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Coronavirus in Kazakhstan: Ways to Mitigate its Legal Effect on Business

On 15 March 2020, the President of Kazakhstan (“**RK**”), K.K. Tokayev, signed a decree introducing state of emergency in Kazakhstan (“**SE**”) from 16 March to 15 April 2020. The decree is likely to cause contractual defaults, termination of contracts, sanctions, losses and litigation/arbitration in Kazakhstan and possibly abroad.

Even before the introduction of the SE, some businesses were affected by the coronavirus due to, for example, significant drop in demand, delays or inability to supply goods, perform work and other consequences of the global pandemic.

Partners at GRATA - Almat Daumov and Bakhyt Tukulov, have analysed possible options to mitigate possible negative legal implications of SE and the global pandemic for Kazakh businesses.

1. Performance of Contracts During the Pandemic

1.1. For Those Affected by the SE Decree

As you may know, the SE Decree, among other things, restricts the operation of large trade facilities, shopping malls, cinemas, theatres, exhibitions and other public areas, it also prohibits entertainment, sports and other public events, and restricts entry to and exit from Kazakhstan, except for diplomats and delegations of international organisations. Quarantine has been introduced as an additional measure.

The SE regime will mostly affect shopping malls, tenants of retail spaces, organisations engaged in entertainment, education and training. The restriction on entry and exit from Kazakhstan may seriously affect companies that engage foreign labour, for example, the oil and gas industry, construction, services, consulting and many others.

The introduction of the SE regime represents a force majeure event. According to Part 1 of Article 359.2 of the Republic of Kazakhstan Civil Code (“**Civil Code**”), an entrepreneur is liable for breach of a contract unless he (she) can prove that force majeure circumstances have occurred and that such force majeure events had an immediate impact on relevant contractual obligations. It is quite possible that a counterparty would disagree with a reference to the force majeure, and the entrepreneur will have to prove this in court. Thus, it may be a good idea to start collecting relevant evidence.

The contract may set out higher thresholds to invoke force majeure or even exclude certain circumstances. Thus, please carefully read your contracts.

Introduction of the SE regime somewhat simplifies proof of force majeure for entities *directly* affected by the SE Decree. Such organisations may want to notify counterparties of the force majeure events referring to the SE Decree.

Under Kazakh law, the occurrence of force majeure leads to the extension of relevant obligations affected by the force majeure and during its duration. If the contract so provides, the parties may terminate the contract. The contract set out other implications of force majeure.

1.2. For Those Not Affected by the SE Decree

Activities of the overwhelming majority of companies in Kazakhstan will probably not be affected by the SE Decree. This, however, does not mean that they cannot refer to force majeure.

If the proper performance of the contract has become impossible due to the pandemic, one may try to obtain a force majeure certificate from Kazakhstan Foreign Trade Chamber LLC (a subsidiary of Atameken National Chamber of Commerce, which certifies force majeure and other similar circumstances in relation to contracts with foreign parties).

As mentioned, careful study of the contract would help to understand if one can rely on force majeure, e.g. generally force majeure provisions in contracts include pandemics, and this can eliminate or minimise contractual liability. The contract may provide for other circumstances as a basis for exemption from liability.

1.3. Notice to a Counterparty

Notice of the force majeure to the counterparty may be required. The contract may set out additional requirements on the course of action in the event of force majeure, e.g. notice within a certain time frame, provision of certain documents, etc. Failure to notify may serve as a ground to reject references to force majeure circumstances.

Service of notice should be recorded - sent by courier, contents of the shipment should be indicated in the waybill, the address is double-checked, and other relevant procedures stated in the contract should be followed. We would recommend notifying a counter-party of the force majeure even if the contract is silent on that. It is preferable to explain in the notice why and how force majeure impacts performance of the contract.

1.4. Applicable Law

One should bear in mind that contracts with foreign parties may be governed by the laws of a foreign state. If the contract is foreign law governed, apart from review of the force majeure provisions of the contract, it may be required to consult a foreign lawyer on whether or not force majeure events have occurred under such foreign law and what needs to be done to prove such events, etc.

It is possible that the legislation of a foreign state, in addition to force majeure, may provide for other grounds for exemption from contractual liability, reduction of such liability or revision of the terms of the contract.

1.5. If Your Counterparty Claims Force Majeure

There may be a situation where you may be notified of the impossibility to perform a contract due to the SE Decree or the global pandemic. As mentioned above, just a reference to such circumstances is not enough to relieve the party from liability, because you need to prove a causal link between the performance of specific obligations under the contract and the force majeure events.

As stated above, read the contract carefully. Certain force majeure events may be excluded by the contract. Failure to comply with the contract requirements for the force majeure events (notification, provision of evidence, etc.) may serve as a grounds to reject a reference to force majeure events.

2. Tax Liabilities

Force majeure events may serve as a ground to claim a so-called "tax credit" - a deferral or repayment of the tax liability in instalments

2.1. Deferral

Deferral refers to the possibility to defer payment of tax for up to six months.

For example, the deadline for payment of a corporate income tax is on or before 10 April 2020. Accordingly, a deferral may be provided until 10 October 2020.

Similarly, value added tax for the first quarter of 2020 must be paid before 25 May 2020. The deferral may allow payment until 25 November 2020.

2.2. Instalment Plan

The Republic of Kazakhstan Tax Code also provides for the possibility to repay tax during a period of up to three years in equal instalments on monthly or quarterly basis. To exercise this right a taxpayer may request the tax authority to change deadline for the performance of tax liability and attach a number of documents.

2.3. Conditions

Deferral or payment in instalments may be available to a taxpayer whose financial position does not allow payment of tax when scheduled, provided there are good reasons to believe that the taxpayer will become capable of paying tax at a time in future.

Force majeure (emergency situations of a social, natural, man-made, environmental nature, military operations and other force majeure events) may serve as a ground to seek deferral or an instalment plan.

Instalment plan or deferral could be available where tax liability is secured by a pledge or a bank guarantee. One can file a list of counterparties-debtors to the tax authority and indicate receivables.

Locations

KAZAKHSTAN

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