

**Force-Majeure Part 1:  
Kazakhstan & the AIFC:  
A Comparative Approach &  
Related Dispute Resolution at  
the AIFC Court and IAC**

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# 1. Force-Majeure under Kazakh Law and AIFC Law: Overview

- **When the AIFC Law applies:**
  - (1) Between participants to the AIFC, between participants to the AIFC and the AIFC bodies, between the AIFC Bodies, unless excluded by agreement;
  - (2) Where parties choose to apply the AIFC Law (this automatically implies the jurisdiction of the AIFC Court, unless expressly agreed otherwise);
- **AIFC Contract Regulations govern Force-Majeure;**

## 2. What is Force-Majeure?

### Article 359(2) of the RoK Civil Code:

*“A party is liable for a failure to perform or improper performance of its obligations in the course of commercial operations, unless he proves that the failure was a result of force-majeure, namely, circumstances extraordinary and unavoidable in such conditions (natural calamities, military actions, etc.). In particular, such circumstances do not include absence of goods, works, or services required for the purposes of performance . . . .”*

Refers to impossibility to perform

### Article 82(1) of the AIFC Contract Regulations (vs Doctrine of Frustration):

*“Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond the party’s control and that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”*

Doctrine of frustration usually terminates an obligation

### 3. Criteria:

The RoK Civil Code	AIFC Law
<p>(1) Extraordinary (<i>exceptional, beyond normal, unusual, something which cannot be taken into account under any circumstances</i>);</p> <p>(2) Unavoidable (natural calamities, military actions, etc.); (<i>if everyone in similar business could not have avoided this circumstance or its implications</i>);</p> <p>(3) Do not include absence of goods, works, or services required for the purposes of performance; (<i>does not include circumstances occurrence of which depends on the will or actions of a party</i>)</p>	<p>(1) Beyond the party's control;</p> <p>(2) Could not have been reasonably expected or avoided;</p>

## 4. Scope:

The RoK Civil Code	AIFC Law
<p>Part 2 of Article 359(2) of the RoK Civil Code: “ . . .</p> <p><i>Laws or a contract <u>may set out other grounds</u> for liability or a release therefrom.“</i></p> <p>Article 374(2) of the RoK Civil Code:</p> <p><i>“If a party’s performance has become impossible due to a circumstance for which neither of the parties is liable, the other party may not demand performance of the obligation, <u>unless otherwise is stated in laws or a contract . . .</u>”</i></p> <p>The Parties may agree on the scope of FM events, e.g. COVID-19 (<i>arguable in practice</i>)</p>	<p>Article 11 of the AIFC Contract Regulations:</p> <p><i>“The parties to a contract <u>may exclude the application of these Regulations, or derogate from or vary the effect of any of their provisions, except as otherwise provided in these Regulations.</u>”</i></p> <p>The Parties may agree on the scope of FM events, and the Court will likely uphold such agreement</p>

## 5. Causation:

### Article 359(2) of the RoK Civil Code:

*“A party is liable for a failure to perform or improper performance of its **obligations** in the course of commercial operations, unless he proves that the failure [**to perform such obligation**] was a result of force-majeure, namely, circumstances extraordinary and unavoidable in such conditions (natural calamities, military actions, etc.). In particular, such circumstances do not include absence of goods, works, or services required for the purposes of performance . . . .”*

FM can be invoked if FM had direct impact on the relevant obligation (e.g. obligation of the Landlord to provide leased space vs. quarantine imposed by state of emergency);

### Article 82(1) of the AIFC Contract Regulations:

*“Except with respect to a mere obligation to pay, non-performance [**of an obligation**] by a party is excused if that party proves that the non-performance [**of such obligation**] was due to an impediment beyond the party’s control and that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”*

## 6. Monetary Obligations:

The RoK Civil Code	AIFC Law
<p>(1) Silent as to whether it can be invoked in relation to FM (<i>but widely supported in practice that it does not apply to monetary obligations</i>);</p> <p>(2) Article 374(1) of the RoK Civil Code:</p> <p><i>“An obligation is terminated due to impossibility to perform where this is caused by a circumstance for which none of the parties is responsible. <u>This rule does not apply to monetary obligations.</u>”</i></p> <p>Article 404(2)(1) of the RoK Civil Code.</p> <p>Russian Supreme Court’s clarification issued on 21 April 2020</p>	<p>Article 82(1) of the AIFC Contract Regulations:</p> <p><i>“<u>Except with respect to a mere obligation to pay, non-performance by a party is excused if . . . the non-performance was . . . beyond the party’s control</u> . . . .”</i></p>

