

# CORONAVIRUS OVERCOMING THE DIFFICULTIES

## FORCE MAJEURE DUE TO THE COVID-19 EMERGENCY IN RUSSIA

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The provision of article 401 of the Civil Code of the Russian Federation releases the debtor from liability for non-performance or partial non-performance of obligations in case of force majeure. The law features force majeure as circumstances that are extraordinary and unavoidable. The law directly excludes from such circumstances the breach of obligations by counter-parties, the lack of necessary goods and the shortage of money. However, the law does not provide any notion of force majeure itself.

In its ruling (case A40-25926/2011-13-230) the Russian Supreme Court held that force majeure circumstances should be both extraordinary and unavoidable. The Supreme Court defined extraordinariness as something beyond the common risks of life that could not be taken into account in whatever situation. The Supreme Court also defined inevitableness an objective, not subjective criterion, meaning that the circumstance could not be avoided not just by the affected party, but for any person in the same circumstances.

Based on the above, one could say that force majeure is an *external* circumstance *beyond the will or influence of the persons concerned* that could *not be predicted or avoided by anybody*.

It should, however, be noted that only the courts can ultimately determine if circumstances of force majeure in respect of a particular obligation have occurred. The basis for this assessment is the relevant clause in the agreement, which can also govern notices and procedural mechanisms between the parties, tolerated delays of performance and termination of the affected obligation. The party claiming exemption from liability due to force majeure will need to provide documented proof of the alleged extraordinary and unavoidable circumstance, and show the cause-effect link between such circumstance and non-performance of the obligation.

In case of absence of force majeure provisions in the agreement, the court assessment is based on statutory provisions and the evidence provided by the parties. The court shall, in particular, determine if the alleged circumstance meets force majeure criteria of being external, beyond the control of the parties, unpredictable at the time of entering into the agreement and unavoidable.

If the party to an agreement failed to perform its obligation and intends to claim force majeure as an excuse for non-performance, it will need to provide to court a documented proof, which may be different for international agreements and Russian internal contracts and transactions.

One of the documents that can typically be relied on as evidence is the “certificate of force majeure”. Russian law authorizes the Chamber of Industry and Commerce of the Russian Federation (the Chamber) to issue “certificates of force majeure” for international agreements. The relevant certificate could be issued at the request of a party based on the specific Regulation of the Chamber. The Regulation defines force majeure as extraordinary, unexpected and inevitable circumstances happened during contract performance, which could be neither rationally anticipated when the agreement was concluded, nor avoided or subsequently overridden. Besides, the circumstances must be beyond the control of the parties.

The Regulation of the Chamber lists examples of force majeure, including natural disasters, fire, *mass disease* (epidemic), strikes, military operations, terrorist attacks and international sanctions; and states that *business risks* like economic downfall, exchange rate fluctuations and contract breach by counterparties cannot be certified as force majeure, unless the parties agreed so in their contract.

In case a party did not perform its obligation due to force majeure, it is released from liability for non-performance, and the other party could not claim compensation of its losses due to such non-performance. The party claiming force majeure as a justification for non-performance should prove that its failure to perform was directly caused by the force majeure circumstance.

One of the documents considered to constitute proof of force majeure in Russia is the certificate issued by the Chamber of Industry and Commerce of the Russian Federation attesting that the performance of a certain contract was affected by the force majeure circumstance.

The application for a force majeure certificate needs to be filed with the Chamber together with all relevant information about the applicant, copy of the contract affected and documentation issued by the competent authority certifying the claimed event/circumstance to be a force majeure. Based on the information provided, the Chamber assesses if the claimed circumstance affected the performance of the obligation and subsequently issues the certificate or rejects the application.

The Chamber issues force majeure certificates for international contracts only, while its local branches in Russia are authorized to issue force majeure certificates for domestic contracts.

