

Coronavirus & contract breaches in Central and Eastern Europe

Securing positions and avoiding litigations



Coronavirus: commercial contracts and consequences—the frustration, discharge and notifications, and prudent steps to avoid litigation or secure a safe position

1. Which contracts may be affected by the coronavirus situation?

Any contracts that involve a country or a precisely specified area (e.g. the City of Wuhan or Hubei province in China) that has suffered major disruption due to either a large number of patients or anti-pandemic state measures (e.g. Italy) that hinder the production or delivery of the goods to or from your company might be affected. The disruption may impact either the production or delivery site, so that the goods cannot be produced or dispatched, or the transportation method/channel as it would arrive at its destination (e.g. the port or road is closed); it does not matter, but it needs to be proved that the Covid-19 outbreak was the cause of the improper or non-performance of the contract so that the lack of due performance is excused. The standards of frustration of contract depends on specific contractual provisions, industry sector and the national law applicable to the contract.

The coronavirus outbreak might also disrupt contracts for services due to potential travel or health and safety restrictions, e.g. arrival bans, quarantines etc.

2. What type of legal regime will be applicable?

The legal effects of the disruption will be adjudged primarily by the contractual provisions in place and under the laws applicable to the contract. The chart below addresses the national law solutions in Central & Eastern European jurisdictions. Please bear in mind that the Convention on International Sales of Goods (CISG) may apply to those sale and purchase agreements where the parties are from member states of this convention and its application has not been excluded.

3. Does the coronavirus outbreak or related restrictions amount to a force majeure event? Under what conditions?

It is important that businesses look at the terms of their commercial contracts, in particular the force majeure clauses as a primary source, to determine whether they need to perform, can recover losses or comply with their duty to mitigate risk, or whether this situation allows or requires a party to terminate a contract or to request amendments. Typically, the coronavirus outbreak will count as a force majeure event, even if it is not specifically mentioned. It is also likely that broader terms like “natural disaster” or “act of God” may be invoked in this situation.

If the contract does not mention force majeure, and thus local laws apply, the applicable regulations must be considered. In times past, force majeure was an act of God which human weakness could not resist, “*casus est vis maior cui humana infirmitas resistere non potest*” (Gai. D.447.14). It is reasonable to conclude that CEE national laws jointly view a pandemic as an event that may render performance impossible or, where state measures have been introduced,



illegal, thus offering a discharge to both parties from the obligations under their contracts. It is also typical that parties who bear no liability for triggering the cause and are thus discharged from their duties, need not pay compensation—and similarly cannot request compensation—for damages, unless the party itself contributed to the occurrence of the force majeure event. This makes precaution even more important at office sites. The chart below indicates the applicable regulation per country as well as the main legal consequence of it.

The pandemic can only be referred to as a force majeure event or be classified as a supervening change in circumstances (referred often to as the "*clausula rebus sic stantibus*" principle) if it was not foreseeable when the contract was entered into, i.e. these will not apply to contracts entered into after the event occurred. For this reason, meticulous attention will need to be given to contracts entered into after December 2019. It would also be prudent to obtain proof evidencing a causal link between anti-pandemic measures and their impact on the contract in real time as the current situation is highly dynamic and such evidence-taking might become difficult months and years later once the evidence will need to be gathered.

4. What other legal tasks does the coronavirus outbreak or related restrictions create to businesses in a force majeure event?

As noted above, national laws in Central and Eastern Europe will very likely view the Covid-19 outbreak as a force majeure event and result in parties from being discharged from their contractual obligations. However, under local laws in CEE parties typically bear the obligation to advise the other party of the development of the situation without delay, and immediately notify the counterparty once performance has ultimately been frustrated, or has become impossible or illegal.

This also means that there is no necessity to actively cancel or terminate a contract, unless there are other contractual obligations which are independent from the current virus outbreak as the cause of the frustration.

Further, depending on the specific actions taken by the host states to minimise the spread of the coronavirus outbreak, continuing the performance of a contract might trigger administrative or criminal liability, e.g. certain states have restricted exports of goods necessary to fight the coronavirus outbreak.

