations Subject to Force Majeure: Theory and Practice (Judge, 2020 – issue 7), pp. 59-64.



3. The occurrence of force majeure circumstances does not depend on the will or actions of a party to the obligation, i.e. its **external nature**.
4. Reasonably expected good faith steps taken by a party to exclude (mitigate) possible risks and the damage incurred by the creditor. First of all, this requirement involves **notification** of the counterparty of the occurrence of force majeure circumstances and their subsequent change.⁵ Secondly, it includes good faith steps by the debtor to **perform the affected obligation in alternative means**.

Particular Cases

Whether occurred or occurring circumstances fall under force majeure or not depends on the circumstances of a particular case. The same approach is assumed by the Moscow Chamber of Commerce and Industry: "In order to recognize the sanction restrictions as force majeure, it is necessary to assess their impact on a party's failure to perform the violated contractual obligation. Thus, restrictive measures taken by a foreign state (sanctions) may qualify as force majeure only after the contract and other documents have been thoroughly reviewed".⁶

However, it should be taken into consideration that courts conventionally did not define force majeure circumstances to include a financial and economic crisis, currency fluctuations, national currency devaluation, lack of funds, increase in prices of goods and services, etc. After 2014 sanctions, the judicial practice has witnessed both decisions stating that sanctions may constitute force majeure and vice versa.⁷ Even embargo has not been qualified as force majeure in some instances, since the debtor was able to purchase similar goods from another seller.⁸

By virtue of law and pursuant to the explanations by the Russian Supreme Court, force majeure circumstances have not usually included violation of obligations by debtor's counterparties or wrongful acts by its representatives, lack of necessary goods on the market or debtor's lack of necessary funds.⁹ However, in 2020, the Russian Supreme

⁵ However, failure to comply with the requirement to notify the creditor does not entail non-recognition of the events as force majeure, but obliges the debtor to compensate the creditor against the losses incurred due to such failure.

⁶ <https://mostpp.ru/projects/uslugi-mtpp-dlya-biznesa/vydacha-zaklyucheniya-o-nalichii-obstoyatelstv-nepredolimov-sily-fors-mazhore/>; see also explanations by other regional Chambers, for example, by the South Ural Chamber of Commerce and Industry <https://chel.dk.ru/news/237165226>.

⁷ See, for example, Award of International Commercial Arbitration Court of the Chamber of Commerce and Industry dated 3 July 2019 in case No. M-243/2018.

⁸ Ruling of Federal Antimonopoly Service of the North-Western District dated 27 June 2014 in case No. F07-6569/2013.

⁹ Article 401(3) of the Russian Civil Code, Paragraph 8 of Ruling No. 7 dated 24 March 2016 of the Plenum of the Russian Supreme Court as amended on 22 June 2021.



Court admitted that even a statutorily excluded case when a debtor does not have necessary funds, in certain circumstance could be held as a force majeure event.¹⁰

The current Russian legislative and law-enforcement practice shows that the probability of recognition of sanctions and other associated circumstances as force majeure becomes considerably higher.

Particularly, the CCI RF has long been defining force majeure to include shipping restrictions, prohibitive measures taken by foreign states, ban on trading transactions, including with certain countries, caused by imposition of international sanctions.¹¹ In March 2022, the CCI RF confirmed that restrictive and other special measures taken by foreign states' governments may qualify as force majeure circumstances.¹² Besides, according to mass media, the CCI RF has prepared a draft law amending the Russian Civil Code to exempt entrepreneurs from liability if they fail to perform their obligations to their counterparties, including due to restrictions on deliveries of imported components imposed by Western countries as part of sanctions.¹³

On the other hand, CCIs of constituent entities are cautious about issuing force majeure certificates regarding cases which are typical in the current situation. For example, the Moscow CCI points out that force majeure does not include failure to deliver goods into Russia caused by inability to make payments to a foreign supplier due to sanctions against the bank/refusal by foreign logistics companies and carriers to transport goods from abroad.¹⁴ CCIs of constituent entities seem to be expecting the CCI RF to issue explanations regarding typical sanction cases and continue to rely on existing force majeure rules.

However, even the CCI RF itself has no current clear stance on all relevant cases. The President of the CCI RF sent a letter to the Chairman of the Russian Supreme Court and requested explanations on whether the situation when a Russian manufacturer becomes unable to perform its contractual obligations due to sanction restrictions regarding delivery of necessary foreign component parts into Russia can in the current circumstances be considered as force majeure for the Russian manufacturer, even if the latter has not entered into a purchase (delivery) agreement with the foreign counterparty regarding foreign component parts.¹⁵

Judging by legislative initiatives, the current regulation does not allow defining force majeure events to include certain situations which, according to public authorities'

¹⁰ Answer to question 7 of Russian Supreme Court's COVID Overview No. 1.

¹¹ Section 1.3 of Regulation on Procedure for Certification of Force Majeure Events by CCI RF (as amended on 26 January 2022). See also Section 1.3 of Decree No. 7-2 dated 24 June 2021 of the CCI RF Panel "On Approval of Regulation on Certification of Force Majeure Circumstances by Authorised Chambers of Commerce and Industry under Agreements (Contracts) Concluded within the Russian Domestic Entrepreneurial Activity".

¹² <https://news.tpprf.ru/ru/news/3058941/>; <https://news.tpprf.ru/ru/news/3067162/>.

¹³ <https://tass.ru/ekonomika/14068959>.

