

## RUSSIAN FEDERATION: SUPREME COURT OVERVIEW OF ISSUES RELATED TO CORONAVIRUS

On 21 April 2020, the Presidium of the Supreme Court of the RF (the "**Supreme Court**") issued guidance on a range of issues in various areas of law (the "**Overview**") as concerns the impact of the COVID-19 pandemic (the "**Pandemic**"), restrictive measures imposed by public authorities at various levels on contractual relations (the "**Measures**"), and procedural issues<sup>1</sup>.

In the Overview, the Supreme Court provides guidance on, among other things, the following issues:

- can the Pandemic and the Measures be ruled a force majeure event / grounds for termination of obligations or for amendment / termination of a contract due to a material change in circumstances;
- how should the "non-working days" declared by the Russian President be treated when calculating limitation periods, and what should be done if the deadline for performance of an obligation falls on a "non-working day";
- do the Measures constitute grounds for a postponement, a stay of proceedings, or an extension;
- what are the legal consequences when the last day of a procedural period falls on a "non-working day"; and
- are the Measures grounds for the reinstatement of procedural timelines?

Overviews of judicial practice issued by the Supreme Court are, in contrast to decrees of the Plenum, not included in the list of new circumstances that allow a case to be reviewed. However, such overviews (and the Overview in particular) do have an impact in shaping judicial practice.

Below we look at these issues in detail.

### SUBSTANTIVE LAW ISSUES

#### Can the Pandemic and the Measures be ruled grounds for release from liability for breach of obligation?

In the Overview (the answer to Question 7 and partly to Question 6), the Supreme Court notes that:

#### Key points:

- The question of whether the Pandemic and the Measures are grounds for release from liability for breach of obligation must be determined on a case-by-case basis.
- It is indicated (unexpectedly) that if a person owing a contractual obligation has lack of funds due to the Measures, this may be grounds for release from liability for breach of obligation.
- Despite the "non-working days" from 30 March to 30 April 2020, limitation periods are to be calculated as usual.
- The "non-working days" in the period from 30 March to 30 April 2020 are to be included in procedural timelines (such as the time frame for appealing a judicial act).
- Procedural deadlines that have been missed due to the Measures can be reinstated by the courts, but not always.

<sup>1</sup> The Overview touches upon, among other things, selected issues of bankruptcy law, administrative law and criminal law (including penalties for disseminating false information). Those issues are not addressed in this briefing.

- an event (including the Pandemic and the Measures) can be declared force majeure only if a 'triad' of factors are present (exceptionality, unavailability and insuperability);
- if it is temporarily impossible to perform an obligation, this does not automatically terminate the obligation of a person owing a contractual obligation, but gives the creditor the right to repudiate the contract if it has lost interest in performance (this was mentioned earlier, in para. 9 of Supreme Court Plenum Decree No. 7 of 24 March 2016);
- the Pandemic and the Measures can be grounds for release from liability only if there is a causal link between them and it is impossible to perform the obligation (it being incumbent upon the person owing a contractual obligation to take steps to prevent the occurrence of (mitigate) adverse consequences).

The Supreme Court has also included a rather unexpected clarification in the Overview. Despite the fact that Art. 401(3) of the Civil Code expressly provides that a lack of necessary funds on the part of a debtor is not grounds for release from liability for breach of obligation, the Supreme Court has indicated the following: *"If a lack of necessary funds is caused by the restrictive measures that have been established, particularly the prohibition of certain activities, imposition of the regime of self-isolation, etc., this may be recognised grounds for release from liability under Article 401 of the Civil Code for failure to perform or improper performance of obligations"*. The criterion for the release from liability is the impossibility of any other *"reasonable and prudent civil party engaged in activities similar to the debtor"* avoiding adverse financial consequences as a result of the Measures.

Without delving into the question of whether this guidance is consistent with Russian law or not, it should be noted that it will generate many disputes. Previously, many believed (not unreasonably) that, for example, it was only in the most exceptional cases that a force majeure event could render it impossible to perform a monetary obligation (i.e., if actually making a remittance became impossible). Now, the range of such circumstances has been enlarged, and debtors are likely to make use of this. Given that the Pandemic and the Measures have had a negative impact on virtually all spheres of the economy, it remains to be seen how widely the courts will be guided by the Supreme Court's interpretation of the law.

### **Can the Pandemic and the Measures be ruled grounds for termination of an obligation due to the impossibility of performing it?**

As we noted in our briefing from 3 April 2020, Arts. 416 and 417 of the Civil Code allow termination of obligations between a creditor and a person owing a contractual obligation if the impossibility of performance, resulting from force majeure, is not temporary but permanent (irremediable). This is also indicated in the Overview (the answer to Question 7).

Given that the Pandemic and the Measures (as we hope) are temporary in nature, it is unlikely that Arts. 416 and 417 of the Civil Code will be broadly applied in the context of the Pandemic.

### **Could the Pandemic and the Measures constitute grounds for amendment or termination of contract?**

As we wrote earlier<sup>2</sup>, the Pandemic and the Measures may be considered in the context of Art. 451 of the Civil Code, i.e., as grounds for amendment or termination of contract through the courts. In the Overview (the answer to Question 8), the Supreme Court also considers Art. 451 of the Civil Code, but does not draw any specific conclusions as to the possibility of termination or amendment of contract as a result of the Pandemic and the Measures. The Supreme Court notes that, in accordance with Art. 451(4) of the Civil Code, a contract can be amended by a court in exceptional cases only, *"when termination of the contract is not in the public interest or would cause the parties to suffer damage significantly exceeding the costs required to perform the contract on the terms amended by the court"*.

