



Legal Alert

27 March 2020

Weinhold Legal

IMPACT OF CORONAVIRUS PANDEMIC AND EXTRAORDINARY MEASURES OF THE SLOVAK GOVERNMENT ON BUSINESS RELATIONS

In our previous Alerts, we provided a summary of the Slovak Government's current measures in connection with the spread of COVID-19 and the possibility of mitigating their negative impact from the labour law perspective. In this Alert, we will provide a brief guide of what to focus on and how to mitigate the unfavourable impact of the Government's restrictive measures on business relations, manifested in particular by delays in fulfilling contractual obligations, an inability to fulfill them and an increased risk of bankruptcy or insolvency.

CONTRACTUAL FORCE MAJEURE

In the case of the risks mentioned above, the first step should always be to analyze the contract in question, paying attention to the issue of so-called force majeure.

If the contract contains a force majeure clause, it is necessary to determine whether following conditions are met:

- ▶ whether or not the coronavirus pandemic fulfils the definition of force majeure in the contract (a non-exhaustive list of situations which could be considered as force majeure such as war, floods or epidemic is often included in the contract),;
- ▶ whether or not the coronavirus pandemic is the

real cause of the relevant contractual failure;

- ▶ the fulfilment of any other conditions stipulated in the contract (as a rule, a disclosure obligation).

Satisfaction of the conditions mentioned above will usually lead to there being no breach of contract and the other party should not have the right to withdraw from the contract or to claim damages or a contractual penalty. However, each contract needs to be assessed individually.

In some areas (typically in the construction industry) contracts often include a specific mechanism for claiming an extension of the time required to fulfil the obligation in question in the event of there being a force majeure situation. Often short prescription periods are set for claiming a time extension (for example, according to the 1999 FIDIC Red Book a contractual party has 28 days for notification). Thus, notification of a force majeure situation to other contractual parties should not be delayed.

CIRCUMSTANCES EXCLUDING LIABILITY

("FORCE MAJEURE" AS REGULATED BY THE CIVIL CODE)

If parties did not regulate force majeure and its consequences directly in the contract, the Commercial Code stipulates in Section 373 that a party that has breached the contract may be released from its duty to provide compensation for damages assuming it will prove that the breach was due to circumstances excluding liability.



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Obstacles considered circumstances excluding liability shall meet following conditions:

- ▶ the obstacle was created independently of the will of the obliged party,
- ▶ it prevents the liable party from fulfilling its obligation and it cannot reasonably be assumed that the obstacle or its consequences may be averted or overcome by the obliged party,
- ▶ the obstacle was not foreseeable at the time of the commitment,
- ▶ the obstacle did not arise when the obliged party was in default of performing its contractual duty,
- ▶ the obstacle did not arise from the economic situation of the obliged party.

(i.e. liberation cause).

While the spread of COVID-19 and the extraordinary government regulations clearly fulfill the first condition, the fulfillment of the subsequent conditions will have to be examined depending on the specific circumstances of each case, eg. the ability of the liable party to anticipate the extent and consequences of the dissemination of COVID-19 with regard to the information currently available at the time of the commitment and the reasonable possibility of averting it, albeit at increased financial cost.

The burden of proof with respect to the applicability of the liberation cause lies usually on the liable party.

An exception to this rule is the so-called Certificate of force majeure, which the Slovak Chamber of

Commerce and Industry (SOPK) began issuing as an authorized public institution within the Slovak Republic in connection with measures of the Slovak Central Crisis Staff to prevent the spread of coronavirus in order to protect Slovak exporters from sanctions in connection with suspension of performance of international agreements.

The SOPK certificate will be issued after meeting the conditions stated on this [website](#). Being an authentic instrument under the Act on Chambers of Commerce and Industry, in cases of force majeure in international relations, it confirms the truth of what is certified in it or if it is not proven otherwise, i.e. shifts the burden of proof from the liable party to the reliant party.

Although the existence of circumstances excluding liability relieves the liable party of the obligation to compensate for damages, the statutory "vis maior" does not in itself affect the obligation to pay a contractual penalty or the possibility of withdrawal if the contractual / legal conditions are met.

