

Impact of COVID-19 on existing contracts.

In light of the current COVID-19 situation and its effect on business operations and economy, please find below an overview of the force majeure regulations and practices of proving force majeure applicable in the Republic of Poland.

1. What is the legal definition of force majeure (if there is a legal definition)?

The term force majeure is not defined but it can be found in several provisions of the Polish Civil Code.

2. Does the legal definition include epidemics and/or pandemics and/or are these usually included or excluded in contractual force majeure definitions?

Despite the lack of a statutory definition, force majeure is assumed to be an accidental or natural external event, and therefore unforeseen or unforeseeable, the effects of which cannot be prevented. When analysing a specific case, it is necessary to answer the question whether, given the experience of an average representative of a given industry, such event could have been reasonably expected to occur, and if yes, whether – within the limits of the capacity of the party affected by the force majeure event – there was a reasonable possibility of protection against this event.

Epidemics are considered to be force majeure events.

Some contracts include a so-called force majeure clause. In some cases, contractual parties define on their own the term force majeure applicable to the contractual relationship between them. Quite often, there are no direct references to epidemics in such definitions or clauses, though it must be noted that the examples of events, stipulated in them, generally do not constitute an exhaustive list.

As a rule, a force majeure clause is included in the contract so that in the event of non-performance or improper performance of the contract by one of the parties due to force majeure it could be possible to release it from liability towards the other party for the resultant damage. Some contracts require the party affected by the force majeure event to take certain steps (e.g. submit a relevant notification) in order to secure legal protection.

3. How should force majeure be proved? Do authorities issue official force majeure certificates?

Authorities do not issue any official force majeure certificates.

In the current situation of the pandemic two legal acts, confirming the existing situation, were adopted, namely: Regulation of the Minister of Health of 13 March 2020 declaring the state



of epidemic threat in the territory of the Republic of Poland and Regulation of the Minister of Health of 20 March 2020 declaring the state of epidemic in the territory of the Republic of Poland.

4. Is the spread of COVID-19 considered force majeure? What is the threshold for considering a virus force majeure, e.g. does COVID-19 amount to force majeure only after an official emergency situation has been declared?

The spread of the COVID-19 virus may be considered a force majeure event.

The official declaration of a state of epidemic threat or epidemic is not a necessary condition for it to be considered as such.

5. Does a force majeure situation cause an temporary or permanent release from all or certain obligations?

Pursuant to Article 475 § 1 of the Civil Code, if a performance becomes impossible due to circumstances for which the debtor is not liable, the obligation expires. It does not apply to a situation of temporary difficulty in fulfilling a performance.

In the case of reciprocal contracts, performances should be fulfilled simultaneously (Article 488 of the Civil Code), unless otherwise agreed. Each party may withhold the performance until the other party offers the reciprocal performance.

If the party obliged to fulfil a performance declares that it will not fulfil it, the other party may withdraw from the contract without setting an extra time limit, also before the date set for the fulfilment of the performance (Article 492¹ of the Civil Code).

If one of the reciprocal performances becomes impossible due to circumstances for which neither party is liable, the party which was to fulfil the performance cannot demand the reciprocal performance, and, if it had already received it, it is obliged to return it according to the provisions on unjust enrichment.

However, if the performance of one of the parties becomes only partially impossible, that party shall lose the right to the appropriate part of the reciprocal performance. In such a case, the other party may withdraw from contract if the partial performance was meaningless to it.

The parties may agree otherwise in the contract.

Contracts often include detailed regulations giving a party the right to withdraw in the case of delay of the other party, also due to force majeure, if such delay exceeds the time limit stipulated in the contract.

It is worthy of note that provisions of Polish law provide also for the possibility of the contractual party invoking the *rebus sic stantibus* clause. Pursuant to the provision of Article 357¹ of the Civil Code, *if, due to an extraordinary change in circumstances, a performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when executing the contract, the court may, having considered the parties' interests, in accordance with the principles of social coexistence, designate the manner of performing the obligation, the value of the performance or even decide that the contract be dissolved. When dissolving the contract, the court may, as needed, decide how accounts will be settled between the parties, being guided by the principles set forth in the preceding sentence.*