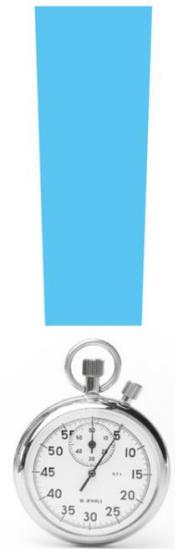


Commercial contracts and public procurement during the COVID-19 pandemic

Key issues for businesses



The global COVID-19 coronavirus pandemic and the related safety measures taken in numerous countries around the world are having a widespread impact on commercial obligations. Problems with access to raw materials, subassemblies or goods, forced closing of stores where leases are still in force, contracts for services not being used by customers, and public procurement aspects call for an analysis of what steps can be taken under existing contracts. There are certain solutions offered by Polish law that are worth noting in this unique situation.

Force majeure and non-performance of contracts

Polish law does not contain a statutory definition of *force majeure* or any specific regulation allowing a party to a contract to independently suspend performance of the contract due to the occurrence of extraordinary circumstances (*force majeure*).

However, the existence of *force majeure* is recognized in the legal literature and court decisions, which generally define it as an external event of an extraordinary nature, unforeseeable, whose effects cannot be prevented. If an event constituting *force majeure* occurs, suspension of contract performance is possible, however, only if the parties have provided for this solution in the contract and the occurrence of *force majeure* truly makes it impossible to perform the contract in the manner specified by the parties.

Thus for any existing contracts, it is worth examining the following legal issues:

- Does the contract contain a *force majeure* clause? (In practice, many commercial contracts do not contain such a clause.)
- Does the *force majeure* clause contain a definition of *force majeure*? (In practice, many commercial contracts refer to *force majeure* but do not offer a definition of this term.)
 - If there is a definition, does the definition expressly allow it to be applied to a pandemic or epidemic? If not mentioned in the definition, is there an interpretation or line of court decisions relevant to analyzed situation?
 - If there is no definition, is there an interpretation or line of court decisions relevant to the analyzed situation?
- In what scope can the clause be applied?

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In answering these questions, not only a proper interpretation of the specific contract, but a thorough knowledge of the jurisprudence on *force majeure*, is necessary.

Force majeure and liability for non-performance of contract

Force majeure is relevant to issues related to liability for non-performance of contracts. A fundamental principle of contract liability in Polish law is that it is based on fault. This means that as a rule, a party to a contract is not required to redress injury caused by non-performance or improper performance of the contract if caused by circumstances for which the party is not responsible.

But this does not mean that due to the COVID-19 pandemic, performance of all contracts can automatically be suspended.

Each instance requires a careful, individual legal assessment, including in particular whether non-performance was truly caused by the occurrence of *force majeure* and whether the party failing to perform the contract applied due diligence.

Court ruling in the event of extraordinary change in circumstances

Parties to a commercial contract can also exercise the possibility of applying to the court with a claim based on a provision stipulated by the Polish Civil Code on extraordinary change in circumstances (*rebus sic stantibus*). This clause applies if performance would entail excessive difficulties or expose one of the parties to a substantial loss which the parties did not foresee when concluding the contract. On this basis, the court may issue a ruling providing for some other method of performing the contract or even dissolving the contract. But this requires the court to weigh the interests of the parties.

The exceptional application of this clause, the use in the clause of several vague and undefined notions:

- Glaring loss
- Excessive difficulties
- Interests of the parties

and the fact that the resolution is left within the discretion of the court means that any effort to exercise this clause requires preparation of a thorough litigation strategy.

Force majeure and tender obligations

Civil Code rules are also applicable to proceedings conducted under the public procurement regime (Art. 14(1) of the Public Procurement Law).

It is inevitable that the current situation will have a serious impact on the **timetables, rights and obligations** of both contracting authorities and contractors in public procurement matters, starting from the stage of tender proceedings. For example, the president of the Public Procurement Office has issued [recommendations on safely maintaining transparency in opening of bids under the threat of an epidemic](#). The National Appeal Chamber (KIO) has suspended the organization and hearing of cases during 16–27 March 2020. The Public Procurement Office and KIO are operating under a procedure limiting direct contact.

The inability to perform certain duties properly or on a timely basis (e.g. presentation of certain certificates) in procedures for award of public contracts, whether by the contracting authority or contractors, will carry serious legal consequences in tender proceedings.

It cannot be ruled out that some proceedings will have to be cancelled, or the deadlines for taking certain actions extended. This could generate a domino effect, as it could lead to extension of the binding periods of bids or bid bonds. This could be particularly painful for businesses, as it may further increase firms' financial burdens during a time of economic difficulty.

Questions may arise about a contractor's capacity to perform the contract due to barriers arising out of *force majeure*. Commitments to lend resources may not prove feasible due to *force majeure*, or staff may be unable to participate in contract performance. In such circumstances, for example, refusal to conclude a public contract should not result in forfeiture of the bid bond. On the other hand, the contracting authority should be able to respond quickly to such a refusal, for example by resorting to the single-source procurement procedure.

Each situation will require an individual assessment and a proportionate, balanced response.

Coronavirus

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