Commercial Flash

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Coronavirus and supplier-customer relations in questions and answers

Coronavirus is now the biggest topic that stirs our entire society. It concerns not only all areas of our lives, but also all areas of law. In previous newsletters, we have already informed you about the impact on labour relations and advised you on how to proceed in relationships with employees. Now, we would like to help you understand the legal impact on your supplier-customer contractual relationships. Below are brief answers to four basic questions that clients have been addressing to us in recent days and hours. Also, remember that coronavirus is no longer an unforeseeable fact and it is advisable to include it when concluding contracts. At the same time, as is always the case with contracts, the parties can negotiate a number of matters differently from the law in the contract, so it is always necessary in each case to look directly at a specific contract and not follow only general recommendations.

Can coronavirus be a reason for reducing or increasing the agreed price?

Consequences of coronavirus, or measures associated with it, can be manifested both on the sides of suppliers and customers. For example, the supplier will have to change the shipping method of its products, thereby increasing its costs. The advertiser for a sporting event that is held without audience participation will not achieve the expected purpose of the agreed advertising performance. Does the party affected by the negative consequences of coronavirus have to bear the consequences by itself, or may it request a reduction or increase in the price agreed in the contract?

In general, the affected party **cannot proceed to unilaterally increase or reduce the agreed price without fulfilling other conditions**. However, the situation is different if

a) the contract was concluded at a time when the spread of coronavirus and the severity of its consequences and the measures taken by governments could not have **reasonably been foreseen**, and at the same time

b) there is **a particularly gross disproportion** between the performances of both parties under the contract, when the costs of performance disproportionately increase on the side of one party or the value of the subject matter of performance disproportionately decreases on the side of the other party.

In such a case, the party affected by the disproportionate performance under the contract may request the other party **that the contract negotiations be resumed**. It must do so **within 2 months** of the date on which it became aware of the change in circumstances leading to a particularly gross disproportion in the performance. If the parties do not agree on an amendment to the contract within a reasonable time, either of them may refer to the court. The court may at its own discretion amend or even cancel the contract. However, as long as negotiations or court proceedings to amend the contract are pending, the affected party must perform as originally agreed in the contract.

Unfortunately, the described procedure under Section 1765 or, as the case may be, under Section 2620 of the Civil Code is not available to the party that has assumed the risk of a change in circumstances in the contract. In other words, if the parties have agreed in the contract that said provisions of the Civil Code shall not apply and none or any of the parties shall have the right to renegotiate the terms of the contract in the event of a change in circumstances. **Therefore, if you are considering applying this procedure, you should check out first whether your contract contains such an arrangement**. We know from our practice that the provisions of the Civil Code were very often excluded in contracts.

Can coronavirus be a reason to justify failure to fulfil contractual obligations?

Coronavirus, or the measures associated with it, may justify the failure to fulfil obligations under contracts if they constitute so-called force majeure. Claims and procedures will vary depending on whether or not your contract contains a force majeure clause, and at the same time, how precisely this clause is formulated in the contract, to which unfortunately the parties do not often pay much attention when concluding contracts.

The contract may contain a clause under which one or both parties shall not be in delay with the performance of the contract if the event of **force majeure** occurs. It is a term that normally refers to situations of war, disasters, flood and, last but not least, epidemics. The term force majeure is then precisely defined in the contract and the contract also provides for the consequences of force majeure and how the parties are to proceed in the event of force majeure (e.g. it stipulates the obligation to notify or to take certain measures so that the fulfilment can take place, even under difficult conditions). **It is therefore necessary in each individual case to assess, on the basis of a contractual definition of force majeure, whether the occurrence of a coronavirus pandemic or coronavirus**, for example in conjunction with governmental measures or generally only governmental measures, **fulfil the definition contained in the contract**. However, the fulfilment of the definition of force majeure alone is not sufficient. It is necessary that the obstacle in the form of coronavirus, or related governmental measures, is the cause of failure to perform in a proper and timely manner. For example, a car parts manufacturer cannot justify a delay in supply with reference to coronavirus, unless the government orders the closure of plants or a substantial part of its employees are quarantined or ill. **The affected party is not in delay, i.e. it does not breach the contract, if:**

a) the contract contains the force majeure clause described above, and at the same time

b) the event of force majeure as defined in the contract occurs, and at the same time

c) the event of force majeure is the cause of the failure to fulfil an obligation, and at the same time

d) the affected party fulfils the conditions agreed in the force majeure clause.