It is important to understand that a “certificate of force majeure” can be relied on as evidence, but does not guarantee release from liability, as the court seized will assess and take into account all relevant facts and documents. In case of absence of a “certificate of force majeure” or in addition to it, other evidence can be supplied, including public authorities’ acts attesting to circumstance as being one of force majeure or imposing restrictions, documents of authorities and public agencies, such as the meteorological office, the civil protection, etc. confirming the existence of the circumstance, statistics or public communications demonstrating the extraordinary and unpredictable nature of the circumstance. In the current COVID-19 pandemic situation, the Russian government has not yet imposed a state of emergency in the country in proper sense, which could be considered a force majeure circumstance. However, the authorities of all Russian regions, including Moscow, introduced a high alert on COVID-19. The mayor of Moscow issued on 14 March 2020 an order declaring that COVID-19 constitutes an extraordinary and unavoidable circumstance, which should be considered a force majeure situation. Consequently, the COVID-19 pandemic could arguably be claimed to constitute force majeure in Moscow. Some other regions of Russia as well declared the COVID-19 pandemic to amount to force majeure for operations within the region, including the Moscow and Saint-Petersburg regions.

On 06 April 2020 the Chamber reported facing a seven-fold increase of the number of applications for issuance force majeure certificates, since the point in time when the first restrictions were

introduced in Russia. At the same time, 95% of the applications related to internal contracts were rejected due to the inconsistency of the reported circumstances in order to justify force majeure.

However, the order of mayor of Moscow declaring the high alert mode in the city to constitute force majeure does not mean that in the current situation any non-performance in Moscow of any contractual obligation may be ascribed to force majeure. Actually, only non-performance of obligations directly affected by the COVID-19 emergency and/or restrictions imposed in that connection could qualify as grounds of force majeure.

In the current COVID-19 circumstances in Russia the fastest and most effective way to contain responsibility for non-performance of contractual obligations is to negotiate and sign with the counterpart an additional agreement stipulating either the release from liability for non-performance, or adapting the contractual terms to the changed circumstances. The party concerned should make a formal offer to the other party to adapt the agreement in writing. In case of a dispute such offer could be provided to the court as evidence of integrity and good faith of the party affected.

In the case the parties cannot agree the adaptation of the contractual terms and conditions, the non-performing party could claim force majeure in connection with the COVID-19 situation, providing evidence that the pandemic directly hampered performance, e.g. that performance due was directly restricted by orders or measures of the state authorities.

In the absence of direct restrictions affecting performance due, the affected party could try to prove that the COVID-19 circumstances were extraordinary, unavoidable and caused the non-performance at stake. This could be rather challenging. Currently, most situations of non-performance are probably caused by the pandemic only indirectly, leaving the Russian courts with no tools to discharge from liability of the defaulting party.

Based on provisions of Russian law and the Russian Supreme Court ruling previously mentioned, the shortage of funds or cash flow, the deficiency of goods on the market, the financial or economic crisis in general, the insolvency of counterparts or the non-performance of obligations by counterparts (typically, upstream of the supply chain), currency exchange rate fluctuations and similar circumstances constitute ordinary business risks and have nothing to do with force majeure. For example, in accordance with this reconstruction, the forced closure of restaurants and entertainment places in Moscow caused by COVID-19 would not qualify as force majeure releasing the operator from liability for non-payment of rent to the landlord.

Finally, as the operations of the Russian courts is currently limited to hearing urgent cases (e.g. injunctions) or cases dealt with by simplified procedures, there is no case law on the subject yet. As a result there prevails, and will no doubt last for some further time, an objective uncertainty as to how the courts will deal with COVID-19 force majeure eventually.

Stakeholders should also bear in mind that in the current COVID-19 situation the Russian government and authorities continuously issue special acts that directly affect business relations and provide the opportunity to renegotiate certain agreements. For example, the Russian Government adopted a special act (no. 439 dated 03 April 2020) introducing conditions and provisions for the deferral of rent payments by the entities of the Russian industry sectors affected by COVID-19 pandemic.

A case-by-case, concrete analysis will, therefore, be a must.

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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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