The Coronavirus pandemic: key legal issues in Russia

March 2020

This alert addresses the key issues of Russian labor and migration law, personal data, the restricted operation of courts, as well as legal remedies for non-performance of agreements and determining what happens to them.

Labor and migration legislation

Following the continuing spread of COVID-19 infections in the Russian Federation, the Russian Federation Government has issued Resolution № 635-p dated March 16, 2020, which provides for the introduction of the following restrictions.

Restrictions have been introduced on entry to the Russian Federation for foreign citizens, including citizens of the Republic of Belarus and citizens of the Eurasian Economic Union between March 18 and May 1, 2020.

These restrictions on entry to the Russian Federation do not, however, affect certain categories of foreign citizens – those in Russia on a residence permit, foreigners entering for private purposes relating to the death of a close relative, persons transiting through air transport points of passage, and certain other categories.

In addition, the Russian Interior Ministry and its territorial offices suspended the acceptance of documents, formalization and issuance of invitations for travel to Russia for study and work, as well as permits to use foreign employees and work permits for foreign citizens from March 18, 2020 (and so far indefinitely). Notably, labor patents for foreign citizens from visa-free countries (Ukraine, Moldova, Tajikistan, Uzbekistan, and Azerbaijan) have not been suspended.

Please note that according to Russian Interior Ministry guidance (https://xn--b1aew.xn--p1ai/news/item/19812878), certain categories of foreign citizens currently present in Russia may extend/obtain work permits and labor patents. Moreover, the Russian Interior Ministry is ready to provide a 90-day extension to foreign citizens present in Russia whose right to remain is expiring or has expired. This applies to both foreign citizens entering by visa, and those entering on a visa-free basis.

In the light of the general ban on foreign citizens entering Russia from any state, a number of Russian Federation Government resolutions establishing various restrictions on the entry and/or work of certain foreign states (Italy, South Korea, Iran, etc.) lapsed from March 18.

Various other measures relating to the outbreak of the COVID-19 pandemic also affect the employer's duty to provide safe working conditions under, among others, Federal Law No. 52-FZ on Sanitary-Epidemiological Public Wellbeing dated March 30, 1999 (as amended), and Federal Law No. 68-FZ on Protection of the Public and Territories from Natural and Manmade Disasters dated December 21, 1994 (as amended).

Specific measures against the spread of COVID-19 vary depending on the Russian Federation region. For example, according to Moscow Mayoral Decree № 12-УМ dated March 5, 2020 (as amended) ("**Mayoral Decree**"), every employer operating in Moscow MUST:

- arrange to take the temperature of all employees and remove employees with high temperatures from the workplace;
- assist employees in complying with self-isolation at home;
- upon receiving a request from state authorities, provide information on all contact details of persons diagnosed with COVID-19 in connection with their work, and ensure the disinfection of the premises where the sick persons were.

The Mayoral Decree also ORDERS persons that have visited territories where incidences of coronavirus infections have been recorded:

- to self-isolate at home for 14 days from return to the Russian Federation from China, South Korea, member states of the European Union, Serbia, Albania, the United Kingdom, the Republic of North Macedonia, Montenegro, Andorra, Norway, Switzerland, Iceland, Monaco, Lichtenstein, Moldova, Belarus, Ukraine, Bosnia and Herzegovina, the Vatican, San Marino, Croatia, the United States. This also concerns citizens ordered to isolate by public health physicians.
  However, given the requirements of the Chief Public Health Physician of the Russian Federation Resolution No. 7 "On ensuring isolation to prevent the spread of COVID-2019" dated March 18, 2020, from March 19, 2020, anyone arriving in Russia from any country must self-isolate. In addition, upon returning to the Russian Federation, they should inform the authorities about the places and dates of their visit to other countries, and provide contact details using the regional hotline (for Moscow the number is +7 (495) 870-45-09);
- to immediately seek medical assistance at home, without visiting a medical organization, upon developing initial respiratory symptoms;
- to comply with orders from public health doctors to self-isolate at home. Please note that in cases we are aware of, foreign citizens violating this requirement have incurred penalties including expulsion from Russia with a five-year ban on re-entry;
- people residing with isolated citizens must self-isolate at home for 14 days or another period ordered by public health doctors;
- persons in isolation or self-isolation are able to obtain a doctor's certificates without visiting a medical organization.