If the affected party does not breach the contract as a result of fulfilling the above conditions, **the other party is not entitled to withdraw from the contract (unless agreed in the contract) or claim damages or a contractual penalty**.

Even if the contract does not contain a clause which excludes delays in the event of force majeure, force majeure is relevant in the contractual relationship. The Civil Code provides for force majeure, unless the contract stipulates otherwise, in its Section 2913(2). This provision implies that if a party has been prevented, whether temporarily or permanently, from fulfilling an obligation by **an exceptional unforeseeable and insurmountable obstacle** that has occurred irrespective of the party's will, **such a party is not obliged to compensate for damage**. Coronavirus with its international dimension is certainly an exceptional obstacle. **The condition of unforeseeability will have to be assessed in the light of the time of conclusion of the contract**, i.e. whether at that time the spread of coronavirus and its consequences were reasonably foreseeable. Also, the insurmountability of a barrier in the form of coronavirus should be assessed on a case-by-case basis. If, however, the barrier in the form of coronavirus occurred only at a time when the obliged party was in delay with its performance, or the contract contained its own definition of a barrier that coronavirus or the measures associated with it did not fulfil, or the contract imposed an obligation to overcome such a type of obstacle, the party affected by the obstacle would not be released of the obligation to compensate for the damage. **It should be emphasised that although the party affected by the obstacle is not liable for the damage, by its failure to perform it breaches the contract (unless it is impossible to perform - see below) and must therefore take into account all the consequences associated with it, such as the possibility of contract withdrawal by the other party (see below) or the obligation to pay a contractual penalty**. This is in contrast to the cases

where due attention has been paid to the preparation of the contract and the contract thus contains an appropriately formulated force majeure clause that also addresses the effects on withdrawal or contractual penalty.

Can coronavirus be a reason for extinguishing contractual obligations?

Governmental measures that prohibit a wide range of activities may cause an obligation under the contract to extinguish due to **the impossibility of its performance** (so-called additional impossibility of performance). However, this is only **provided that the performance cannot be provided even under more difficult conditions, at higher costs, with the help of another person, or after a specified period of time**. The same would be true if the parties were aware when concluding the contract that the creditor would not have an economic interest in late performance. If, for example, a cultural event is prohibited and cannot be held even on an alternative date, there occurs the event of impossibility of performance and a contractual obligation extinguishes. However, the impossibility of performance would not be the case if the entrepreneur on his own initiative, for preventive reasons, decided, for example, to interrupt production in his plant. **The other party must be informed of the impossibility of performance without undue delay**. If **consideration** has already been paid for the performance that has not been provided, **it must be refunded**. Since in the case of coronavirus, the party has not caused the impossibility of performance, **it will not be obliged to compensate the other party for the damage caused thereby, unless the damage is caused to the other party by late informing about the impossibility of performance**.

If the party has failed to fulfil its obligation due to coronavirus in a due and timely manner and this is not the case of impossibility of performance or the contract does not exclude delay due to force majeure, the other party **has the right to withdraw from the contract** under the terms of the contract. If the contract does not provide for withdrawal, the other party may withdraw from the contract after providing an additional reasonable period for performance in the case of a minor breach of the contract, or without undue delay in the case of a material breach of the contract.

Does coronavirus affect international transport and the import and export of goods to/from the Czech Republic?

According to current information, which is changing at any moment, measures to restrict cross-border movement do not apply to international transport by trucks, trains and vessels. However, it cannot be ruled out that the measures taken will have some effect on the speed and fluency of transport and, for example, on the delay in the supply of goods with the consequences described above.

For example, in Slovakia, which has adopted/notified the appropriate measures already on Thursday, truck drivers must wear respirators when loading and unloading goods, to minimize direct contact with workers of foreign shipper/recipient of goods and be equipped with rubber gloves and hand disinfection.

In addition, there are, of course, also earlier measures in place, prohibiting (with a few exceptions) the export of respirators and disinfectants from the Czech Republic abroad.

We believe that we have helped you to obtain at least a basic overview of the impact of the current measures on your contractual relations, and we firmly believe that this impact will be minimized. We will keep you informed about any news that might be of interest to you and could help you in the current situation.

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