



## ONPOINT / A legal update from Dechert's Moscow Office

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### COVID-19 Coronavirus: Russia's Supreme Court Provides Clarifications on the Impact of COVID-19-related Measures on Contract Performance and Dispute Resolution

On April 21, 2020, the Presidium of the Supreme Court of the Russian Federation issued an "Overview of selected issues of judicial practice, related to the application of legislation and measures to stop the spread of the coronavirus infection (COVID-19) on the territory of the Russian Federation No. 1" (the "Overview").<sup>1</sup>

This Overview sets out a number of important clarifications on the practical application of recent legislative developments as well as recent COVID-19 related measures to dispute resolution, contract performance, creditors' rights, the imposition of criminal liability for spreading fake news on COVID-19 and on administrative liability for the violation of sanitary rules and protective measures. We set forth herein a number of clarifications affecting contract performance and dispute resolution.

#### I. Contract Performance

##### COVID-19 as a force majeure event

Under Russian law, unless otherwise provided by law or agreement between the parties, a party who has either not fulfilled, or who has improperly fulfilled, a contractual obligation shall be released from liability (e.g. payment of damages, other penalties) if such party proves that the proper performance of this obligation was impossible due to a force majeure event, i.e. extraordinary and unavoidable circumstances under the given conditions. Whether circumstances can be categorized as force majeure is established by the relevant Russian court with respect to a particular case (i.e. acts of state authorities declaring particular circumstances as a force majeure event do not automatically exclude liability of a defaulting party under a contract). Furthermore, if a force majeure event is proven, this does not mean that party is released from its obligation to fulfill the terms of the contract, itself, but may release the party from liability for defaulting on the contract.

The Overview addresses the issue of whether the current health crisis, restrictive measures and regime of self-isolation may be categorized as a force majeure event. It provides that in order to be considered by courts as a force majeure event, the circumstances must be:

- extraordinary;
- unavoidable under the given conditions;
- external to the activities of the debtor/obligor

The Supreme Court emphasizes that the spread of the COVID-19 should not be universally recognized as a force majeure event for all situations, but rather, a court should consider the type of activity of a debtor/obligor, the conditions for such activities, and the region where the debtor/obligor operates. Thus, the existence of a force majeure event must be established on a case-by-case basis, taking into account the specific circumstances of a case (including the period of fulfillment of an obligation, the nature of the unfulfilled obligation, and the reasonableness and good faith of the debtor's actions, etc.).

The Overview also states that the COVID-19 health crisis itself and the measures taken to limit its spread may be recognized as a force majeure event (provided that they meet the above criteria and the improper performance at issue is a result of such circumstances), for example:

- the measures adopted by state and local authorities, including mandatory rules of conduct when introducing emergency measures;
- bans on transportation;
- restrictions of individual movement;
- suspension of commercial activities;
- cancellations or postponement of public events;
- the introduction of self-isolation regimes for citizens, etc.

The Overview also explicitly confirms that a lack of monetary funds of a debtor/obligor, as a general rule, may not be a basis for exemption from liability. However, if the lack of necessary funds is caused as a result of enforced restrictive measures, in particular the prohibition of certain activities, enforced self-isolation, etc., then a lack of funds may be recognized, in certain cases, as a basis for exemption from liability for non-performance or improper performance of obligations. In particular, exemption from liability is possible if any other debtor/obligor acting in a reasonable and prudent manner, carrying out activities similar to the debtor, could also not avoid the adverse financial consequences caused by any restrictive measures (for example, in the case of a significant decrease in profit due to the forced closure of restaurants). Therefore, in order to avoid liability, the debtor/obligor will have to prove the presence and duration of a force majeure event;

- the presence of a causal relationship between the force majeure event and the impossibility or delay of contractual performance;
- the party's lack of involvement in the creation of the force majeure event;
- the conscientious adoption by the party of any reasonably expected measures to prevent (or minimize) possible risks.

When considering an exemption due to a force majeure event, Russian courts may take into account relevant documents (conclusions, certificates) to confirm the presence of the force majeure event (e.g. certificate issued by the Chamber of Commerce and Industry).