	Poland	Czech Republic	Slovakia	Hungary	Romania	Bulgaria	Ukraine
Force majeure regulation	<p>This exists, but the term of force majeure is not defined in the provisions of Polish law. Case law and legal doctrine have developed a definition: force majeure is considered to be an external and unforeseeable occurrence whose effects cannot be avoided. A debtor is relieved from liability for non-performance or improper performance of a contract that is due to force majeure.</p>	<p>This may be generally relied on in cases where the non-performing party would otherwise become liable for damage. The respective provisions are contained in Section 2013 of the Czech Civil Code.</p> <p>The obliged party may be released from its liability if it proves that it was temporarily or permanently prevented from fulfilling its contractual duty due to an extraordinary, unforeseeable and insurmountable obstacle, which occurred independently of its will. However, various restrictions apply such as no release if the breach arises from personal circumstances, when there is already a default in performing the obliged party's contractual duty, or an obstacle which the liable party was contractually required to overcome.</p> <p>Apart from the force majeure regulation, Czech law also recognises situations when performance becomes impossible. In such situation, a contract may be frustrated. However, the practical applicability of this section is questionable; a contract does not become frustrated if the liable party is able to fulfil its obligation later, within an additional period provided by the creditor.</p>	<p>Pursuant to Sections 373 et. seq. of the Slovak Commercial Code, force majeure exclusion of liability will apply automatically, unless otherwise agreed.</p> <p>The contracting parties are not liable for a failure to fulfil the contractual obligations, if the failure has been caused by circumstances excluding liability, i.e. force majeure.</p> <p>Those circumstances are defined as obstacles: (i) which occurred independently of the intent of the obliged party; and (ii) which prevent the obliged party from fulfilling its obligation, if (iii) regarding such obstacles it cannot be reasonably assumed that the obliged party could have averted or overcome them (or their consequences), or could have foreseen such obstacles at the time when the obligation was agreed.</p> <p>Force majeure will typically provide for the suspension of obligations under the contract. Force majeure does not as such terminate the obligations of the obliged party if performance remains possible after the force majeure circumstances have disappeared.</p>	<p>This exists, the respective provisions are in Sections 6:3, 146 174, and 179-180. §§ of the Hungarian Civil Code.</p> <p>If performance is impossible, the contract is frustrated. If none of the parties bears liability in triggering the causes, no damages are to be paid. If a party does bear liability, it may need to reimburse damages, unless it is able to prove that the damages occurred in consequence of unforeseen circumstances beyond its control, and there had been no reasonable cause to take action for preventing or mitigating the damages.</p> <p>If performance does not turn completely impossible and thus the contract is not frustrated but the force major event directly results in a a delay or defective performance, the defaulting party can exempt itself from the liability for damages if it proves such delay or default stems from the force major event. This, however, does not affect the parties' obligation to cure defective performance, even if it was a result of the force major event.</p>	<p>Article 1351 of the Civil Code. Note that under Romanian law, two standards apply for frustration: one, force majeure; second, unforeseeable circumstances. Force majeure needs to be an external event, unforeseeable and inevitable. Note that based on these specific conditions, according to local case law, the applicability of force majeure is appreciated on a case-by-case basis and there might be cases in which Covid-19 would not qualify, especially since its foreseeability becomes clear after a certain time. The unforeseeable circumstances require that an event could not be predicted or stopped by the debtor, the standard being appreciated solely regarding the personal capacity/knowledge of the debtor.</p>	<p>This exists, the respective provisions are in Article 306 of the Bulgarian Commercial Act. A force majeure event under Bulgarian law is defined as unforeseen or unsurmountable event of extraordinary nature, which has occurred after the contract was signed. The party, which may not perform its obligations as a result of the force majeure event is not liable for damages, resulting from its failure to perform (unless that the party has been in delay as at the time when the event occurred).</p>	<p>Article 14-1 of the Law on Ukraine "On Chambers of Commerce and Industry in Ukraine" defines force majeure circumstances, a term Ukrainian law sometime uses as an alternate term for circumstances of insuperable force, as meaning extraordinary and unavoidable circumstances that objectively prevent the fulfilment of obligations provided for by the terms and conditions of the agreement (contract etc.) and obligations under legislative and other regulatory instruments.</p> <p>The above-mentioned law also contains an open-ended illustrative list of circumstances whose presence should be considered as an event of force majeure. This list of force majeure events includes natural calamities and epidemics.</p> <p>Although neither Civil Code nor the Commercial Code of Ukraine provide a definition of force majeure, they both set forth that the party having breached the obligation shall be released from liability for such breach if it proves that the breach occurred as a result of an accident or insuperable circumstance (Articles 617 of the Civil Code of Ukraine and 218 of the Commercial Code of Ukraine).</p>

