

Covid-19: Contracts and force majeure

Coronavirus and how it affects contracts. In cases where contractual obligations cannot be fulfilled on time or at all, the question arises as to what happens to such contracts, whether it is possible to terminate them, whether the contracting party has the right not to fulfil its obligations and with what consequences, or whether it can seek changes to the content of the contract.



What to do if the other party fails to comply with the contract due to the current situation?

It depends on what you have agreed in the contract.

At this difficult time, many clients prefer to take a business approach and try to find a mutually acceptable solution, either by:

- accepting a delay for a certain period of time (beware of the statute of limitations) without waiving the demand for the given performance (or even the right to any penalties)

or, if certainty is desired,

- entering into an amendment to the contract with the debtor governing the conditions of performance.

It is possible that the debtor will attempt to reach out to you because of:

- 'consequent impossibility of performance', i.e. that satisfaction of the obligation became completely impossible after the liability was incurred and thus ceased to exist by law. In such a case, the payment already made constitutes unjust enrichment and the party is obliged to return the payment in full;

or at least because the following occurred:

- 'material change in circumstances' entitling the debtor to claim from you the renewal of the contractual negotiations (conclusion of an amendment) if the change in circumstances was not foreseeable and caused a particularly gross disproportion in the rights and obligations of the parties by disadvantaging one of them. If you do not agree within a reasonable period of time, either of you may file a motion with the court, which may then decide to amend or terminate the contract. However, a material change in circumstances cannot be invoked by the debtor if it has assumed the risk of a change in circumstances in the contract.

A specific and, in practice, not very frequent situation is

- 'fixed obligation', where it follows from the contract or due to the nature of the obligation that you cannot be interested in late performance and, therefore, the contract is terminated upon the debtor's default, unless you notify the debtor without delay that you insist on the performance of the contract.

If your debtor attempts to take this approach and you disagree with it, we recommend that you respond promptly and, if in doubt, refuse the approach and (at your discretion) either insist on proper performance or exercise your right to terminate (withdraw from) the contract and claim possible contractual or other penalties. However, compensation of damages is excluded in this case.

In the event of a dispute, the assessment of the situation, in particular whether the above-mentioned conditions have been met, will depend on the judgment of the court. In extreme cases, the court may deem the insistence on proper performance of the contract or the imposition of penalties to be manifest abuse of rights, which does not have legal protection.

What is force majeure and what are its consequences?

'Force majeure' is a different legal concept from the above.

The legislation refers to this term in several places, but in highly specific and, in practice, not very common situations. For example, the limitation period does not run for as long as a force majeure event lasts, but only if the force majeure event has prevented a party from exercising its right.

The statutory regulation of force majeure may be supplemented or modified in the contract. Therefore, specific consequences of force majeure will always depend on what you have agreed in the contract.

The same applies to the definition of force majeure, which is not defined by law. However, in view of the definition of force majeure in case law, the present situation may qualify as a force majeure event.

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