

Coronavirus and non-performance of contractual obligations in the Kyrgyz Republic

World Health Organization has characterized the outbreak of COVID-19 infection as a pandemic. More and more countries are closing borders, restricting people's movement, banning public gatherings, and controlling trade. Such measures have already hit hard tourism, air transportation, hospitality services. Other business sectors are expected to suffer in the coming weeks and months.

The Kyrgyz Republic has taken preventive measures too. On March 21, the government declared a nation-wide *emergency situation*, and four days later a *state of emergency* was declared in the cities of Bishkek, Osh, Jalal-Abad and some rural districts. The emergency regime imposes tight restrictions for operation of businesses and movement of people and cargo, and the business community is now facing a situation where running normal commercial activities, undertaking logistical operations, and fulfilling contractual obligations have become extremely challenging if not impossible at all. Under these circumstances, attention has focused on the outcomes of delaying or non-performing affected commercial contracts and on remedies available to mitigate the resulting legal risks.

The key question is whether or not the COVID-19 infection constitutes a force-majeure (FM) event. Pursuant to civil laws of Kyrgyzstan, unless otherwise provided by law or a contract, a person who breaches a commercial obligation shall not be held responsible if it proves that performance of the obligation was impossible due to an irresistible force, i.e. extraordinary and unavoidable circumstance (FM). The scope of FM events shall not encompass, among other things, third-party non-performance and lack of commodities or money required for performance of the obligation. Therefore, in order to qualify as a FM, the circumstance which has made performance of the obligation impossible must meet the criteria of extraordinariness and objective unavoidability.

Although the authorities in Kyrgyzstan have not officially declared the coronavirus pandemic as a FM event like in other countries, clearly the infection and the government's response measures do constitute extraordinary and unavoidable circumstances of superior force. The restrictions imposed to contain the outbreak spread, including lockdowns and logistical constraints, make it impossible to carry on the majority of businesses as usual and, accordingly, to perform duties owed to counterparties in due manner. Moreover, on a practical level, most commercial agreements include a FM clause and such a clause usually covers epidemics and governmental acts preventing performance of the contract.

Nonetheless, the parties to a contract may have controversies in characterizing the virus outbreak as a FM event, and such a dispute can be finally resolved in the court. When reviewing a case, the court will assess the impact of a FM event on each contractual obligation individually. A number of factors will be taken into account, including, among other things, the moment when the contract was made (i.e. whether the contract was made before or after occurrence of the FM), measures taken by the affected party to prevent or mitigate the FM's adverse consequences for the contract, the language of the FM clause in the contract, official confirmations obtained by the affected party from competent authorities. Crucially, the affected party must be able to substantiate that it is by effect of the FM event the contract was breached – commercial risks will not serve as an excuse.

In case the court finds that the pandemic and lockdown are indeed an excuse for the non-performance in a given case, the court will render a judgement whereby the deadlines for performance of an obligation are extended until the FM event comes to an end, while the affected party is relieved from liability for non-performance of the obligation over the delay period. This means that so long as the FM circumstance exists, the counterparty may not charge the affected party penalties, damages or other material sanctions.

The protection from liability does not mean a relief from fulfilling the obligation, the fulfilment is just postponed till a moment in the future – as soon as the FM stops, the affected party must supply goods, works or services as provided in the contract. However, the counterparty may not be interested in late delivery and is entitled to withdraw from the contract in the period when the FM circumstance exists.

Occurrence of a FM does not terminate a contractual obligation if the performance remains possible after the FM event comes to an end. But in a situation where lockdown restrictions include

prevention from delivery of certain services, performance of an obligation may become objectively impossible. In this case, the obligation automatically terminates by reason of impossibility of its performance. Where parties have previously passed each other some assets (payments, goods, services etc.), such assets shall be returned or reimbursed.

However if the performance remains practically and legally possible but implies extremely unfavourable commercial outcomes for the affected party, such party may address the court to seek variation or cancellation of the contract by reason of a material change of circumstances. The change of circumstances is deemed material where they have changed to such an extent that if parties reasonably foresaw such changes, the parties would not have made the contract in the first place or would have made it on significantly different terms. Evidently, in the light of the lockdown, the circumstances for operating many businesses have changed significantly.

The thing to bear in mind when submitting the claim is that variation of contractual terms is defined by law as an exceptional measure which only can be applied by the court when cancellation of the contract may contravene public interests or may result in losses for the parties that are significantly higher than costs of performing the contract on varied terms. Therefore, the court would tend to uphold cancellation rather than variation of contract terms and conditions. Where the judgement is made in favour of cancellation, the court will determine its consequences for the parties based on fair allocation of costs incurred by them in the course of their contractual relationship.

In order to mitigate potential losses caused by the pandemic, it is highly advisable to communicate with counterparties to discuss further actions. Successful talks may result in extension of performance timelines, revision of contractual terms with the consideration of current difficulties, or peaceful cancellation of the contract and reconciliation of all mutual claims. But above all else, fruitful negotiations may help avoid litigation risks which imply lengthiness, uncertainty and significant legal costs.

In case where a litigation seems unavoidable, it is vital to ensure that all essential evidence is collected for the future proceedings. Particularly, care needs to be taken to send a timely FM notice to the counterparty, obtain a FM certificate from the Chamber of Commerce and Industry of the Kyrgyz Republic (CCI), and produce other documents evidencing the occurrence of the FM and its impact on performance of the contract.

The CCI issues a FM certificate on the basis of an application from the affected party to a contract. The following documents need to be filed along with the application:

- duly certified copy of the contract which includes provisions that parties are relieved from liability for non-performance caused by a FM event and that an epidemic is treated as a FM event;
- copies of contractual specifications;
- a letter describing the progress of performance prior to occurrence of the FM event;
- a certificate from the Ministry of Healthcare of the Kyrgyz Republic confirming the existence of the COVID-19 epidemic;
- for CCI members – proof of annual fee payment, for other applicants – proof of FM certification fee payment.

The CCI may request additional documents and information. The FM certificate is issued within ten working days after receipt of the application, but the applicant may request to issue it in a three-day period. CCI has the right to decline an application on a condition that the applicant is given a reasoned response in writing.

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