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## FORCE MAJEURE AND THE IMPACT OF COVID-19 MEASURES ON BUSINESS IN BULGARIA

### WHAT IS TO BE DONE?

Following the swift spread of the coronavirus in Europe and the first cases in Bulgaria, on 13 March 2020 the Bulgarian National Assembly declared a *State of National Emergency* at least until 13 April 2020, but subject to potential additional extension. In addition, several measures directly affecting companies in Bulgaria have also been adopted.

#### **Who is affected by the measures and how?**

The first step that companies must undertake is to assess whether the new legislative acts are addressed to them and what obligations they create. As of this moment, the most relevant act for business is **Order № ПД-01-124/13.03.2020 ("Order")**. The Order prohibits any visits by customers to an exhaustive list of commercial premises (i.e. bars, restaurants, shopping malls). On 17 March 2020, the Minister further amended the Order by prohibiting all gatherings of more than 2 persons in public spaces. The Minister also issued various orders imposing prohibition of entry into Bulgaria for foreigners from third countries and some particular EU member states, as well as imposing time limits for stay in Bulgaria for drivers of transport trucks.

The companies that are listed in the Order – in particular shopping malls and stores located in such malls – must cease their commercial activities in relation to customers. It is still unclear whether their employees can enter the premises and whether they can be assigned other work (i.e. disinfection of the space, conducting inventory, processing of online sales, etc.). Requests have been made to the Ministry of Healthcare and more detailed regulations are expected soon.

Other companies, not envisaged in the Order, may continue their activities while complying with strict sanitary-hygienic requirements. Furthermore, if the nature of the work allows, they must provide for a work-from-home schedule.

Nevertheless, new measures and clarifications are issued every day and all business shall constantly follow the developments.

#### **Can force majeure be invoked to justify non-performance and how it works**

One of the most important questions that concern companies is what the consequences are if they are unable to perform their contractual obligations.

- *The test for Force Majeure*

Bulgarian law provides for **force majeure** as an excuse for contractual non-performance. Force majeure is *an unforeseeable and unavoidable event of an extraordinary nature which has occurred after the conclusion of the contract*. It could be invoked even if not contained in the respective contract.

Whether force majeure can be invoked would depend on the fulfillment of an objective test of five cumulative requirements:

- **Unforeseeable event** – Consistent case law considers an unforeseeable event as one that the parties could not have reasonably predicted at the time of the conclusion of the contract.
- **Unavoidable event** - The courts have held that an unavoidable event occurs if it may not be evaded and its consequences may not be prevented. This is assessed considering the level of development of the technology, science, etc. Furthermore, the debtor must prove that it has done everything possible to prevent the event but to no avail.
- **Extraordinary event** - Jurisprudence has mostly regarded natural disasters, such as earthquakes, floods and fires, as extraordinary events. However, acts of state organs have also been considered to satisfy this requirement.
- **Occurring after the conclusion of the contract** - The debtor cannot invoke force majeure if the circumstance was already present, or if the contract is signed during such event.
- **Causal link between the force majeure circumstance and the non-performance** must be established.

If all requirements are met, the debtor can invoke *force majeure* as grounds to stop performing its obligations. However, whether this will be accepted both by the creditor and by the court will depend on the concrete facts, as force majeure is established on a case-by-case basis.

- *Obligation to notify the counterparty*

The debtor, who bases its non-performance on force majeure, shall notify the other party in writing within a reasonable time about the nature of the *force majeure* and its potential consequences for the performance of the contract. If the debtor does not comply, it will bear responsibility for the damages resulting from the failure to notify. The term *reasonable time* is not legally defined, but the case law considers that it depends on the facts of each case. In any event, it is best to notify the other party as soon as the potential consequences are identified.

- *Force majeure certificates*

A company which is unable to perform its contractual obligations due to force majeure circumstances may request the issuance of a force majeure certificate from the Bulgarian Chamber of Commerce and Industry and/or the Bulgarian Industrial Chamber. These certificates are recognized internationally and are deemed as persuasive evidence by international arbitration institutions and Bulgarian courts.

- *Consequences of invoking force majeure*

If a party validly invokes force majeure, it could be released from the execution of its obligations, affected by the respective event. On the other side, the counterparty would also be released from the execution of its respective obligations. Thus, for example, if a seller of goods is unable to deliver the goods, the buyer would not be obliged to pay the goods.

### **Potential exposures under financial agreements**

The spread of the coronavirus may also significantly affect financial and loan agreements. In particular, the potential non-execution of contractual partners could lead to material adverse events and events of default. However, an assessment must be made under any given contract in order to conclude if there are any specific clauses regulating such events.

On another note, the Bulgarian National Assembly adopted an Act on the State of Emergency which provides that the consequences for delay of payment of private persons or entities shall not be applicable during the state of emergency. This includes any interests and penalties that may be accumulated as well as non-pecuniary consequences, such as requests of early prepayment or escalation or termination of the contract. This provision was aimed at safeguarding the interests of the debtors, which may experience lower income during the state of emergency. However, the Bulgarian lawmakers are considering adopting a more balanced provision, which will also protect the rights of the creditors to ensure performance under the contracts.

### **What can be done if a business partner invokes force majeure?**

Another important consideration for companies is what measures can be adopted to defend themselves against non-performance of business partners. The available remedies would depend on whether force majeure has in fact occurred or not.

If there are no grounds to validly claim *force majeure*, but the other party to the contract is not performing, a company can cease performance of its own obligations arising from the same contract. Additionally, if both parties are merchants, the company can invoke Art. 315(1) Commerce Act and retain any lawfully received movable property and securities of the debtor.

In case there are valid ground to invoke *force majeure* events, the performance of obligations is suspended until the force majeure circumstances last for both parties. If the force majeure last for a long period and renders the contract meaningless, then this could be a ground for its rescission.

In any case, companies may request interim measures from courts in order to secure future claim for performance. Currently, courts continue to review requests for interim measures despite the state of emergency.

### **Credit and payment insurances**

Particular attention shall be paid by companies having payment or credit receivables insurances or factoring arrangements. Most of such policies provides for strict terms to notify the insurer about any objection by counterparties and/or limitations of such events. A careful analysis of the policy is required to minimize the potential losses.

## CONCLUSION

When facing the current developments of COVID-19, companies shall quickly and efficiently evaluate their legal standing in respect of their clients and suppliers. This unprecedented situation raises numerous legal issues, which if correctly assessed, may minimize, if not to avoid, losses for international business.

For information regarding other aspects of COVID-19, please see additional Client Alerts prepared by Wolf Theiss at the following link: <https://www.wolftheiss.com/covid19/>.

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