¹⁴ <https://mostpp.ru/projects/uslugi-mtpp-dlya-biznesa/vydacha-zaklyucheniya-o-nalichii-obstoyatelstv-nepredolimoy-sily-fors-mazhore/>.

¹⁵ <https://news.tpprf.ru/ru/news/3058941/>.



judgement, shall fall under force majeure amid the imposed restrictions. Thus, the Russian Prime Minister has mandated the Ministry of Justice and the Ministry of Economic Development to prepare proposals enabling recognition of Western sanctions as force majeure circumstances for those who failed to perform their contractual obligations.¹⁶ On 22 March 2022, a draft law amending the Russian Civil Code to include new provisions, originated by P.V. Krashennnikov, was introduced to the Russian State Duma.¹⁷

According to draft law No. 92282-8, it is proposed to introduce the following provisions:¹⁸

1. An obligation shall be terminated if its performance objectively becomes conclusively impossible due to sanctions.
2. A party shall not be liable for failure to perform or improper performance of its obligations if it proves that such performance has objectively become temporarily impossible due to sanctions (it is clarified that in order to ensure performance of obligations, the debtor shall not be deemed to have failed to perform the obligation, unless the parties agreed otherwise after enactment of the law).
3. A party may avoid the contract if the other party fails to perform or improperly performs its obligation due to an objective temporary impossibility to perform it because of sanctions (however, according to the general rule, the ways to ensure performance of a contractual obligation shall continue securing obligations that survive the repudiation or are connected with the same). The party which is entitled to avoid the contract shall be obliged to give the other party a reasonable notice of its intention to repudiate the contract.
4. According to an agreement entered by the parties after 23 February 2022, a security payment securing an obligation may involve contribution of shares, bonds or other securities or valuables to be transferred under the secured obligation or not to be transferred.

According to the draft law, it is proposed that it should not apply to persons who contributed to "unfriendly actions of foreign states and international organisations involving introduction of restrictive measures against citizens of the Russian Federation and Russian legal entities", that is to imposition of sanctions.

While legislative and law enforcement officials are seeking common ground concerning force majeure and sanctions, it is recommended to take the following steps to mitigate risks:

¹⁶ <https://www.forbes.ru/finansy/459403-pravitel-stvo-sobiraetsa-priznat-sankcii-fors-mazorom-dla-biznesa>.

¹⁷ <https://sozd.duma.gov.ru/bill/92282-8>.

¹⁸ See also other provisions relating to both loans issued by foreign controlling entities to Russian joint stock companies and amendments of Part IV of the Russian Civil Code.



Recommendations

- Check the force majeure clause in your contract taking into account provisions supplementing or amending general rules provided for in law or court practice (e.g. some force majeure events being excluded or included).
- Check whether the obligation can be performed by alternative means. For example, logistic constraints impede delivery of goods or technologies from abroad to the debtor, while their analogues may be purchased in the Russian Federation or from friendly countries. Failure to act accordingly may cause the court not to treat the case as force majeure.
- Promptly notify your counterparty about impossibility to perform your obligation giving description of the events impeding such performance and keep notifying the counterparty about any changes in these circumstances (the contract may provide for particular timeframe and procedure for such notification).
- Consider applying to the CCI RF or a CCI of a constituent entity, depending on the nature of the transaction, for a force majeure certificate. Obtaining such certificate is not obligatory to prove force majeure circumstances, and such certificate does not guarantee that courts/arbitrators will agree with the CCI's opinion without proving all elements of force majeure in the court/arbitration. However, a CCI certificate would be good additional evidence that the obligations cannot be performed. Please note that some contracts may oblige a party to obtain a certificate for proving force majeure circumstances, and in case no such certificate is issued, the court can draw adverse conclusions. Moreover, some courts interpret obtaining such certificate as such party's acting in good faith.
- Collect and record all documentary proof of impossibility to perform obligations. For example, with respect to COVID-19, the CCI RF requested, among others, debtor's by-laws concerning the company's activities during the effective period of the President's Decrees on non-working days.¹⁹
- Remember that force majeure itself does not terminate debtor's obligations, unless their performance remains impossible after the force majeure circumstances are eliminated.²⁰ The creditor is not deprived of the right to withdraw from the contract if, as a result of delay caused by force majeure circumstances, such creditor has lost interest in the performance.²¹ In this case, the debtor is not liable to the creditor for losses caused by the delay in performance of obligations due to force majeure.²² If the creditor has not

¹⁹ Letter No. 04v/0086 dated 10 April 2020 of the CCI RF "On Procedure for Preparation of Force Majeure Certificates in Connection with Spread of Coronavirus Disease (COVID-19)".

²⁰ Paragraph 8 of Ruling No. 7 dated 24 March 2016 of the Plenum of the Russian Supreme Court as amended on 22 June 2021.

²¹ *Id.*

²² *Id.*



withdrawn from the contract, the debtor shall, after termination of force majeure circumstances, perform the obligations within a reasonable period of time²³ (construction contracts often allow a pro rata extension of the work completion time).

- If performance of an obligation is still possible but is not economically feasible/profitable, consider applying other measures, for example, material change in circumstances or a "change in law" clause that is common for construction contracts.
- If force majeure events caused full or partial objective impossibility to perform an obligation which continues (which cannot be eliminated), such obligation shall be terminated in full or to the respective extent pursuant to Articles 416 and 417 of the Russian Civil Code.
- Keep pace with the legislation, court explanations and CCI guidelines.

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²³ See, for example, answer to question 5 of Russian Supreme Court's COVID Overview No. 1.

