



Covid-19 – Force Majeure?

Practical Advice for Further Performance of Contractual Obligations

On 11 March 2020 the World Health Organisation announced that **Covid-19 has reached the scope of pandemic**, therefore in response to the communication on 12 March 2020 **the Cabinet issued Decree No 103¹ by which the emergency situation was announced in Latvia from 12 March 2020 to 14 April 2020** (Decree No 103). Furthermore, on 14 March 2020 the Cabinet determined additional restrictions and prohibitions by Decree No 105² (Decree No 105).

The restrictions apply to everybody and significantly affect daily routines of businesses. Taking into account that business is closely related to performance of different contractual obligations the current changed situation may significantly encumber performance of obligations or performance thereof in due time and scope.

The **force majeure** institute is a legal remedy widely known yet rarely applied in business. The *force majeure* situation is caused by extraordinary circumstances, which are unforeseen, beyond the control of the parties, which the parties are unable to prevent and due to which any party is unable to perform its contractual obligations, as a result of which other parties incur or may incur loss. If *force majeure* situation is proved, such loss incurred by the other party is not subject to compensation. In such case performance of contractual obligations is either suspended for the period of existence of *force majeure* situation or the contract is terminated if the performance of the contractual obligations is no longer possible due to *force majeure*.

Considering the abovementioned consequences caused by the current *force majeure* situation, **we call to assess a necessity to take the primary precautionary measures listed hereunder:**

1. To assess whether there is a currently **valid contract**, the performance of which is encumbered or impossible as a result of Decree No 103 or Decree No 105.
2. To clarify whether the respective contracts contain a **force majeure clause** or other relevant provisions:

¹ The Cabinet Decree No 103 of 12 March 2020 "Regarding Announcement of Emergency Situation", available at: <https://likumi.lv/ta/id/313191-par-arkartejas-situacijas-izsludinasanu>.

² The Cabinet Decree No 105 of 14 March 2020 "Amendments to the Cabinet Decree No 103 of 12 March 2020 "Regarding Announcement of Emergency Situation"", available at: <https://likumi.lv/ta/id/313216-grozijumi-ministru-kabineta-2020-gada-12-marta-rikojuma-nr-103-par-arkartejas-situacijas-izsludinasanu>.

- | If the contract contains a **force majeure clause**, it must be ascertained what exactly is considered *force majeure* for the purposes of such clause, what the agreed procedure of notifying the other contractual party is with regard to occurrence of such circumstances, the agreed deadlines of notifying must be checked, etc. Attention should be also paid to whether the *force majeure* clause contains a reference to "pandemic", "epidemic", "illness", "government action", "government decrees", etc.
 - | If the contract **does not contain a force majeure clause**, it is possible to apply international legal provisions, as well as case law and doctrinal findings since the Latvian regulatory framework does not stipulate what specifically is deemed to be *force majeure*. Whether spreading of Covid-19 and the related restrictions applied by the government is deemed *force majeure* depends on the industry within which the contract has been entered into, the time of entering into the contract, whether Covid-19 and the related government restrictions/emergency measures render the performance of the contract impossible, etc. For example, airlines which are subject to the restrictions imposed by the government decree regarding international passenger transportation will be able to refer to *force majeure*. Yet, for example, with regard to certain supply contracts performance of obligations is still possible, although the performance may be delayed while, for example, default on a cash payment obligation is very likely not to be recognised as *force majeure*, because bank operations are not suspended. In a nutshell, such assessment depends on correlation of many circumstances, for instance, the particular situation, nature and place of contractual obligations, what could have been reasonably foreseen at the time of entering into the contract, the particular industry and other considerations.
3. To assess which **contractual party** finds performance of the contract impossible:
- | If it is on the part of the **company**:
 - i. **Marking (registration) of the default.** In the event of defaulting on a contract it is advisable for the company's responsible entity (normally it is the Board) to register in detail the cause thereof, the time of the decision passed with regard to the impossibility of performance, the involved parties and other circumstances, which affected defaulting on the contract.
 - ii. **Determining causal relation.** Decree No 103 and Decree No 105, which determine the emergency situation and other related restrictions are an objective basis for establishing *force majeure*. However, the party must be able to provide reasonable causal relation between *force majeure* and defaulted contractual obligations.
 - iii. **The obligation to notify.** A party unable to perform its contractual obligations must immediately notify the other party regarding occurrence of *force majeure*, the consequences caused thereof and the eventual period of remedying the consequences. Such notice must be annexed with document confirming occurrence of *force majeure*. Similar measures must be taken in cases where performance of the contract has not commenced yet, but will take place in the nearest future, otherwise liability to compensate for any incurred loss might arise due to failure of timely notification.
 - | If it is on the part of the **business partner**:
 - i. **To verify the notice from the other party.** If a business partner announces that it is unable to perform the contract it is advisable to verify whether the received information corresponds to the actual situation, whether there are submitted relevant confirmation and whether the partner is obliged to compensate for the incurred loss where the default has been caused by other indirect circumstances or where the sending of notice is past the deadline.

- ii. **Suspending of obligations.** If a company becomes aware of that its business partner is unable to perform a significant part of its obligations the company has to assess the necessity of suspending the performance of obligations.³
 - iii. **Withdrawal from the contract.** Assess the impact of suspending of the contract due to *force majeure* on its further validity. Where suspending of the contract albeit for a short period considerably changes the essence of the contract, early termination of the contract and possible consequences thereof must be considered. Other facts, for example, actual insolvency of the business partner or other material breach of the contract by the partner may serve as the basis for termination or contractual relations. Where the decision is made in favour of withdrawal from the contract the business partner must be respectively notified and the legal consequences of termination must be assessed.
4. **To assess additional circumstances** before sending *force majeure* notice to the other contractual party:
 - | To consider whether there are options for **mitigation of the consequences of the current situation**.
 - | To consider whether there are any **alternatives** for performance of contractual obligations.
 - | **Collecting evidence.** The party referring to a *force majeure* event is obliged to prove the occurrence of *force majeure*. The fact of occurrence of such event may be certified, for example, by using a service provided by the Latvian Chamber of Commerce and Industry – a *force majeure* statement.⁴
 - | **Review your insurance cover** and verify whether your insurance terms indicate the correct types and degrees of cover for crisis situations and whether they apply to any changes in your business. If applicable, inform your insurer about occurrence of an insured event.
5. **Follow any new government decrees announced** as a reaction to COVID-19 outbreak.

For additional information, please contact:



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³ United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (Vienna), Article 71 (3).

⁴ Latvian Chamber of Commerce and Industry. Force Majeure Statement. Available at: <https://www.chamber.lv/lv/content/231>