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THE RUSSIAN SUPREME COURT LEGAL REVIEW IN RELATION TO THE COVID-19 PANDEMIC

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The Russian Supreme Court released a special legal review clarifying the applicability of certain provisions of Russian law in connection with the COVID-19 pandemic (Review of the Presidium of the Supreme Court of the Russian Federation no.1 dated 21 April 2020). It supplies official interpretations covering a number of diverse issues of administrative, civil and criminal law in the pandemic scenario. We comment below on selected topics which are of interest to businesses and commercial operations.

1. Performance of obligations

The lockdown (non-working) period from 30 March 2020 to11 May 2020 proclaimed and imposed by the President (Order no. 206 dated 25 March 2020, Order no. 239 dated 02 April 2020, Order no. 294 dated 28 April 2020) does not postpone deadlines for the fulfillment of obligations falling due during that period.

The Supreme Court notes that general rules on timelines provided for in Article 193 of the Civil Code of the Russian Federation say that in a case when the last day of a term falls on a non-working day, that term is automatically postponed till the first following working day.

However, the Supreme Court specifies that certain deadlines must be met even if they fall on a non-working day. The Court further explains that the lockdown period and other restrictions imposed to address the COVID-19 pandemic apply only to certain sectors and are not intended to block or suspend the generality of transactions and business activities.

The Supreme Court furthermore notes that in some cases non-working days could have made impossible the fulfillment of an obligation, while the lockdown period per se would not alter a due date. The Court also recalls that if performance is not possible due to force majeure in connection with the COVID-19 pandemic, then the obligation must be fulfilled upon the ending of force majeure circumstances without liability of the obligor for the delay.

2. Modification and termination of obligations

The Supreme Court refers to Article 451 of the Civil Code providing that significant changes in circumstances, which were the basis for an agreement, could constitute grounds for the

modification or termination of the obligation or agreement if the text of the agreement does not provide otherwise.

The change in circumstances must be unpredictable for both parties, which is likely to be the case of the COVID-19 pandemic and the restrictions imposed in connection with it. If the parties would not have concluded the agreement or its agreement provisions would have been different in the context of the COVID-19 emergency, then the agreement could be terminated by either party based on Article 451 of the Civil Code.

At the request of either party the agreement may be modified by the competent court, but only in exceptional cases, where the termination of the agreement could result in harm to the public interest, or where the prejudice caused by termination is more severe than that caused by performance of the obligation on amended terms.

The Supreme Court furthermore notes that in connection with the COVID-19 emergency, a special legislation was adopted (no.98-FZ dated 01 April 2020) offering, among other business support measures, an option to amend rent agreements concluded before the implementation of the extraordinary provisions issued to delay rental payments.

3. Force majeure

In accordance with the provision of Article 401 of the Civil Code, an entrepreneur or business entity is exempted from liability for non-performance or partial non-performance of an obligation if the debtor proves that non-performance was caused by force majeure, which is defined by law as the occurrence of extraordinary and unavoidable circumstances.

The Supreme Court explains that circumstances that are invoked should be simultaneously extraordinary, unavoidable by any person engaged in the same business, and external to the debtor's own sphere of activity. The Court clarifies that extraordinary means that the circumstance is exceptional and unusual in the given situation, and that unavoidable means that no person performing the same activity as the debtor could avoid the circumstance or its consequences. Circumstance under the influence of the will or actions of the debtor, cannot qualify as force majeure (e.g. lack of funds, non-performance by contractors).

The Supreme Court says that the COVID-19 pandemic could amount to force majeure, but furthermore states that this does not automatically applies to any debtor, but only in cases where facts and circumstances invoked in fact present the force majeure features provided by law, and in fact caused the non-performance of the obligation.

Under general rules, the lack of funds cannot be considered force majeure. However, the Supreme Court specifies that if the shortage of funds was the result of restrictions imposed due to the COVID-19 pandemic (e.g. mandatory suspension of certain business activities), it could amount to grounds for exemption from liability for non-performance, if a rational and prudent obligor could not avoid the occurrence of financial harm.

The Supreme Court moreover explains that it is essential to understand that force majeure does not per se cancel obligation. The obligation should still be performed within a reasonable period after force majeure circumstance cease to exist, unless the creditor is no longer interested in performance and withdraws from the agreement. Obligations could be cancelled due to force majeure only in cases, where the force majeure circumstances are of a permanent nature and make the fulfillment of the obligation impossible.

The Supreme Court lists the evidence, which the defaulting party should provide to the court in order to be exempted from liability for non-performance:

- evidence of the force majeure circumstance and its duration;
- evidence of cause and effect link between force majeure and non-performance or partial non-performance;
- evidence of not having influenced or contributed to the production of the force majeure circumstance;
- evidence of having taken all prudent and reasonably expected measures in order to avoid and lower the risk of non-performance.

4. Limitation of legal claims

The Supreme Court confirms that based on Article 202 of the Civil Code limitation periods for the filing of judicial actions are suspended in case force majeure circumstances make it impossible to timely file the action.

In accordance with general law, the running of the time limit is suspended if force majeure materialized within the last 6 months of the limitation period. Consequently, if at the point in time where force majeure materialized the limitation period is still to run for more than 6 months, force majeure does not suspend limitation. Upon the force majeure circumstance coming to an end, the limitation continues to run and is extended for up to 6 months.

The burden of the proof of force majeure rests with the plaintiff, who should provide evidence thereof in case the defendant or a third party raises objections to the extension of the limitation period. The court will assess the evidence and determine if the force majeure circumstance occurred and time limit could be extended.

Thus, explains the Supreme Court, measures implemented by the Russian State and local authorities against the COVID-19 pandemic could be considered grounds for suspension of limitation subject to the assessment of the court seized in individual cases.

5. Procedural matters

According to Federal law no. 68-FZ “On protection of population and territory from natural and anthropogenic emergencies” dated 21 December 1994, the Russian State authorities have the power to impose restrictions on travelling, visiting and accessing public places and institutions. The Supreme Court confirms that the provisions of Article 169 of the Code of Civil Procedure Code, Article 158 of the Code of Arbitration Procedure (Code of Commercial Court Judicial Procedure), and Article 152 of the Code of Administrative Judicial Procedure provide for the adjournment of proceedings if the relevant restrictions made the action or accomplishment impossible.

The Supreme Court notes that the courts could also resort to the suspension of proceedings where a party is unable to attend a hearing. The suspensions are foreseen by Article 216 of the Code of Civil Procedure, Article 144 of the Code of Arbitration Procedure (Code of Commercial Court Judicial Procedure), and Article 191 of the Code of Administrative Judicial Procedure.

The Supreme Court notes that the court seized should take decisions on adjournments and suspension strictly on a case by case basis taking into account all relevant circumstances.

At the same time, even in the presence of the COVID-19 restrictions, the courts could hear cases other than urgent matters, if the existing restrictions allow and all the parties court either join the hearing, if attendance is mandatory, or agree to the case being tried in absentia.

The Supreme Court furthermore addresses the situation, where a procedural deadline fell on during the lockdown official period. In that connection, the Supreme Court refers to Article 114

of the Code of Arbitration Procedure, providing that if a procedural time limit ends on a non-working day, the deadline is automatically postponed to the first following working day. In its Review, the Supreme Court directs the commercial courts in such cases to adjourn proceedings to the first subsequent working day, so that the parties could always benefit from the right to a fair trial.

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Il presente articolo ha esclusivamente finalità informative e non costituisce parere legale.

This article is exclusively for information purposes, and should not be considered as legal advice.

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