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# **Force Majeure: Kazakhstan Court Practice**

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Almaty Astana Belgrade Bratislava Budapest Bucharest Istanbul Kyiv Prague Sofia Tashkent

## **Court Practice Search (limitations, disclaimers)**

1. Search: judicial acts issued during 2013-2019 (2020).
2. Search: publicly available judicial acts – *Paragraph* database.
3. Search: some key words (especially related to 359.2).
4. Judicial acts: both factual descriptions and legal analysis are usually not detailed and often not very clear.
5. Courts are not uniform in their application of the law.
6. The Kazakhstan Supreme Court's Clarification of May 6, 2020, clarified only some issues related to force majeure.
7. This presentation is not legal advice.

## Civil Code - Article 359

1. ...
2. A person that did not perform, or improperly performed, an obligation in the course of entrepreneurial operations, shall bear property liability **unless** [the person] proves that proper performance was impossible due to insuperable force, i.e., circumstances extraordinary and unavoidable under conditions at hand (natural calamities, military actions, etc.). Such circumstances do not include, among other things, the absence of goods, works, or services necessary for the performance.
3. The legislation or a contract may provide other grounds for liability and for exemption from liability.

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3. The **legislation** or a **contract may provide other grounds** for liability and for **exemption from liability**.

## Why start with Article 359.3?

1. It allows parties to a contract to establish:
  - contractual grounds for liability; and/or
  - contractual grounds for exemption from liability.
2. If there is a contractual ground, it *usually* overrides Art. 359.2.
3. **The contractual ground** (e.g., the contractual concept of “*force majeure*” and its effect) **may be different from the statutory ground** (i.e., from “*impossibility of proper performance* due to *insuperable force*”).

***Assumptions: (i) no contractual clause on force majeure; or  
(ii) the contractual clause is identical to Art. 359.2***

## Why start with Article 359.3?

3. The legislation or a contract may provide other grounds for liability and for exemption from liability.

## Also remember Article 379.

Article 379. Legal relations arising out of a contract

***With respect to obligations arising out of contracts, the general provisions on obligations*** ([i.e.,] articles 268-377 of the [Civil Code) ***apply if otherwise is not provided by provisions of this chapter*** [i.e., of Chapter 22 of the Civil Code, which consists of articles 378-392] ***or by rules*** [of the Civil Code] ***on different types of contracts*** [i.e., by articles 406-990].

## Civil Code - Article 359.2

A person that did not perform, or improperly performed, an obligation in the course of entrepreneurial operations, shall bear property liability unless [the person] proves that proper performance was impossible due to insuperable force, i.e., circumstances extraordinary and unavoidable under conditions at hand ... .

- 1) Does Article 359.2 apply in this particular case? Are there any applicable statutory provisions other than 359.2? Are there any contractual provisions on force majeure?
- 2) Does an event constitute “*insuperable force*”?
- 3) What is “*impossibility of proper performance*”?
- 4) Is there a causal link between the event of “*insuperable force*” and “*impossibility of proper performance*”?
- 5) Did the debtor (obligor) properly notify the creditor (obligee)? What if not?

# Notification

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## Civil Code - Article 359.2

2. A person that did not perform, or improperly performed, an obligation in the course of entrepreneurial operations, shall bear property liability unless [the person] proves that **proper performance was impossible** due to **insuperable force**, i.e., circumstances extraordinary and unavoidable under conditions at hand (natural calamities, military actions, etc.). Such circumstances do not include, among other things, the absence of goods, works, or services necessary for the performance.

**Article 359 does not provide the debtor's obligation to notify the creditor of the impossibility of proper performance due to insuperable force.**

**Is there such a statutory obligation? Yes**

## Statutory obligation to notify

“**Article 628.** Circumstances of which the contractor must warn the client

**1. The contractor shall immediately warn the client** and, until receipt of instructions from the client, **suspend the work if the contractor discovers:**

1) unsuitability or shoddiness of materials, equipment, or technical documentation, provided by the client, or of a good transferred for processing by the contractor;

2) possible adverse effects for the client of carrying out the client’s instructions on how to perform the work; or