The Mayoral Decree introduces other restrictions in Moscow. In particular, attendance at sporting, entertainment, public or other mass events is banned until April 10, 2020.

Recreational events involving citizens, including cultural, fitness and sporting events, exhibitions, entertainment and educational events, in buildings, structures (premises therein) with more than 50 people participating simultaneously, and certain other events are suspended (so far indefinitely).

Personal data protection

Due to the Coronavirus outbreak, many organizations are introducing additional health-related arrangements. One of the most common ones is measurement of the employee's temperature. The legality of such actions was explained by the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) in its special Clarifications (please see "***Features of the use of thermal imaging cameras by employers - operators of personal data - to prevent the spread of Coronavirus***" of March 10, 2020, for the details).[1] According to Roskomnadzor, body temperature belongs to a special category of personal data related to information on health status. Pursuant to the Russian Labor Code, an employer may request information on an employee's state of health without obtaining relevant consent if such information is necessary to determine whether the employee is capable of performing work functions (please see ***Article 88 of the Russian Labor Code***). For cases when the temperature of a non-employee of the company is measured, it is considered that the visitor to the organization expresses their consent to collect information on body temperature (without identification) through implicative actions, i.e. by directly visiting the organization. It is recommended that the data is destroyed within 24 hours after being recorded.

A similar position is supported by the European Data Protection Board.[2] Employers and the competent public health authorities have legal grounds to process personal data without the consent of the personal data subjects in cases where such processing is necessary for the prevention of threats related to the spread of COVID-19, as in this case it is a matter of protecting vital interests. It should be taken into consideration that medical data is a special kind of personal data. Distinctive features of this category of data are the special list of grounds for its processing, as well as enhanced protection requirements.

Another important challenge posed by the epidemic is the need to create opportunities for employees to work remotely. Employers should consider that in this case, the transfer of confidential information requires the use of special secure information systems that prevent employees from illegally copying files and minimize the risk of leakage of confidential information through other means.

Finally, the status of information on the Coronavirus epidemic itself is also controversial. On the one hand,

[1] Clarifications of the Federal Supervision Agency for Information Technologies and Communications of 10.03.2020 on "The Features of the use of thermal imaging cameras by employers - operators of personal data - to prevent the spread of Coronavirus"

[2] Please, see the ***Statement of the EDPB Chair on the processing of personal data in the context of the COVID-19 outbreak*** for more details: https://edpb.europa.eu/news/news/2020/statement-edpb-chair-processing-personal-data-context-covid-19-outbreak_en

information about infected people, their diagnoses and state of health must be protected on the grounds of privacy and medical secrecy. On the other hand, this information also reflects the overall current sanitary-epidemiological situation. In any case, in the nearest future we should expect a strengthening of the role of medical organizations and public authorities and, as a consequence, an increase in the volumes of personal data processed by them.

Operation of courts restricted

On March 18, 2020, the Presidium of the Supreme Court of the Russian Federation and the Presidium of the Council of Judges of the Russian Federation issued resolution No. 808, which sets the following restrictions on the operation of courts in Russia due to the COVID-19 pandemic. The restrictions are effective from March 19, 2020, through April 10, 2020:

- Personal attendance of citizens is suspended.
- It is recommended that litigants file documents with the court online or by mail only.
- Only urgent cases will be heard, and cases in summary or expedited proceedings (in other words, those cases in which court hearings are not held).
- All courts must start hearing cases using videoconferencing systems if they have the technical capability to do so.
- All judges and court employees must self-isolate if they have the slightest symptoms of illness.
- Access of non-litigants to the courts will be restricted.

Announcements of suspended operations have already appeared on the websites of the commercial (*arbitrazh*) courts in Russian Federation constituent entities (regions).

The Moscow Commercial Court has issued a notice that, while restrictions are in effect, case documents may only be filed remotely, court hearings will not be held (other than urgent ones), the ability to review case file materials and obtain writs of execution will be limited. Court visitors must have protective equipment (a surgical mask/respirator and rubber gloves).