The Supreme Court also points out that additional rights to repudiate or amend a contract are set out in Art. 19 of Federal Law No. 98-FZ On Amendments to Certain Legislative Acts of the Russian Federation on the Prevention and Elimination of Emergency Situations, dated 1 April 2020. While that article does indeed indicate that it is possible, under certain conditions, to agree on a mandatory basis a deferral of payment of rent for real estate, its provisions are much less clear as regards the possibility of rent reductions.

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<sup>2</sup> See our briefing from 3 April 2020.

## How should the "non-working days" be treated when calculating limitation periods, and what should be done if the deadline for performance of an obligation falls on a "non-working day"?

The President of the RF declared the period of 30 March to 30 April 2020 non-working days<sup>3</sup> ("Non-working Days"). Among the questions this raises is whether the due date of an obligation should be deferred until the Non-working Days have ended. The Supreme Court notes that the Non-working Days "are not grounds for deferring the due date of an obligation pursuant to Art. 193 of the Civil Code" (the answer to Question 5).

Another question is whether or not statutory limitation periods are suspended and whether or not they can be reinstated. The Supreme Court has indicated that limitation periods continue to run as usual (the answer to Question 6) and that the question of reinstatement should be decided by the courts on a case-by-case basis.

## PROCEDURAL LAW ISSUES

In the Overview, the Supreme Court also clarifies the following procedural issues.

- The Measures may constitute grounds for a postponement, a stay of proceedings, or an extension (the answer to Question 1).

It should be noted that, as regards the hearing of cases by the courts from 18 March 2020 to 30 April 2020 (inclusive), two joint decrees of the Presidium of the Supreme Court and the Presidium of the Judicial Council of the Russian Federation were adopted: No. 808 of 18 March 2020 ("**Decree No. 808**") and No. 821 of 8 April 2020 ("**Decree No. 821**"). Decree No. 821 replaced Decree No. 808.

In accordance with Decree No. 821, from 8 April 2020 to 30 April 2020 (inclusive):

- it is recommended that the courts "*consider cases and materials of an urgent nature, including those relating to protection of citizens' constitutional rights to liberty and personal inviolability, to protection of health and property (...interim measures, etc.), cases to be heard in summary or simplified proceedings, [and] cases in which all the participants have submitted petitions requesting that the case be heard in their absence, if their participation in the consideration of the case is not obligatory*" (para. 3);
- "[taking into account] *the circumstances of the case, the opinions of the parties to the proceedings, and the conditions of the high-alert regime introduced in the respective constituent entity of the Russian Federation, a court is entitled to make its own decision whether or not to consider a case that is not specified in paragraph 3 of this decree*" (para. 4).

The same guidance is provided in the Overview.

Therefore, the list of categories of cases that can be heard by the courts is presently not exhaustive, and the question of whether a given case can be considered or not is to be decided by the courts on a case-by-case basis (taking into account the opinions of the parties participating in the proceeding).

- Non-working Days (as this term is defined above) are to be included in procedural timelines and are not grounds to reschedule procedural deadlines to the next working day following them (the answer to Question 2).

Therefore, if, for example, the deadline for appealing a judicial act is 22 April 2020 and an appeal is filed with the court only on 6 May 2020, the deadline for appeal will be deemed to have been missed (although it will still be possible to apply for reinstatement of the lapsed period — see below).

On one hand, there are reasons to believe that the above guidance of the Supreme Court will help prevent possible abuses of procedural rights by participants in proceedings when determining compliance with procedural timelines. However the Overview was issued rather late (after about three weeks had passed since 30 March 2020), and many persons may have already missed procedural deadlines, e.g., believing, in good faith, that where a procedural deadline fell on one of the Non-working Days it would be moved to the next working day following them. The guidance set out in the Overview may significantly limit such persons' ability to exercise their procedural rights.

- If the last day of the period for which a hearing has been postponed falls on a non-working day (including the Non-working Days), the postponement is deemed to last until the first working day that follows it. On that first working day, the

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<sup>3</sup> Edicts of the President of the RF No. 206 On Declaration of Non-working Days in the Russian Federation, dated 25 March 2020, and No. 239 On Measures to Ensure Sanitary and Epidemiological Welfare of the Population in the Territory of the Russian Federation in Connection with the Spread of the New Coronavirus Infection (COVID-19), dated 2 April 2020.

court is to extend the period of postponement, set a date and time for the new hearing, and notify the parties accordingly (the answer to Question 3).

Generally it can be said that the guidance issued by the Supreme Court of the RF is an additional guarantee that a case, the hearing of which has been postponed to one of the Non-working Days, will not be considered in the absence of the parties / their legal counsel. However, it is likely that this clarification on automatic prolongation of postponements will not be applied by the courts to cases that continue to be heard (i.e., urgent cases and cases in which all parties have requested the court proceed in their absence (provided their participation in the hearing is not obligatory)).

- Procedural timelines that have been missed by persons involved in a case due to the Measures are to be reinstated (the answer to Question 4).

Note that in order to reinstate a procedural timeline, parties must prove a causal link between the lapse of the procedural deadline and the Measures. It seems that it may be very difficult for parties to a case (especially legal entities) to prove such a link. Among other things, on the Non-working Days it is still possible to file documents with the courts, both by post and through the courts' digital services. Furthermore, the possibility cannot be ruled out that the above guidance of the Supreme Court will be applied by the courts with account for previous clarifications of the higher courts regarding the reinstatement of procedural timelines, from which it follows that internal organisational problems of a legal entity are not a valid reason for missing such deadlines<sup>4</sup>.

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<sup>4</sup> See para. 14 of Decree of the Plenum of the Supreme Arbitrazh Court of the RF No. 36 On Application of the Arbitrazh Procedure Code of the Russian Federation When Considering Cases in the Appellate Instance of an Arbitrazh Court, dated 28 May 2009.

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