3) other **circumstances beyond the control of the contractor**, which threaten suitability or durability of the results of the work or **which make it impossible to complete the work in time.**

“**Article 628.** Circumstances of which the contractor must warn the client

**2. The contractor, who did not warn the client of the circumstances** mentioned in Clause 1 of [Article 628], or continued the work, without waiting for the expiration of a reasonable time period for response to the warning, or in the presence of a timely instruction of the client to suspend the work, **shall not have the right, when making relevant claims to the client or facing relevant claims, to refer to these circumstances.**

**For work contracts (*dogovora podriada*), Article 628 clearly provides harsh consequence for a breach of the contractor’s obligation to notify the client.**

**Case 2017\_12\_05:** *“This requirement is contained in **Article 628.1.3** of CC, according to which **a contractor must immediately notify the client** and, before receiving instructions from him, suspend work if other **circumstances beyond the contractor's control are found that ...make it impossible to complete [the work] on time.***

*Under Article 628.2 of CC, **a contractor who has not notified the client of the circumstances specified in paragraph 1 of this article ... shall not be entitled to refer to these circumstances.***

*It is established that **such notification was not sent** by the Respondent to the Claimant. Therefore, **the Respondent's arguments about the occurrence of force majeure, if the above conditions are not met, the court considers untenable.**”*

Concept of “**impossibility of proper performance**”  
 (“невозможность надлежащего исполнения”)

**Article 359.2:** “... proper performance was impossible due to insuperable force ...”

**Article 349.1:** “Violation of an obligation shall mean its non-performance or performance in an improper way (untimely, with defects in goods and works, with violation of other terms set by the content of the obligation) – improper performance. **If case of arisen impossibility of proper performance of an obligation, the debtor shall notify the creditor of that without delay**” (“незамедлительно”).

**What happens if the debtor (obligor) fails to notify (or notifies with delay) and thereby violates Article 349?** No relevant court cases were found.

There is no direct and clear answer in the Civil Code. Several possible answers: **the debtor's failure to properly notify ...**

- (i) has no legal consequences (does not deprive the debtor of its right to be released from liability on the basis of Article 359.2);
- (ii) deprives the debtor of its right to be released from liability on the basis of Article 359.2; or
- (iii) does not deprive the debtor of its right to be released from liability on the basis of Article 359.2, but leads to the debtor's liability for the failure to notify.

## Contractual obligation to notify

What if a contract provides the contractual obligation to notify ... and the debtor does not notify accordingly.

Court practice is not consistent.

**Some courts:** the debtor's failure to comply with its contractual obligation to notify deprives the debtor of its right to be released from liability.

**Some courts:** the debtor's failure to comply with its contractual obligation to notify does not deprive the debtor of its right to be released from liability.

**Some courts** apply common sense/bona fine criteria. Did the lack of notification have a material effect?

Case 2018\_02\_14: *“Moreover, the court does not take into account the [the defendant’s] argument ... on non-fulfilment ... due to force majeure circumstances because **in accordance with ... the agreement ... the party shall immediately notify on the occurrence of force majeure. [The defendant] did not send a notice on occurrence of force majeure to the claimant’s address and therefore the court comes to the conclusion that the reference to the given circumstance is not justified.**”*

Case 2019\_05\_15: *“**Violation by the supplier of the 3-day period for notification on occurrence of circumstances of insuperable force does not undermine the fact of such circumstances and violations made during [unilateral] termination and may not serve as the basis to invalidate the decision.**”*



## Contractual obligation to notify

What if a contract provides the contractual obligation to notify ... and the debtor does not notify accordingly.

- 1) If the contract does not provide for punishment for breach of the obligation to notify**, the punishment should probably be the same as for the breach of the statutory obligation provided by Article 349 of the Civil Code.
- 2) If the contract does provide for punishment for breach of the obligation to notify**, the contractual punishment should apply.

The logic is simple: the contract, on the basis of Article 259.3, modified the statutory ground for exemption from liability.

# Impossibility of proper performance

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359.2: “A person that did not perform, or improperly performed, an obligation in the course of entrepreneurial operations, shall bear property liability unless [the person] proves that proper performance was impossible due to insuperable force, i.e., circumstances extraordinary and unavoidable under conditions at hand (natural calamities, military actions, etc.). Such circumstances do not include, among other things, the absence of goods, works, or services necessary for the performance.”

