

FORCE MAJEURE AS A GROUND FOR EXEMPTION FROM RESPONSIBILITY FOR BREACH OF THE ENTERPRISE'S OBLIGATIONS

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Introduction. The military aggression of the Russian Federation against Ukraine harmed everyone, including Ukrainian business, most of which actually stopped due to the inability to function. This is connected, first of all, with the fact that the repayment terms of all types of contractual obligations are approaching, and there is no possibility to fulfill them physically. So, today, every entrepreneur is concerned about how to act and protect themselves from liability for failure to fulfill current and long-term obligations in such conditions.

The armed conflict that began on February 24, 2022 in Ukraine was officially recognized as force majeure circumstances – extraordinary, unavoidable and objective circumstances for subjects of economic activity or natural persons under contracts that make it objectively impossible to fulfill obligations operations that were taken on by enterprises earlier [1]. The list of circumstances under which force majeure occurs, according to national legislation, is not exhaustive, but within the scope of this article, we will consider force majeure that arises due to armed aggression, martial law, military actions, and the impact of these circumstances on the fulfillment of one's obligations Yazan by business entities.

Analysis of recent research and publications. Such scientists as I.A. Berzhanir, A.L. Berzhani, T.A.I. Yashchuk [9], S. Prodayevich [7], Slobodyaniuk [3], Krasko [8], A.M. Savchenko, I.R. Korotaeva [10] and others. However, most scientists studied force majeure circumstances mainly from the point of view of the emergence of the very concept of "force majeure", its comparison with the concept of "irresistible force", interpretation of the signs of force majeure circumstances. However, the issue of determining and objectively assessing the ability of business entities to repay their obligations under wartime force majeure circumstances, which is extremely relevant today, remains insufficiently studied.

Objectives of the article. The purpose of the article is to clarify the issue related to force majeure in time of war and to provide recommendations on the possibility of exemption from liability for failure to fulfill obligations.

The main material of the study. The study of the essence of the business entity's obligations revealed that they are extremely important elements of the company's resources. Liabilities arise due to the existing debts of the business entity or when transferring certain assets or providing services to another enterprise in the future and are reflected in the balance sheet according to the repayment amount. It is equally important to consider the classification of liabilities at the legislative level and on the basis of accounting (Figure 1), which makes it possible to understand the essence of liabilities more accurately, and for accountants and managers of a business entity allows them to obtain comprehensive information about the company's debt.

Every enterprise tries to repay all its obligations on time, which indicates its stable financial position. However, very often there are certain unforeseen circumstances, independent of the company, which make it impossible to repay all the company's obligations on time. One of these phenomena is force majeure.

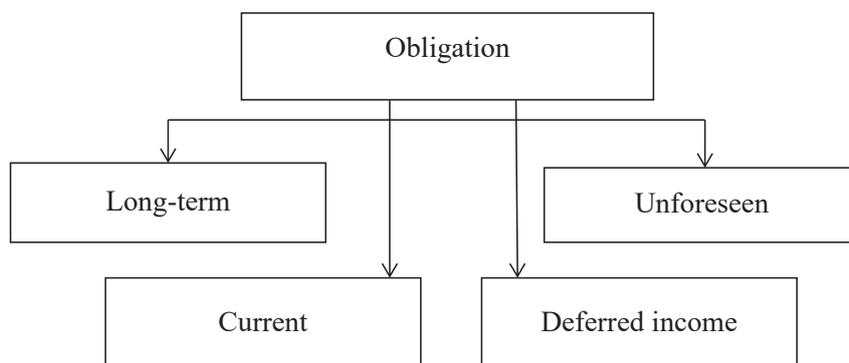


Figure 1. Classification of the company's liabilities according to P(S) BO 11 "Liabilities"

Force majeure is perhaps the most well-known contractual crisis response tool. However, not everyone correctly understands what this concept is. Currently, there is a problem of unambiguous definition of the concept of "force majeure" in civil legislation, as it is often equated with the concept of "force majeure" or "unforeseen circumstances". This makes it important to study and define these concepts.

The analysis of regulatory legislation made it possible to assert that there is no legislative definition of the term force majeure, as well as an exhaustive and mandatory list of them. However, analyzing the provisions of Art. 141 of the Law of Ukraine "On Chambers of Commerce and Industry in Ukraine" [1], the following circumstances can be called force majeure, as shown in Figure 2.

