# Commercial Flash

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## Impact of the extraordinary situation in the Slovak Republic ob consumer-supplier relations

*Coronavirus is now the biggest topic affecting 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 industrial 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 asking us in the 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?**

The 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?

Slovak legislation does not recognise a statutory provision that would allow the affected party, in the event of a substantial change in circumstances, to unilaterally change the terms of the contract, including a reduction or increase in the agreed price, as the new Czech Civil Code allows subject to meeting certain conditions (a so-called "hardship clause"). In general, it can therefore be stated that the affected party **cannot unilaterally increase or reduce the agreed price without fulfilling other conditions**.

On the other hand, the exercise of rights and obligations **must not be contrary to good morals, or contrary to the principles of fair trade**, and no one may abuse his or her rights against the interests of others, and no one may enrich himself/herself to the detriment of others. The terms 'good morals' and 'fair trade' are not defined by law, as a result of which they provide a relatively broad scope of application, as well as broad judicial discretion. When alleging good morals / fair trade, it is necessary to consider whether and to what extent any of the parties to the legal relationship alleging conflict with good morals / fair trade has exerted a sufficient degree of diligence and foresight when entering into a particular legal relationship.

It is apparent from the relevant case law that the application of the corrective „good morals" or "fair trade" must not, in a particular case, undermine the principle of legal certainty (security) of civil relations, and must not unduly undermine the subjective rights of the parties under the rule of law.

Therefore, if the consequences of coronavirus, or the measures associated with it, caused objective inequality between individual parties with regard to their position at the conclusion of the contract, based on which one of the parties, in order to protect its position, requested a change in the agreed price, the argumentation of the above institutes of good morals / fair trade could be taken into consideration. However, as Slovak legislation, unlike the legislation of neighbouring countries, does not provide for a hardship clause, or any other statutory provision allowing a unilateral amendment to contractual terms, including a reduction or increase in the agreed price, according to our information, the application of good morals / fair trade in connection with a change in the agreed price has not been established in Slovak case law.

**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 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 that excludes delays in the event of force majeure, force majeure is relevant in the contractual relationship. The Commercial Code provides for force majeure (using the term "a circumstance excluding liability"), unless the contract stipulates otherwise, in its Section 374. This provision implies that if a party has been prevented from fulfilling an obligation by **an unforeseeable, unavoidable and insurmountable obstacle that has occurred irrespective of the party's will, such a party is not obliged to compensate for damage**. Obviously, an obstacle in the form of coronavirus has occurred independently of the obliged party's will, since the obliged party could not have objectively influenced the occurrence of coronavirus and the related governmental measures. **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 unavoidability and insurmountability of an obstacle 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 an obstacle 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 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 the withdrawal or a 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 the agreed period of time**. The same would be true if the obliged party was aware when concluding the contract that the creditor would not have an economic interest in late performance, unless the other party, without undue delay after becoming aware of the impossibility of a part of the performance, would notify the obliged party that it insists on the remainder of the performance. If, for example, a cultural event is prohibited in taking place of which, at a later date, the other party is not interested to the knowledge of the obliged party at the time the contract is concluded, and the other party does not even insist 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 or her own initiative, for preventive reasons, decided, for example, to interrupt production in his or her plant. **The obliged party is obliged to notify the other party without undue delay after becoming aware of a fact that makes the performance impossible**. 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 being informed late about the impossibility of performance**.

Another possibility that can in this context be taken into account in relation to the termination of a contract is a situation where, as a result of a substantial change in the circumstances in which the contract was concluded, the essential purpose of the contract which was expressly stated therein is frustrated. In such a case, under Section 356 of the Commercial Code, the party concerned may withdraw from the contract due to the frustration of the purpose of the contract. Therefore, if **the essential purpose of the contract has been frustrated as a result of coronavirus and related measures (provided that it has been expressly stated in the contract), the obliged party may withdraw from the contract for this reason. The party that has withdrawn from the contract in this way is obliged to compensate the other party for the damage it has suffered, which should be borne in mind when terminating the contract due to the frustration of its purpose**. However, the applicability of the provision in question will always have to be assessed on a case-by-case basis, in particular with regard to the question whether coronavirus, taking into account all the individual circumstances of the particular case, constitutes a substantial change in circumstances or whether the essential purpose of the contract has been frustrated.

If a party is in delay in performing its obligation under the contract as a result of coronavirus 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 agreed in 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 Slovak Republic?**

According to current information, which is changing by the moment, the transport restrictions introduced do not apply to imports and supplies, i.e. do not apply to international transport by trucks, trains and vessels. However, in view of the introduction of border controls and the closure of smaller border crossing points, 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.

In this context, we would also like to draw your attention to the measures under which 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 disinfectant.

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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