What is “**impossibility of proper performance**”?

The standard is very high: it is impossibility, not difficulty

**Did the debtor take all possible measures to avoid the failure of proper performance of its obligation?**

## Did the debtor take all measures to avoid the breach?

Kazakhstan courts pay substantial attention to this question.

Case 2018\_02\_26: *“The Court, based on the provisions of ... the agreement, was clarifying **which measures were taken by the defendant to find alternative ways to perform the agreement (to deliver goods by either air transport or by rail road)**. The defendant argued that air transportation costs were several times higher and that the costs would be higher than the agreed price in the agreement and that rail transportation would take even longer. The Court believes this is covered by entrepreneurial risk. **The defendant, when submitting the price offer and signing the agreement, accepted the obligation and, therefore, was obligated to take all measures to properly fulfil it bearing entrepreneurial risk for its non-performance.**”*

**Causal link between the event of “*insuperable force*” and “*impossibility of proper performance*”**

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## Causal link

359.2: “A person that did not perform, or improperly performed, an obligation in the course of entrepreneurial operations, shall bear property liability unless [the person] proves that *proper performance was impossible due to insuperable force*, i.e., circumstances extraordinary and unavoidable under conditions at hand (natural calamities, military actions, etc.). Such circumstances do not include, among other things, the absence of goods, works, or services necessary for the performance.”

Is there a direct causal link between the event of “*insuperable force*” and “*impossibility of proper performance*”?

**Kazakhstan courts** rarely expressly discuss such causal links.

A few cases stand out.

Case 2018\_08\_01: The appellate court “cannot agree with the conclusions of the [trial] court, because the purpose of **further sale of metal scrap outside [Kazakhstan]**, purchased under the agreement in consideration, **was the purpose solely for the defendant**, while for the claimant this purpose does not make sense, which is evidenced by the lack of the statement in this regard in the agreement. **The claimant’s purpose was cleaning of its territory from metal waste by way of its sale. The defendant was obligated, and had the ability, to remove metal scrap from the claimant’s territory to its [own] territory (or to a third party’s territory).**

**Therefore, issuance by a state body of the decision on prohibition of export from the territory of [Kazakhstan] of waste and scrap of ferrous metals for the six-months-term was not a force majeure for the given agreement ....”**

Case 2011\_11\_10:

*“The respondent's reference to events that occurred in Japan as force majeure is baseless, since **the contract was concluded by the respondent in April 2011, and the earthquake and explosion at the nuclear power plant ... occurred in March 2011 and at the time of conclusion of the contract, these events were known to the respondent.***

*Therefore, **the absence of the desired product on the market in conjunction with the above events in Japan does not constitute force majeure for early termination of the contract on this basis and the release of the defendant from paying a penalty ... in accordance with ... the contract.**”*



Case 2012\_03\_26: ***“Indeed, the Presidential Decree dated 17 December 2011 № 197 in connection with ... riots in Zhanaozen, Mangistau Oblast, ... the state of emergency ... was declared in the boundaries of the city of Zhanaozen in Mangystau Oblast.***

***It follows from this Decree that the state of emergency was introduced only within the borders of Zhanaozen and, accordingly, entry to the city of Zhanaozen in the Mangistau region is restricted, as well as exit from it (paragraph 4 of the Decree). Entry to Aktau and the Mangistau Oblast itself was not restricted, therefore, the defendant's reference to this circumstance is untenable.”***

# Other issues

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## **Article 374.1 v. Articles 404.2.1 + 403.1**

### **Article 361 (judicial acts 13 v. 9)**

**Article 361.** Consequences of impossibility of performance of a bilateral contract

If in a bilateral contract, performance by one party becomes impossible due to a circumstance for which none of the parties is responsible, then none of the parties (if a legislative act or a contract does not provide otherwise) shall have the right to demand performance of the contract.

In such a case each of the parties shall have the right to demand the return of all that it [i.e., the party making the demand] performed without receiving corresponding counter-performance.

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# Q&A

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