The St. Petersburg and Leningrad Region Commercial Court announced on its website that, while restrictions are in effect, there will be no personal attendance of citizens nor will documents be issued or people be able to review case files. No court hearings will be held (other than court hearings on administrative liability cases).

Similar announcements are appearing on the websites of other commercial courts of Russian Federation constituent entities, the commercial courts of appeal and cassation, as well as the courts of general jurisdiction.

In most cases, for litigants this will mean adjournment of court hearings scheduled for the period from March 19, 2020, through April 10, 2020. They will also be unable to file documents through the court office, review court case file materials, obtain writs of execution and copies of judicial acts during this time.

However, we recommend that you keep track of information about the status of court hearings scheduled while the restrictions are in effect. It is still possible that certain hearings will be held on the already scheduled date (this is particularly true of hearings of the courts of appeal and cassation). To reduce risks, motions to adjourn hearings may be filed, if necessary.

In addition, on March 18, 2020, the Chairman of the Government of the Russian Federation issued the following instruction:

- The Ministry of Economic Development of Russia together with the federal executive government agencies concerned shall submit to the Russian Federation Government by April 1, 2020, the draft of a federal law **enabling a moratorium on filing bankruptcy petitions to be imposed**.
- The Federal Tax Service of Russia, state corporations and federal executive government agencies that have subordinate organizations **shall postpone until May 1, 2020, the filing of bankruptcy petitions** in respect of those who have a debt to the budgets of the Russian Federation budgetary system, state corporations, federal executive government agencies and their subordinate organizations, if bankruptcy proceedings have not already been initiated.
- Senior officials and the Russian Federation Central Bank are recommended to **postpone until May 1, 2020, the filing of bankruptcy petitions** in respect of those who have a debt to the budgets of the Russian Federation constituent entities, executive government agencies of the Russian Federation constituent entities and their subordinate organizations, as well as a debt to lending institutions, if bankruptcy proceedings have not already been initiated.

Liability for non-performance or late performance of concluded agreements and determining what happens to them

A number of legal tools may be used to combat the legal effects of COVID-19 in terms of Russian and English contract law, as well as international trade practices.

Russian legal concepts

In terms of Russian law, deviations from performance of a concluded contract, depending on the situation, may be due to

- Force majeure,
- A material change in circumstances,
- Circumstances making performance impossible and terminating the obligation.

If a party to an agreement can prove that its non-performance under an agreement was due to **force majeure**, that party will be released from liability for its non-performance (art. 401, clause 3 RF CC).

Mass illnesses and epidemics, restrictions on transport and state prohibitions are listed as force majeure circumstances in the "Procedure for certification of force majeure circumstances by the Russian Federation Chamber of Trade and Industry" "dated December 23, 2015. However, it should be noted that the unavailability of required goods on the market or non-performance by the debtor's counterparties cannot be considered force majeure.

Force majeure is a tool for release from liability, but does not in itself determine what happens to the agreement thereafter. However, as the RF Supreme Court Plenum has ruled, the party that did not receive performance is not deprived of the right to repudiate the agreement if as a result of the delay caused by the force majeure it has lost interest in performance.

For the avoidance of uncertainty and disputes over the agreement, parties should endeavor to set out the consequences of force majeure in the agreement in as much detail as possible.

The second notion is **material change of circumstances** (article 451 RF CC). A change in circumstances is material if the change is one that if the parties could have reasonably foreseen it, they would not have concluded the agreement or would have concluded it on significantly different conditions. A material change in circumstances is grounds for termination or amendment of the agreement. A material change in circumstances differs from force majeure in that it is a forward-looking tool. The purpose of a material change in circumstances is to enable the parties to an agreement to determine what happens to the agreement in a different way than if the initial conditions had continued, rather than release one party from liability for non-performance.

Use of the notion of a material change in circumstances in the case of an epidemic/pandemic and/or quarantine or other restrictions seems unlikely in most cases. This is especially the case for long-term agreements, where there is reason to believe that the situation will return to normal, and the corresponding parties have the ability to protect themselves from liability for temporary non-performance by using force majeure.

