



About this virus, then...

The coronavirus epidemic is not only exerting an all-too-obvious impact on the global economy as a whole, but also on all and sundry individual projects and enterprises, especially ones depending on deliveries or services from countries which, to date, have been most severely affected (such as China). The coronavirus crisis also has implications for legal / contractual / obligation relations at the B2B level, and between companies and their staff.

Summary

The coronavirus epidemic has implications for the legal situation of business enterprises first and foremost with respect to:

- **Contractual liability**, e.g. in the context of any litigation over claims for rectification of harm occasioned by failure to perform, or improper performance of, an obligation. Here, much may depend on whether or not **force majeure** is deemed to have arisen; an entity which succeeds in its force majeure plea may find itself exonerated of any contractual breach;
- **Liability in tort**, e.g. harm occasioned to third parties as a result of operation of the business enterprise. Here, force majeure – in the sense of an extraneous event or phenomenon which could not have been reasonably foreseen or prevented – may, in some cases, exempt the enterprise from liability for damages;
- In negotiation – or, indeed, renegotiation – of commercial contracts, the coronavirus epidemic should be duly taken into account in structuring any force majeure clauses.

What, then, is force majeure ?

The established definition of force majeure in Polish law speaks of (i) an event of an extraneous character which (ii) is impossible to predict (or which is highly unlikely to occur) and (iii) which could not have been prevented. In order for any given situation to qualify as force majeure, all three elements must arise.

Approached from this angle, the coronavirus epidemic may be deemed to constitute force majeure. Yet whether or not this instance of force majeure critically impedes any given venture remains a question for case-by-case analysis.

Force majeure as an extenuating circumstance

It should be noted that force majeure delimits liability for harm arising in connection with use of dangerous equipment or for harm occasioned by a transport operation, production facility, or construction company using machinery on a large scale (strict liability). But the force majeure event (e.g. the epidemic) and the harm caused must be connected by a direct causal link, and the actual arising of the harm must coincide with the operation of the force majeure. In the present case, this would mean that the coronavirus epidemic may constitute force majeure exempting a business enterprise from liability for harm caused in its operations – in some cases, subject to certain conditions.

Proceeding to liability pursuant to commercial contracts, construction works contracts, contracts for carriage, contracts for completion of a specific task, or commission contracts – **in short, contractual liability** – a party may avoid liability for failure to perform, or to perform duly, where the cause of such failure does not result from lack of due care and skill on such party's side. Or, in other words, where there is no culpability of that party. **The harm arising from the force majeure event (e.g. the present epidemic) should, as a general rule, give rise to a presumption of lack of fault on the part of the entity to perform under the contract.** All along, it should be borne in mind that possible exemption of liability for a party affected by the coronavirus epidemic will, in each and every instance, require assessment of the force majeure factor's impact on that party's actual possibility of performing the contract as originally stipulated, presuming due care and skill. Also, any party seeking to plead force majeure is well advised to keep communication lines with its contracting counterparties open.

Force majeure in contractual clauses – Worth noting

Contracts often include detailed regulations concerning potential force majeure events.

These tend to tilt towards the detailed side, with lists of specific circumstances which the parties may be willing to recognise as force majeure. In like spirit, the parties often provide that a recognised instance of force majeure gives rise to specific effects, such as the right to rescind the contract or the possibility of extending applicable deadlines and/or the duration of the contract itself so as to provide

for the time lost to force majeure. Again, every specific case stands to be analysed individually, but transparency and honesty in dealing with one's contractual partners are always a good strategy.

Recommendations re contract clauses

As regards contracts already executed (especially ones of a long-term nature), it is recommended to submit them – as a matter of urgency – to specialised verification so as to assess their provisions concerning force majeure and, if necessary, to amend such provisions so as to increase the chances that, when faced with extraordinary impediments to performance, force majeure may be successfully cited.

When negotiating a contract which yet has to be executed, meanwhile, regard should be had to how any force majeure clause is formulated so as to ensure that our interests are duly protected if we find ourselves unable to perform on account of reasons beyond our control. The current coronavirus crisis eloquently testifies to this.

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