SUBSEQUENT IMPOSSIBILITY OF PERFORMANCE

Theoretically, the coronavirus pandemic may also lead to the extinction of the entire obligation, this is because the fulfilment of the debt (e.g. the execution of a certain delivery) has become impossible (legally or factually). In the event of such an extinction, the other party would have to make restitution of unjust enrichment (performance already received). However, the extinction of obligation for this reason can only occur in very specific



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situations such as the following:

- ▶ legislation issued after the conclusion of the contract prohibits the debtor from action, for an indefinite period of time, to which he is bound, or
- ▶ to meet the commitment requires official permission which the debtor has not been granted although he duly sought it (asked the competent authority within the prescribed deadline and in a stated manner).

On the contrary, the obligation does not extinguish when the debt can be fulfilled:

- ▶ under more difficult conditions,
- ▶ at a higher cost,
- ▶ after a determined period,
- ▶ with the help of another person.

The burden of proof regarding the impossibility of performance lies with the obliged party.

If the impossibility of performance was not due to circumstances excluding liability, the debtor, whose obligation ceased to exist for that reason, would be obliged to pay the damage thereby caused to the creditor.

FIXED OBLIGATIONS

In the event of a contracting party's default in the performance of an obligation it is also necessary to consider whether this is a so-called fixed obligation, i.e. a contract with an exactly agreed period for performance

implying that the creditor is not interested in late performance. Such obligations extinguish automatically upon the debtor's default unless the creditor notifies the debtor prior to the due date that it insists on the contractual performance. The termination of the obligation shall have the same effect as if the creditor had withdrawn from the contract.

RECOMMENDATIONS

If you are unable to meet your contractual obligations as a result of the current situation, we recommend that you inform your business partners as soon as possible and try to negotiate, for example, an extension of delivery dates, a discount, etc. By timely information to the other party, you can achieve not only an agreed modification of the contractual obligations, but also such notification may ultimately affect, for example, the level of damage compensation.

Section 377 of the Commercial Code obliges any party that is in breach of an obligation or, having regard to all the circumstances, any party that should know that it is to breach its obligation arising from a contractual relation, to notify the other party without delay of the nature of the obstacle preventing it from fulfilment of the obligation and its consequences.

In the event of default in respect of multiple monetary obligations towards multiple creditors, we recommend that you try to negotiate an extension of the maturity of the commitments in order to avoid the obligation to file for bankruptcy. We also recommend that you track



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transactions that could be considered to favor creditors in the event of bankruptcy, or to follow internal corporate practices in the event of bankruptcy threats.

NEWS

In connection with the above-mentioned issues the Slovak parliament approved a bill on certain emergency measures in connection with the spread of dangerous contagious human disease Covid-19 and on justice prepared by the Ministry of Justice of the Slovak Republic.

The approved bill regulates in particular:

- ▶ **extension of the deadline for filing for bankruptcy proceedings by the debtor** in case of his over-indebtedness, if it occurred between 12 March 2020 and 30 April 2020, **to 60 days**,
- ▶ possibility of collective bodies of legal persons (companies) during the extraordinary situation/state of emergency declared by the Slovak Government to **use correspondent voting or electronic means to attend meetings of company bodies**, even if this does not result from their internal regulations/statutes,
- ▶ **the ineffectiveness of acts leading to the exercise of liens** between the effective date of the law and April 30, 2020.

The current wording of the Act approved by the National Council of the Slovak Republic is available on this [website](#).

We also recommend monitoring programs to assist the

Slovak economy in the fight against the spread of COVID-19 which is being prepared by the Slovak Government. The current draft measures are published on this [website](#).

This information in this bulletin is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made.

Nor should the information in this bulletin be considered an exhaustive description of the given matter and its possible ramifications. We also note that legal opinion varies regarding some of the issues raised in this bulletin due to ambiguities in the relevant provisions. Thus, it is possible that an interpretation other than the one presented here will prevail in future.

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