The third potentially applicable notion in Russian law is **termination by circumstances preventing performance**; either due to circumstances outside the control of any party after the obligation arose (art. 416 RF CC), or due to a state authority issuing an act rendering performance impossible (art. 417 RF CC). In this case, an additional court decision is not required to terminate the obligation. However, the law does not define or provide a clear indication of what should be considered a circumstance outside the control of any party, and does not contain clear criteria for distinguishing such circumstances from force majeure.

As in the case of material change in circumstances, inability to perform is oriented towards the future. It does not release from liability for non-performance; its purpose is to determine what happens to the obligation. However, there has not been consistent court practice with respect to applying the notion of inability to perform. It is unlikely that inability to perform due to an epidemic/pandemic and/or quarantine or other restrictive measures would be recognized by a Russian court as circumstances falling within the effect of articles 416 or 417 RF CC.

English law and international practice

Outside the Russian legal context, a situation where normal performance of an agreement is impossible due to unforeseen circumstances, including due to an epidemic/pandemic and/or quarantine or other restrictions) should be analyzed in terms of:

- force majeure
- frustration, and
- hardship.

The criteria for **force majeure** in English law are largely similar to the Russian law criteria for force majeure, but there are differences.

Force majeure does not necessarily have to be named force majeure or referred to in the agreement as such. Terms such as exceptional circumstances and any circumstance not within a party's reasonable control are commonly used.

It is very important to note that it is not possible to apply force majeure (exceptional circumstances) by default – if the agreement does not contain the corresponding provisions releasing the parties from liability for non-performance under various conditions, force majeure cannot be cited. For this reason, contracts governed by English law need to set out their force majeure provisions in fine detail.

The party citing force majeure or other exceptional circumstances indicated in the agreement needs to successfully pass the 'but for' test to verify that the

unforeseen circumstance cited by the party is the cause of the non-performance. In brief, this means answering the question: but for this circumstance, would the party have performed the obligation? With respect to the subject of this alert, the question could be as follows: “But for the quarantine imposed, would the goods have been delivered?”

Force majeure clauses often suspend the affected obligations for the period of the force majeure event rather than remove the obligations altogether. A party wishing to rely on force majeure provisions must ensure that it would properly comply with applicable notice requirements, otherwise such a party may be unable to rely on the protection provided by the force majeure clause. The notion of force majeure or exceptional circumstances should not be confused with the doctrine of **frustration**. An example of frustration would be the irrecoverable loss of property involved in the agreement (for example, the loss of a chartered vessel) for reasons objectively outside the control of the parties.

In certain circumstances relating to COVID-19, actions such as the closure of the supplier’s enterprise or placement of a quarantine hospital on its property by order of the authorities could serve as grounds for termination of an agreement due to frustration, especially if the supplier has no alternative means of performing the obligation (for instance, if the supplier does not have another manufacturing facility).

An important difference between frustration and force majeure (exceptional circumstances) is that frustration is forward-looking, its purpose is to terminate the agreement, not to exclude liability for past non-performance.

In the context of international agreements, it is worth considering the third concept – **hardship**. A good source of language for hardship and commentaries on it is the UNIDROIT Principles of International Commercial Contracts.

A reading of the UNIDROIT Principles makes it clear that there is a certain similarity between hardship and force majeure (exceptional circumstances) – in particular, there are time criteria (the events must take place after the conclusion of the agreement), and there is an objective inability to take them into consideration at the time of conclusion, or to control them.

But there are also several material differences: First, the parties have considerable freedom to determine what is and is not hardship for each of them. Second, the party citing hardship can only ask the other party to review the agreement, but cannot suspend performance or be released from liability for the non-performance. Third, the main element of hardship is the overall economic effect – the disbalance of the agreement (change in the weight of contractual obligations). Therefore, hardship can only be cited where performance is difficult but not impossible.

As in the case of frustration, hardship is forward looking, and its purpose is to determine the possibility of amending the agreement, not to exclude liability for past non-performance.

Which defense to choose?

A number of important factors need to be considered. Most important is the law the parties have chosen to govern their relations. In addition, the effect of the pandemic or its consequences on the parties and their performance of the agreement, the causal link between the pandemic and non-performance or potential non-performance, the expected duration of the adverse effects of the disease or its consequences, the ability to change the form of performance or provide alternative performance, and the readiness of the parties for bona fide negotiations need to be thoroughly analyzed.

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