The events that are taking place in Ukraine today provide an opportunity not only to consider in detail the concepts of "force majeure" and "force majeure", but also the circumstances due to which they arise. After all, war, armed conflict, and martial law in the twenty-first century are not new concepts, but they are objectively new forms of circumstances that make it impossible to fulfill one's obligations.

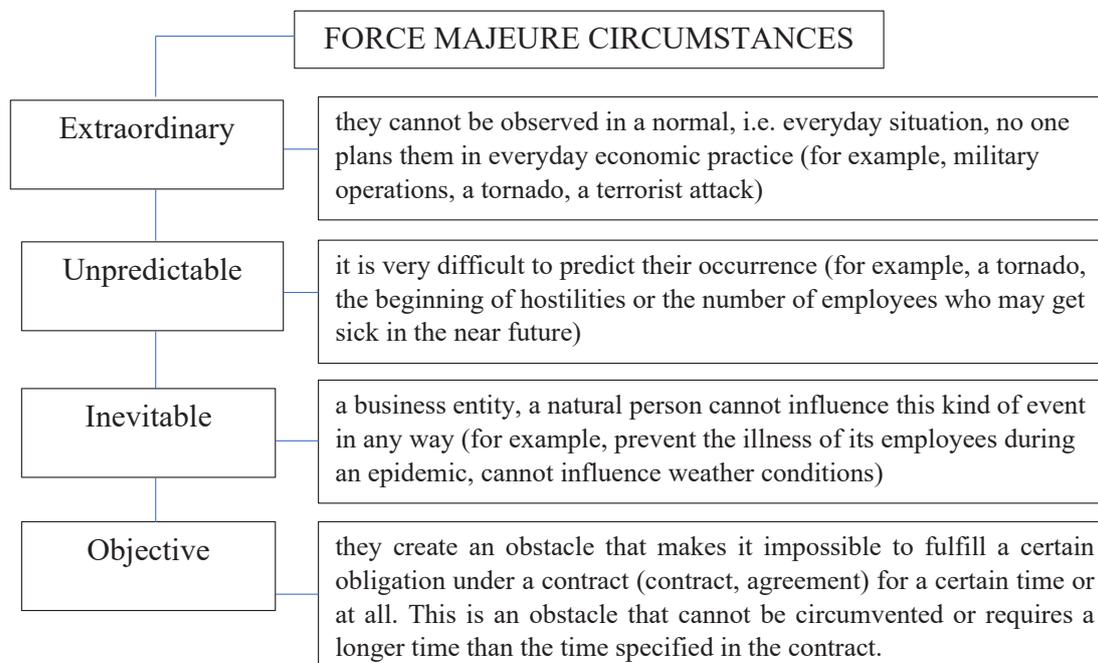


Figure 2. The main types of force majeure circumstances

According to I.S. Prodayevich, the definitions of force majeure and force majeure coincide in their main characteristics, since "force majeure" is a direct borrowing from the French language, which means irresistible

force, a term borrowed from international business practice. She believes that these concepts are the same in terms of their semantic load, but it would be better to use the term "irresistible force" for internal relations in the country, while the term "force majeure" is used only in international relations [7].

I.Yu. Krasko, distinguishing between the concepts of force majeure and force majeure, noted that, similar to force majeure, force majeure is a circumstance external to the activities of the parties bound by the contract, which does not depend on their will and desire. But force majeure circumstances are subjective, because they are related to the will of a person, a group of people and arise as a result of their manifestation of will [8]. Ukrainian law equates force majeure with war, enemy actions, general mobilization, military operations, and armed conflict, among other things.

In the author's view, force majeure, or circumstances of irresistible force, are extraordinary and unavoidable events, circumstances independent of the will of the business entity, the occurrence of which led to the objective impossibility of fulfilling obligations.

To date, the presence of martial law and military actions on the territory of Ukraine no longer requires proof. However, economic entities face the task of proving to the counterparty the real existence of force majeure circumstances, due to which they are deprived of the opportunity to fulfill the obligations assumed, that is, to substantiate that it was precisely because of armed aggression or because of military actions that they did not have any opportunity fulfill and fulfill contractual obligations. Here it is important to remember that the key feature of force majeure is the causal relationship between the force majeure circumstances and the impossibility of fulfilling a specific obligation. In other words, the war with the Russian Federation alone cannot automatically mean that anyone in Ukraine is exempt from fulfilling any obligations, regardless of whether there is a real possibility of fulfilling them or not.

