

Coronavirus and contract performance:
force majeure / hardship?

23.03.2020, Moscow

Structure

- Practical differences between force majeure and hardship
- Can coronavirus qualify as force majeure?
- Can coronavirus qualify as hardship?
- Coronavirus and future commercial contracts
- Coronavirus and labor contracts
- Overall conclusion

Force majeure and hardship: practical differences

- Force majeure only entails exclusion of liability, i.e. damages and penalty. It does not generally lead to a change in delivery deadlines and does not prevent contract termination for cause by the adverse party (unless explicitly agreed by the parties).
- Hardship does not excuse contract performance nor excludes liability. However, hardship allows to request renegotiation of the contract, which, if unsuccessful, can lead to court-mandated termination or adaptation (in exceptional cases) of the contract.

Coronavirus as force majeure: statutory criteria (1)

- Force majeure is triggered when three requirements are jointly met:
 - (1) the event is unforeseeable (extraordinary),
 - (2) the event is impossible to overcome or avoid, and
 - (3) it renders contract performance objectively impossible and not merely onerous.

Coronavirus as force majeure: statutory criteria (2)

- (1) Foreseeability:
 - For contracts concluded prior to the outbreak, coronavirus-related governmental actions will likely be unforeseeable.

- (2) Impossibility to avoid:
 - In many cases it will be possible to avoid/overcome coronavirus-related impediments
 - For example, in case a travel ban for German employees is introduced, it is often possible to hire local personnel to do the same job.

Coronavirus as force majeure: statutory criteria (3)

- (3) Impossibility of performance:
 - Generally, only direct prohibition of contractual performance will amount to force majeure.
 - For example, a direct prohibition to import certain goods could qualify as force majeure.
 - However, there may be an obligation to consider alternative ways to perform the contract (for example, if air delivery is prohibited, the supplier may have to consider railroad delivery).

Coronavirus as force majeure: case law

- Courts have dealt with coronavirus only indirectly and with different attitudes.
 - In one case the court found it justified for a Chinese shareholder not to attend a shareholder meeting in Russia because of a travel ban due to coronavirus (Ruling of the Arbitrazh Court of Amur region dated 02 March 2020 on case no. A04-665/2020).
 - However, in another case the court rejected references to travel bans affecting the company's CEO as an excuse for the non-provision of documents to the court (Ruling of the Arbitrazh Court of the Tver region dated 13 February 2020 on case no. A66-17378/2019).
- Previously, the courts also have not easily made a finding of force majeure with regard to animal epidemics.
 - For example, African swine fever was not deemed force majeure (e.g., Ruling of the Arbitrazh Court for the North Western District of Russia dated 26 July 2019 on case No. A21-4963/2018; Ruling of the Fifteenth Arbitrazh Appellate Court dated 26 April 2010 on case No. A53-18991/2009).

Coronavirus as force majeure: Russian authorities

- Chief Health Inspector required persons incoming to Russia to remain isolated for 14 days (Decree dated 18 March 2020 N 7). In combination with other factors (e.g., where the contract is agreed to be performed solely by foreigners or by specific persons that have to be isolated and are unable to be replaced), this may constitute force majeure.
- The Mayor of Moscow expressly stated that the coronavirus threat is a force majeure (item 8(1) of the Decree of the Mayor of Moscow dated 14 March 2020 No 20-YM).
 - This decision may constitute an excess of the Mayor's constitutional authority.
 - However, it may show that the courts may adopt a lenient approach towards coronavirus situations in practice, depending on the specific governmental response.

Coronavirus as force majeure: Chamber of Commerce

- Oftentimes, force majeure circumstances affecting international contracts are confirmed by a certificate issued by the local Chamber of Commerce.
- In practice, many international contracts expressly provide for the duty to obtain this certificate to confirm force majeure.
- In Russia, these functions are performed by the Russian Chamber of Commerce (Moscow) within 10 business days after submission of relevant documents (Regulations No. 173-14 dated 23 December 2015). The fee is 13.5 thousand RUB or approx. 170 USD.

Coronavirus as force majeure: conclusions

- Therefore, whether coronavirus-related governmental actions can qualify as a force majeure will depend on the specific governmental response.
- The force majeure threshold will generally be met only when the governmental action directly prevents contract performance and the means of contract performance cannot be reasonably altered (even at more costs).
- In practice, the courts will have to find a balance between excusing performance in exceptional circumstances and keeping the sanctity of contracts in order to avoid creating even further stress on the economy.

Coronavirus as hardship: statutory criteria

- In practical terms, the criteria to trigger hardship are similar to force majeure. The event has to be unforeseeable at the time of contract conclusion and impossible to avoid or overcome by reasonable means (Art. 451 of the Russian Civil Code).
- However, the main difference is that under the hardship standard, contract performance must become excessively more onerous, rather than impossible.
- The standard of excessive onerousness (substantial disruption of contractual equilibrium) generally requires that the costs of performance increase by a substantial amount (usually at least over 50%).
- This may be different when the contract provides for a lower threshold, for example via an adaptation clause / change-of-legislation clause.

Coronavirus as hardship: case law

- Hardship is almost never applied by Russian courts, and there are very few examples of successful cases, some of which relate to sanctions.
- However, since in most previous cases Russian courts have refused to find hardship largely because the event was foreseeable or part of entrepreneurial risk (such as currency devaluation), it is quite possible that coronavirus-related impediments will be qualified as hardship where they directly affect contract performance and cannot be avoided.
- In 2012-2014 a Russian borrower was seeking to amend a loan contract based on hardship doctrine. The borrower referred to cattle importation ban introduced by the European Union as a result of Schmallenberg virus outbreak. The courts rejected the claim with reference to the fact that such an outbreak was foreseeable (case No. A21-8837/2012)

Contract virus and future commercial contracts

- Force majeure / hardship or adaptation clauses in contracts may significantly alter the statutory regime, and therefore need to be crafted with precision.
- For new contracts, coronavirus will unlikely be deemed force majeure or hardship, as coronavirus-measures may be found to be no longer unforeseeable.
- Therefore, in future contracts it is strongly advised to add express adaptation / exclusion clause to agree on specific consequences of coronavirus-related measures.

Contract virus and labor contracts

- No obligation to allow working from home at this stage. However, the authorities recommend remote employment.
- Possibility to reduce salary by one-third in case of standstill/idle time due to coronavirus in affected businesses (Art. 157 of the Russian Labor Code).
- In case of a threat of mass dismissal of employees (e.g. in tourism-related businesses), the company may introduce reduced business hours subject to a proportionate decrease of the salary (Art. 74 of the Russian Labor Code).
- However, Russian labor law is generally strictly oriented at protecting employees. Thus, due diligence to follow all statutory procedures is required before undertaking any labor-related steps.

Overall conclusion

- Specific approaches to force majeure / hardship will likely depend on the gravity of governmental response to the coronavirus threat.
- For example, in case of total quarantine/indiscriminatory isolation, a finding of force majeure is possible. However, in case of milder actions, such as travel bans for foreigners, a finding of force majeure is much less likely.
- For new contracts, express provisions dealing with coronavirus are necessary, as coronavirus will not be deemed force majeure / hardship for new transactions due to the foreseeability requirement.

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