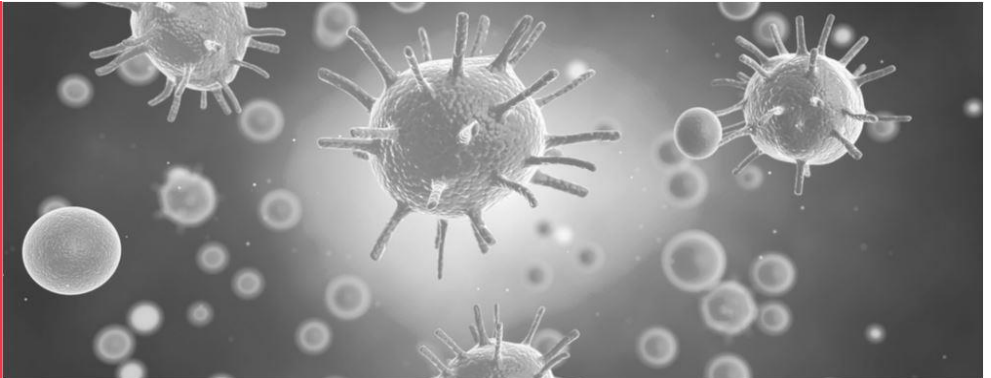


**CORONAVIRUS
ALERT**

24/7



Business support 24/7 during coronavirus pandemic

Dispute proceedings – force majeure

The occurrence of the COVID-19 epidemic in Poland gives rise to a number of obstacles to the performance of contracts by businesses. For trading practice, it will be of great importance to diagnose the impact of the epidemic on liability for non-performance of obligations, and specifically whether the epidemic and its consequences could be qualified as an example of force majeure.

Epidemics as force majeure

The concept of force majeure is not defined in the law. It is assumed that force majeure is an external event of an accidental or natural nature, i.e. impossible or difficult to predict and which is not under human control. **Events of force majeure also include epidemics.**

Contractual force majeure clauses

Some contracts contain a force majeure clause. This clause is introduced in order to waive the liability of one party to the other in the event of non-performance or improper performance of a contract due to force majeure.

In each case, the content of the contract is important. In some contracts, the parties themselves define the concept of force majeure, which is binding for the purpose of the contract. Other contracts (especially construction contracts based on FIDIC models) require the affected party to take certain steps (e.g. giving notice) to secure legal protection.

Force majeure and statutory grounds for liability

If the contract does not contain a force majeure clause, the liability of a party for non-performance of the contract will normally be **fault based**.

Therefore, if, as a result of an epidemic, its effects, including, e.g. the introduction of restrictions, a party cannot perform a contract, it will not be possible to attribute fault (or consequently liability) to that party. The epidemic's actual impact on the performance of the contract will be of great importance here.

In some contracts, liability is **risk based** (the damaging event does not have to be illegal; it does not even have to be the behaviour of a party). This liability applies to contracts relating to the use of hazardous equipment, use of natural forces or use of other persons. It is generally accepted that **risk-based liability can also be avoided in cases of force majeure**. It seems that cases of force majeure (i.e. cases against which a party cannot secure itself even taking the utmost care) are far removed from risks that can, however, be avoided by taking due care.

Summary

Liability for damages in the event of non-performance of a contract due to an epidemic or its effects may be excluded regardless of whether or not the contract contains a force majeure clause and regardless of the liability regime (fault- or risk-based liability).

So much for theory. In practice, the parties may differ, e.g. as to whether the non-performance of a contract was linked to an event of force majeure (epidemic). In this respect, it should be emphasised that, in the event of a court dispute over damages (or contractual penalty), it will be **the non-performing party that will bear the burden of proving that the non-performance was due to force majeure** (epidemic).

In this context, it should also be clarified that the mere occurrence of force majeure (epidemic) generally does not alter or terminate the contract (unless in the force majeure clause in the contract the parties agreed otherwise). However, a party may consider making use of the clause on an extraordinary change in circumstances provided for in the Civil Code. It provides for the **possibility of applying to a court for the manner of meeting obligations or the amount of the performance to be modified or even for the contract to be terminated** (it would have to be demonstrated that, due to an extraordinary change in circumstances, making the performance would be excessively difficult or would expose one of the parties to a serious loss which the parties did not anticipate when concluding the contract).

Finally, it should be pointed out that the party which, in the event of force majeure (epidemic), does not perform the contract should **immediately notify** the other party. This is required by the principle of cooperation between the parties in the performance of obligations. In this case, the other party will be able to take measures that at least reduce the extent of its damage. On the other hand, the absence of notification may in itself lead to the non-performing party's liability for the damage that has arisen from the absence of notification (preventing the other party from reducing the size of the damage).

To sum up:

- a) Check the contract for liability for non-performance (fault based, risk based, etc.);
- b) If it is impossible or difficult to perform an obligation, inform your business partner;
- c) Collect evidence on an ongoing basis of the impossibility or difficulty of performing the obligation (it may be difficult to gather this evidence later on);
- d) Find out which court has jurisdiction to resolve disputes with your business partner; it may be possible to agree on another forum, e.g. an arbitration court, which often works more efficiently and has a greater sense of business matters.

We are at your disposal



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