War, as a force majeure circumstance, exempts from responsibility only if, as a result of the circumstances connected with it, the enterprise /individual cannot fulfill certain obligations. For example, force majeure may be applicable if, due to damage to warehouses, it became impossible to supply products stored in them, or if hostilities take place in the region, as a result of which transportation from the warehouse is impossible. Accordingly, counterparties whose activities were not affected by the war (for example, foreign partners) cannot refer to the war as a force majeure, which prevents them from supplying goods or making payments to a Ukrainian company whose business is affected by the war. The commercial risks of these counterparties associated with interaction with such an enterprise are not force majeure.

It is also important to consider that the definition of force majeure does not imply exemption from the obligation as such, but only exemption from responsibility for its non-fulfillment. The obligation itself will still have to be fulfilled after the force majeure has ceased (unless it is terminated on other grounds, for example, due to impossibility of fulfillment).

Another important aspect is the characteristic of the obligation, the failure of which can be attributed to force majeure. The deadline for the fulfillment of such an obligation must either already come or will come in the near future. In other words, the concept of force majeure does not apply to the future and not to the contract as a whole, but only to specific obligations that have already been violated or will be violated in the near future (the term of which has come due/is about to come due, but cannot be fulfilled within the specified period).

As you know, the basis for the emergence of almost all obligations of the enterprise is a contract: when receiving a loan – a credit agreement, loans – a loan agreement, financial assistance – an agreement on providing refundable or non-refundable financial assistance, when renting – a financial lease (leasing) agreement. Credit relationships are governed by written commitment agreements that define the parties' mutual obligations and liabilities and cannot be unilaterally amended without the consent of the other party.

Currently, the legislator has clearly outlined the consequences of the existence of martial law for the field of loan relations, providing a number of benefits for potential debtors who cannot fulfill the terms of the contracts. In particular, after the adoption of Law № 2120-IX dated 15.03.2022, a number of amendments were made to the Civil Code of Ukraine [2], the Laws of Ukraine "On Mortgage" and "On Consumer Lending", which provide for the release of borrowers from liability for breach of loan obligations during the period of martial law and within thirty days after its termination. In particular, the law stipulates that interest, fines and other payments related to non-fulfillment of the contract are not accrued during this period; it is prohibited to evict individuals from mortgage objects; it is prohibited to put the mortgaged property up for auction and acquire ownership rights to it by the mortgagee, and to increase the interest rate on consumer loans. Another important innovation is the suspension of a number of terms for the period of martial law, including the limitation period and special terms for termination of the surety obligation, which are extended for the duration of martial law [5].

The question arises how, in this case, to consider obligations for the fulfillment of which the legislator did not provide any preferential conditions? This is where, in our opinion, the force majeure rules can be applied.

It should be emphasized once again that the occurrence of force majeure is not a reason to change the terms of the contract and release from the obligation. This means that even if during the war the business entity cannot fulfill its obligations under the contract, this is not a reason to change the terms of the contract, but can only be an exemption from paying fines. The possibility of terminating the contract in connection with the occurrence of force majeure circumstances is possible only if the parties have previously agreed on this (such circumstances were foreseen in the contract or additional agreement). This means that referring to force majeure as a reason for exemption from liability, the interested party must prove how exactly the force majeure manifested itself in a specific obligation. In practice, the question constantly arises as to how to confirm the existence of force majeure.

In this regard, the legislation states that, in principle, the presence of force majeure circumstances can be confirmed by any evidence, which, in the opinion of the court, will be sufficient to establish the relevant circumstance.

In addition, to resolve this issue, on February 28, 2022, the Chamber of Commerce and Industry issued document № 2024/02.0-7.1, which was addressed to all those concerned, and to whom it confirmed the existence of a force majeure circumstance of military aggression by the Russian Federation against Ukraine and the introduction of martial law in Ukraine [4].

