

COVID-19 and contractual relations

On March 15, the President of the Republic of Kazakhstan Kasym-Jomart Tokayev signed a decree on imposing state of emergency in the country in connection with the spread of a new type of coronavirus (COVID-19). The state of emergency is enforced on the territory of the republic from 8 am on March 16, 2020 until 7 am on April 15, 2020. Additional restrictive measures in some regions of Kazakhstan are being introduced by central and local government agencies to prevent the spread of coronavirus COVID-19 depending on the epidemiological situation in a particular region. In particular, all organizations and enterprises in the cities of Almaty and Nur-Sultan are temporarily suspended starting from 30 March until 13 April 2020. Nevertheless, the companies that are essential for the life support of the city will continue operating.

State measures to counter the pandemic have affected many aspects of life, which has ultimately affected the contractual relations between citizens and legal entities, including with regard to the performance of obligations under the contracts. Due to imposing the state of emergency, many companies experience problems in fulfilling their obligations before their counterparties. In these conditions, the questions on whether it is possible to use the pandemic as a basis for eliminating liability for delay, refusal to perform the contract or changing its terms become extremely important for business.

In terms of Kazakhstani legislation, the following legal concepts can be applied to contractual relations during state of emergency:

1. Insuperable force, or "force majeure";
2. Termination of the obligation due to inability to perform the obligation;
3. Termination of the obligation based on the act of a public authority.

Force majeure as a circumstance precluding liability

The Civil Code of the Republic of Kazakhstan stipulates the expression "insuperable force" instead of the term "force majeure". According to the Article 359 of the Civil Code of the Republic of Kazakhstan, an entity which failed to perform or improperly performed an obligation in the course of business activities shall bear material liability if it fails to prove that proper performance was impossible due to force majeure, i.e. emergency and unavoidable circumstances (natural phenomena, military actions, etc.). Such circumstances do not include, in particular, the absence of goods, works or services on the market.

The occurrence of force majeure, as a general rule, does not suspend or terminate the contract, but only relieves the parties from liability for failure to perform or improper performance of obligations under the contract. If the company considers that the state of emergency imposed due to the epidemic is a force majeure, the following peculiarities should be taken into account:

- emergency means that a breaching party could not anticipate the occurrence of such circumstances;
- unavoidability means the impossibility of excluding, preventing, avoiding or overcoming the circumstances and their consequences;
- the debtor is presumed innocent if he proves that he/she has taken all measures in his/her power to properly perform the obligation;
- the burden of proving force majeure rests with the party invoking it;
- a circumstance that has become extraordinary and unavoidable for one party is not necessarily the same for another;
- a direct cause-and-effect relationship between a failure to perform (breach) an obligation and the circumstances to which the party refer is essential to establish and determine force majeure.

Circumstances of force majeure that have occurred on the territory of Kazakhstan are certified by the Foreign Trade Chamber of Kazakhstan LLP in accordance with the conditions of foreign and domestic transactions, international treaties concluded and ratified by the Republic of Kazakhstan, as well as trade and port customs recognized in the Republic of Kazakhstan. A force majeure certificate is a document that evidence a force majeure circumstance. Such certification is not mandatory, however, may serve as an evidence of the occurrence of force majeure.

Inability to perform the obligation

In accordance with the Kazakhstani legislation, the coronavirus and its consequences may not simply exempt a party from liability for failure to perform an obligation by applying force majeure concept, but may terminate the obligations under the contract in full, for example, in the event of inability to perform the obligation due to the suspension of shopping and entertainment centres, non-food trade markets, trading houses, cinemas, theatres, exhibitions and other facilities with a large crowd of people, the ban on entertainment, sports and other public events.

Under Kazakh law, an obligation shall cease to be due to inability to perform it if it is caused by a circumstance for which the breaching party is not responsible. However, it should be noted that this provision does not apply to monetary obligations. If a party is unable to perform an obligation caused by a circumstance for which neither debtor nor the other party is responsible, the party shall not be entitled to demand performance of the obligation from the other party, unless otherwise provided by the law or the contract. In this case, the party that has duly fulfilled the obligation shall be entitled to demand the return of the performed obligation.

Termination of the obligation based on the act of a public authority

Furthermore, the civil legislation of Kazakhstan stipulates provisions according to which an obligation under a contract may be terminated in whole or in part if the performance of an obligation becomes impossible due to an act issued by the state authority (public act). It is important to note that a party, which suffered losses caused by non-fulfilment of an obligation due to the public act, has the right to demand for compensation. To apply this rule, the company shall prove the existence of a public act, as well as the cause-and-effect relationship between the issuance of the act and the impossibility to perform obligations under the contract in full or in part.

Practical recommendations

If a company, when concluding a contract, assumes that a state of emergency caused by coronavirus may affect execution of the contract, it should explicitly state in the contract that the restrictive measures imposed in connection with a pandemic are force majeure. The inclusion of such provisions in the treaty would make it much easier to prove that a force majeure has occurred. In addition, it is also recommended that the parties to the contract should explicitly enshrine the consequences of the occurrence of force majeure, in particular by relieving the debtor from liability for the delay or by allowing the parties to the contract to modify it or unilaterally terminate it (whichever is in the interest of the parties to the contract).

The parties should also pay attention to the procedure for notifying each other of the occurrence of the force majeure. In particular, the contract should specify the terms, the order of sending the notice with the necessary documents attached. Such provision of the contract will promote certainty in mutual relations of the parties.

As for acting contracts, the parties in order to minimize possible losses from the exposure of the coronavirus infection may negotiate actions aimed at:

- extension of the contract's term;
- termination of the contract with the settlement of all mutual claims;

- reconsideration of the terms and conditions regarding the contract execution procedure in terms of, for example, delivery volume, payment procedure, contract value, etc.

These actions will help to reduce the risks associated with potential litigation as well as the associated monetary and time costs.

If, due to unavoidable circumstances, the dispute with the counterparty escalates into a legal proceeding, it is necessary to arrange for the collection of necessary evidences and arguments to be used in the litigation. In particular, it is necessary to timely notify the counterparty on the occurrence of force majeure, to prepare an act on the impossibility of performance of the contract etc. For the purpose of proving the occurrence of the force majeure, it is advisable to apply to the Foreign Trade Chamber of Kazakhstan LLP in advance for obtaining a conclusion on the occurrence of a force majeure.