## 7.1 Remedies:

The RoK Civil Code	AIFC Law
<p>(1) Article 374(1) of the RoK Civil Code:</p> <p><i>“An obligation is <u>terminated</u> due to impossibility to perform where this is caused by a circumstance for which none of the parties is responsible. This rule does not apply to monetary obligations.”</i></p> <p>(2) Article 374(1): applies to situations where performance is impossible due to an act of state</p> <p>A party may seek termination of the contract (debate over the sustainable effect of FM to give rise to termination)</p>	<p>Article 82(2) of the AIFC Contract Regulations:</p> <p><i>“If the impediment is only temporary, the excuse has effect <u>for the period that is reasonable</u> having regard to the effect of the impediment on performance of the contract.”</i></p> <p>Article 82(4): <i>“Nothing in this section prevents a party from exercising a right to <u>terminate</u> the contract or to withhold performance or request interest on money due.”</i></p> <p>A more balanced approach (reasonableness test). Greater focus on contract language.</p>

## 7.2 Remedies (Potential to Reconsider the Contract: Hardship):

The RoK Civil Code	AIFC Law
<p>Not possible, unless so allowed by the contract;</p>	<p>Article 13(6) of the AIFC Constitutional Statute:</p> <p><i>“In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgements of the AIFC Court in related matters and <u>final judgements of the courts of other common law jurisdictions.</u>”</i></p> <p>Maybe possible?</p> <p>Doctrine of Hardship (changed circumstances)?</p> <p>US Doctrine of Impracticability (changed circumstances, excessively onerous performance)?</p>

## 8. Notice Requirement:

The RoK Civil Code	AIFC Law
<p>(1) None (except specified by the contract);</p> <p>(2) May be derived from Article 8(4) (duty to act in good faith, fairly, and reasonably);</p>	<p>Article 82(3) of the AIFC Contract Regulations:</p> <p><i>“The party who fails to perform <u>must give notice</u> to the other party of the impediment and its effect on the party’s ability to perform. If the notice is not received by the other party within a <u>reasonable time</u> after the party who fails to perform knew or ought to have known of the impediment, the party is liable for damages resulting from the non-receipt.”</i></p> <p>Notice is required, contents of the notice are clearly stated.</p>

## 9.1. Evidence and Burden of Proof:

The RoK Civil Code	AIFC Law
<p>A certificate from the Foreign Trade Chamber helps considerably, but it is not binding;</p> <p>Document evidence (almost exclusively, e.g. acts of state bodies), original copies, emails may or may not be admitted;</p> <p>What if parties agreed on the certificate as proof of FM, and the party failed to produce it?</p>	<p>No specific criteria yet, all available evidence, far greater flexibility (witness statements, software, emails, photocopies, etc.)</p> <p>High focus on contractual language</p>

## 9.2. Standard of Proof:

The RoK Civil Code	AIFC Law
<p>Higher standard of proof in Kazakh courts, Article 68(6) of the RoK Code of Civil Procedure:</p> <p><i>“The volume of evidence is considered sufficient to decide a civil case, if admissible and reliable evidence which, <u>without dispute</u>, proves circumstances relevant for the case, and which the counter party has not refuted, is collected.”</i></p> <p>Rarely applied in practice, but the standard is not clear</p>	<p>Balance of probabilities (more probable than not)</p>

## 10. Overview of Judicial Practice:

The RoK Civil Code	AIFC Law
<p>(1) Circumstances which fall within the party's control (contractors, subcontractors, due care, e.g. accident, excluding a road accident(?), injunction by the state, delayed issuance of permits, discovery of ground water, fire, );</p> <p>(2) Circumstances beyond the party's control (weather conditions not FM (+/-),</p>	<p>We will see</p>

**Thank you!**

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