The Chamber of Commerce and Industry of Ukraine also published on its website an explanation that during the period of martial law, in case of breach of obligations, the letter mentioned above can be printed from the website of the Chamber of Commerce and Industry of Ukraine and attached to the notification of force majeure circumstances that made it impossible to fulfill the contractual obligations in the established term, for the ability to reasonably postpone the deadlines for the fulfillment of obligations and resolve disputed issues by peaceful means. It is also indicated that, if necessary, the party that violated its obligations during the period of force majeure has the right to apply to the Chamber of Commerce of Ukraine and the regional Chamber of Commerce authorized by it to obtain the appropriate Certificate of force majeure, following the procedure established by the Chamber of Commerce Regulations of Ukraine dated 18.12.2014, for each obligation separately. As we can see, the Chamber of Commerce and Industry of Ukraine remind us that force majeure still exists in connection with a specific obligation, and therefore, ideally, a specific cause-and-effect relationship should be investigated. Such a certificate is issued upon proof of the following key facts:

- the time has come to fulfill the obligation under the contract;
- force majeure circumstances led to the impossibility of such performance within the term specified in the contract.

However, there are no grounds to claim that Russia's attack is a force majeure for every contract throughout Ukraine, since active military operations are not taking place in the entire territory of Ukraine, and the state of war does not provide for a significant restriction of the rights and freedoms of citizens throughout the territory of Ukraine [5]. That is why we will consider the main possible instruments of influence on contractual relations for business entities (Table 1).

Table 1

Possible instruments of influence on contractual relations

Instruments of influence on contractual relations	Regulatory and legislative justification	The essence of the tools
A significant change in circumstances	Art. 652 of the Civil Code of Ukraine	Gives grounds for making changes or terminating the contract, including in court. According to the Code, a change in circumstances is material if they have changed to such an extent that, if the parties could have foreseen the occurrence of such events, they would not have entered into the contract or would have entered into it on different terms
Termination of the contract due to the impossibility of its performance	Art. 607 of the Civil Code of Ukraine	A contract that has become impossible to perform after its conclusion can be terminated in a court of law. At the same time, the impossibility of its fulfillment may be due to both factual and legal circumstances (for example, the imposition of sanctions on the counterparty or the prohibition of certain legal actions).
C special legal instruments that are specific to the relevant type of contract	Art. 762 of the Civil Code of Ukraine	For example, the lessee may not pay the rent in case of impossibility of using the leased object or demand its reduction if, due to circumstances for which he is not responsible, the possibility of using the leased object has significantly decreased.

Therefore, the existing military situation requires not only actual changes in lifestyle and adaptation of business, but also appropriate legal actions. In the process of research, it is possible to provide recommendations to business entities to analyze their current contracts, determine their future fate, apply the necessary legal norms and necessarily discuss all these issues with the counterparty. In our opinion, the first thing to do is to audit all existing contracts for the company's obligations. All concluded contracts should be divided into several categories, for example:

- the further implementation of which is possible (even if it will cost more or the implementation will be complicated);
- performance is temporarily impossible (for example, the city to which the goods must be delivered is temporarily occupied);
- fulfillment is impossible in full (the subject matter of the contract was destroyed, the counterparty was sanctioned, etc.).

After categorizing the contracts, it is necessary to determine the legal fate of each of them and apply one of the tools defined above, which will allow the business to suspend the fulfillment of its obligations, change agreements with counterparties or terminate individual contracts.

Thus, every business entity should be clearly aware that force majeure does not allow avoiding the fulfillment of obligations; including financial ones (for example, rent payments). On the other hand, force majeure circumstances allow for the postponement of obligations or exemption from liability of a business entity for their failure to fulfill them during the period of such circumstances (fines, damages).

The application of force majeure is regulated at the legislative and contractual level, therefore, in the author's view, it is very important to also check the provisions of existing contracts regarding the order of its application determined by the parties. For example, legal regulations do not provide grounds for terminating the contract due to force majeure, even if such circumstances last for years. At the same time, in a particular agreement, the parties, for example, may stipulate all the conditions for unilateral termination of the agreement if the duration of force majeure exceeds a certain period.