### COVID-19 as a basis for amending/terminating a contract

Under the general rules of Russian law, any circumstances that the parties could not foresee when concluding a contract may be the basis for amending and terminating such contract, if, having foreseen such conditions, the parties would either not have entered into the contract or would have entered into such a contract under significantly different conditions. However, a change in contract due to a significant change in circumstances at the request of only one of the parties is possible only in exceptional cases.

Thus, the COVID-19 pandemic, and the measures taken to limit its spread, should be treated as a ground for amending/terminating a contract only in exceptional cases, e.g. when the fulfillment of the contract is contrary to the public interest or will entail damages to the parties which will significantly exceed the costs required to execute the contract.

## II. Dispute Resolution

Based on the Overview:

- Courts have the right to postpone, suspend or extend proceedings during the current COVID-19 crisis on a case-by-case basis. Courts also have the right to proceed with the consideration of non-urgent cases depending on the situation in a particular region of the Russian Federation (previously courts were only allowed to consider urgent and certain specific cases);
- Time limits for various procedural actions, including challenging court rulings, are not interrupted during the period of non-working days announced by Presidential Decrees No. 206, dated March 25, and No. 239, dated April 2.<sup>2</sup> If the date of the time limits falls on a newly announced non-working day, such time limit is not extended to the following working day.
  - However, where proceedings had been previously postponed until a day that falls on a newly announced non-working day, the postponement is then further extended to the first working day at which point the court will have to schedule a new date for the proceedings and notify parties on such date.
- If parties fail to comply with such time limits due to COVID-19 related protective measures (e.g. restrictions on free movement of citizens, closure of certain public places and organizations for visitors, changes in work schedule of authorities and organizations), courts have the right to still permit parties to perform procedural actions (e.g. to file appeals against court rulings). However, in practice, it may be difficult for parties to prove that they had no opportunity to meet the time limitation. Therefore, parties should try to adhere to the required timeframes and collect as much evidence as possible to confirm the circumstances preventing them from meeting the time limits, they have not met them.
- Any statute of limitation which expires on an announced non-working day is not extended to the following working day unless it is suspended on the grounds provided by Russian law, including a force majeure event.
- If it is impossible for a person to file a claim within the statute of limitations due to restrictive measures (e.g. self-isolation, impossibility of electronic or postal filing due to age, illness or other circumstances), courts may consider such impossibility as a justifiable reason and accept the claim filed beyond the statute of limitations. However, based on the wording of the Overview, it is not clear whether legal persons will be able to refer to such measures as a justifiable reason for failure to comply with the statute of limitations.

### Steps companies should take

While the impact of COVID-19 continues to disrupt ordinary business, companies should take the following steps:

- ensure they have undertaken all measures to fulfill their obligations to the extent possible and to prevent (or minimize) the risk that they can be treated as acting in bad faith;
- notify creditors/counterparties about a delay in performance or non-performance as early as possible, describing in detail the circumstances that led to such a failure;
- keep in contact with the creditor/counterpart even when there is no delay or concern of non-performance, as there may be a possibility of delay or non-performance in future;
- consider applying to the local Chamber of Commerce and Industry (or other applicable authority) to confirm the presence of a force majeure event.

For companies involved in, or planning to initiate, litigation in Russian state courts it may be advisable to take the following steps:

- observe the time limitations for procedural actions (e.g. filing an appeal, etc.) and statutes of limitation to ensure that deadlines are not missed;
- collect as much evidence as possible to confirm any circumstances preventing the company from meeting a deadline;
- where necessary, file motions to the court to postpone the date of the court hearing or to restore a missed deadline for filing documents to court;
- when developing litigation strategies keep in mind that the current consideration of cases may be longer than usual.<sup>3</sup>

If you have any questions about this, or any other topic, we would be happy to help in any way we can. Please feel free to reach out to your Dechert contact for assistance.

For more information on the global impact of Coronavirus COVID-19 please see our [COVID-19 Business Impact page](#).

For more information on the impact of Coronavirus COVID-19 in Russia please see our articles [here](#).

### Footnotes

1) <https://www.vsr.ru/files/28856/>

2) <https://www.dechert.com/knowledge/onpoint/2020/3/the-russian-government-provides-further-clarity-to-its-covid-19-.html>

3) <https://www.dechert.com/knowledge/onpoint/2020/4/covid-19-coronavirus---effects-the-operation-of-russian-state-co.html>

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