Force majeure in wartime conditions is closely related to the damage that its war has caused to the persons who invoke such force majeure. Therefore, I would like to separately draw attention to the fact that on March 20, 2022, the Cabinet of Ministers of Ukraine adopted Resolution № 326 "On the approval of the Procedure for determining damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation." In this Resolution, the Government states that the determination of damage and losses to enterprises is carried out in accordance with the methodology approved by a joint order of the Ministry of Economy and the State Property Fund, in agreement with the Ministry of Reintegration [6]. The main indicators that are assessed, according to this Resolution, are: human, economic, military losses; losses associated with ensuring public safety and order, combating crime, loss of housing stock and facilities; objects of public buildings and housing and communal services; damage caused to land and water resources, atmospheric air, forest resources, etc. According to the said procedure, this Methodology may be used by enterprises in determining losses resulting from the destruction and damage to their property, as well as lost profits from the inability or obstacles to conduct business activities due to the armed aggression of the Russian Federation.

Conclusions. As a conclusion, we note that the circle of contractual obligations, in respect of which the martial law stipulated certain benefits in case of their non-fulfillment, is quite narrow (applies mainly to loan relations), and in the case of impossibility of fulfilling obligations under other contracts, it is advisable to use the concept of force major. Thus, despite the fact that the mechanism for determining damage and losses will be established only in the future, it is worth emphasizing that it is already extremely important to record all available facts of destruction and damage to property as a result of hostilities, using all available means in order to be able to prove the existence of force majeure and to temporarily release from liability for breach of obligations.

REFERENCES:

1. Pro torhovo-promyslovi palaty Ukrainy [About Ukrainian Chamber of Commerce and Industry]: Zakon Ukrainy vid 02.12.1997 r. № 671/97-VR. Available at: <https://zakon.rada.gov.ua/laws/show/671/97-%D0%B2%D1%80#Text> (accessed 22 March 2022).
2. Civil Code of Ukraine: Law of Ukraine № 435-IV dated 16.01.2003 / Verkhovna Rada of Ukraine. Available at: <https://zakon.rada.gov.ua/laws/show/435-15/conv#n3076> (accessed 03 March 2023).
3. Slobodyaniuk V.P. (2020). Consequences of force majeure for subjects of economic legal relations. *A young scientist*, no. 5 (81), pp. 248–252. Available at: <http://molodyvcheny.in.ua/files/journal/2020/5/51.pdf>

4. Regulation of certification by the Chamber of Commerce and Industry of Ukraine and regional chambers of commerce and industry of force majeure circumstances (circumstances of force majeure): Decision № 40(3) dated 15.07.2014. Chamber of Commerce and Industry of Ukraine. Available at: <https://zakon.rada.gov.ua/go/v0040571-14> (accessed 21 March 2023).

5. Force majeure during war: a review of judicial practice. Available at: https://jurliga.ligazakon.net/analytics/211877_fors-mazhor-pd-chas-vyni-oglyad-sudovopraktiki (accessed 18 March 2023).

6. Some issues of ensuring the conduct of economic activity under martial law: Resolution of the Cabinet of Ministers of Ukraine dated March 18, 2022 № 314. Available at: <https://zakon.rada.gov.ua/laws/show/314-2022-Text>

7. Prodaevich I. V. (2018). Termination of obligations due to impossibility of performance. *Actual problems of state and law*, issue 42, pp. 166–170. Available at: http://nbuv.gov.ua/UJRN/apdp_2018_42_32

8. Krasko I. Yu. (2018). Corporate law. Selected articles. Kyiv, p. 64.

9. Berzhanir I. A., Berzhanir A. L., Yashchuk T. A. (2020). Economic essence of obligations and calculations of the enterprise. *Pryazovsky Economic Bulletin*, no. 2, pp. 240–244.

10. Savchenko A. M., Korotaeva I. R. (2019). Analysis of accounts payable. *Modern Economics*, no. 18, pp. 174–180.

11. Travins'ka S.I. Klyasyfikatsiia potochnykh zobov'язan' v zakonodavstvi ta bukhholders'komu obliku. Available at: http://bukuniver.edu.ua/Applications/zbirnik/n6/31_Klas.pdf

12. Safarova A.T. Problemy otsinky potochnykh zobov'язan' u bukhholders'komu obliku. Available at: http://vlp.com.ua/files/90_1

UDC 347.424

JEL M41

Oksana Furmanchuk, Candidate of Economic Sciences, Associate Professor of the Department of Finance, Banking and Taxation, National University "Yuri Kondratyuk Poltava Polytechnic". **Anna Lisna**, Student, National University "Yuri Kondratyuk Poltava Polytechnic". **Force majeure as a basis for exemption from liability for breach of obligations of the enterprise.**

The article is devoted to the analysis of the concepts of "force majeure" and "force majeure" as circumstances of exemption from responsibility for non-fulfillment or improper fulfillment by the counterparty of its obligation under the contract. This is necessary to determine the possibility and necessity of distinguishing such concepts and their scientific research in the future. The article defines which circumstances can be recognized as force majeure, and also examines and examines the powers of the Chamber of Commerce and Industry of Ukraine as an entity authorized to confirm the existence of force majeure and issue the corresponding certificate. The position is argued that when issuing a certificate of force majeure, it is necessary to take into account how exactly this or that circumstance affects the proper fulfillment of the terms of the contract and whether there is a cause-and-effect relationship between the event and the inability of one of the parties to properly fulfill their obligations, since the mere presence of such events is not enough. The main types of force majeure circumstances and possible instruments of influence on contractual relations are considered, and a brief description of them is given. The issue of the possibility of exemption from liability for non-fulfillment of obligations has been investigated. Considerable attention is paid to the question of how to prove to the counterparty the real presence of force majeure circumstances, due to which they are deprived of the opportunity to fulfill the obligations assumed, that is, to substantiate that it was precisely because of armed aggression or because of military actions that they did not have any opportunity to fulfill and fulfill contractual obligations. It was concluded that every business entity should be clearly aware that force majeure does not allow avoiding the fulfillment of obligations, including financial ones. However, circumstances of force majeure allow the postponement of obligations or release from responsibility of the economic entity for their non-fulfillment during the existence of such circumstances (fines, damages). In terms of contractual relations, business entities were recommended to analyze their current contracts in detail, determine their future fate, apply the necessary legal norms and necessarily discuss all these issues with the counterparty.

Key words: enterprise, force majeure, regulatory and legal support, instruments, sanctions, military actions.

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Стаття присвячена аналізу понять «форс-мажор» та «непереборна сила» як обставин звільнення від відповідальності за невиконання чи неналежного виконання контрагентом свого зобов'язання за договором. Це є необхідним для визначення можливості і необхідності розмежування таких понять та їх наукового до-

слідження в майбутньому. У статті визначено, які обставини можуть визнаватися як форс-мажорні, а також розглянуто та досліджено повноваження Торгово-промислової палати України як суб'єкта, уповноваженого підтверджувати наявність форс-мажору, видавати відповідний сертифікат. Аргументовано позицію, що під час видачі сертифікату про форс-мажорні обставини потрібно враховувати, як саме та чи інша обставина впливає на належне виконання умов договору та чи існує причинно-наслідковий зв'язок між подією та унеможливленням однієї із сторін належного виконання своїх обов'язків, оскільки самої наявності таких подій є недостатньо. Розглянуто основні види форс-мажорних обставин та можливі інструменти впливу на договірні відносини, надано їм коротку характеристику. Досліджено питання можливості звільнення від відповідальності за невиконання зобов'язань. Значну увагу приділено питанню як саме довести контрагенту реальну наявність обставин форс-мажору, через які вони позбавлені можливості виконувати взяті на себе зобов'язання, тобто обґрунтувати, що саме через збройну агресію або через воєнні дії в них не було будь-якої можливості виконати та виконувати договірні зобов'язання. Зроблено висновок, що кожен суб'єкт господарювання повинен чітко усвідомлювати, що форс-мажор не дозволяє уникнути виконання зобов'язань, в тому числі фінансових. Але, обставини непереборної сили дозволяють відтермінувати зобов'язання або звільнити від відповідальності суб'єкта господарювання за їх невиконання в період існування таких обставин (штрафні санкції, збитки). У розрізі договірних відносин було рекомендовано суб'єктам господарювання детально аналізувати свої чинні договори, визначати їхню подальшу долю, застосувати необхідні норми законодавства та обов'язково обговорити всі ці питання з контрагентом.

Ключові слова: підприємство, форс-мажорні обставини, нормативно-правове забезпечення, інструменти, санкції, воєнні дії.