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Main legal consequence of virus outbreak	Discharge from liability for non-performance or improper performance the contract.	<p>If all conditions of force majeure are met, the obliged party may be released from its obligation to compensate for any resulting damage. Full release from the obligations under the contract and the contract's frustrations are not likely and rather theoretical.</p> <p>The creditor's right to terminate/withdraw from the contract is not affected by the force majeure event.</p>	<p>Suspension of obligations under the contract. Force majeure does not as such terminate the obligations of the obliged party if performance remains possible after the force majeure circumstances have disappeared.</p> <p>The creditor's right to terminate/withdraw from the contract is not affected by the force majeure event. Generally, the creditor may terminate the contract if the obliged party fails to fulfil its obligations including within an additional reasonable period granted by the creditor, and if the creditor is not interested in performance as a result of the delay.</p>	Discharge from performance; partial performance already provided needs to be settled.	If it were found to meet the applicable standards as force majeure or unforeseeable circumstances, it would discharge liability, both contractually and tortious. Partial performance already made usually needs to be settled.	The suspension of the performance of the obligations, which are affected by the force majeure event, and the related obligations of the counterparty. The creditor may terminate the contract if because of the duration of the event it no longer has an interest in the contract, e.g. if the transaction must be performed at a specific time. The party that is unable to perform has the right to terminate the contract as well.	If the interested party is successful in proving that the outbreak is a circumstance of force majeure that prevented it from performing its contractual or statutory obligations (1) the performance of its affected obligations is suspended until after force majeure circumstances cease to exist and (2) the interested party is released from liability resulting from the breach.

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Clausula rebus sic stantibus	Yes, only if the outbreak happened after the contract was entered into. According to Article 3571 of the Polish Civil Code, if owing to an extraordinary change in circumstances the performance of an obligation would be excessively onerous or would threaten one of the parties with a material loss, a court may determine the manner of performance of the obligation, the amount of consideration, or the court may rule to dissolve the contract. An extraordinary change in circumstances must be unforeseeable to the parties when the contract was concluded, which is why foreseeability is a key issue.	Limited applicability, often expressly excluded in Czech business contracts. Changed circumstances may allow the affected party to seek to renew negotiations regarding the existing contract or its cancellation. On the other hand, changed circumstances do not allow the affected party to postpone its performance under the existing contract.	This is applicable to contracts on future contracts. This is also applicable to existing contracts if due to a material change in the circumstances under which the contract was concluded, the main purpose of the contract, specifically mentioned in that contract, is frustrated.	Yes, only if the outbreak happened after the contract was entered into. Foreseeability may be a key issue.	Yes, if (1) it happened after the conclusion of the contract; (2) it and its extent was not and could not have been reasonably envisaged at the moment of conclusion.	Clausula rebus sic stantibus would apply, only if this has been specifically agreed in the contract. If the parties have not agreed contractually on the consequences, resulting from unforeseeable changes in the situation as from the contract formation, the general business frustration principles would apply. Under Bulgarian law, business frustration occurs when: (i) circumstances which the parties could not have foreseen have occurred; and (ii) it is possible but would be unfair and contradictory to good faith to perform the contract as agreed. If these two requirements are met, the affected party may request the court to amend or terminate the contract. This right can be exercised exclusively by a court claim. Any extreme negative economic changes resulting from the outbreak may probably give rise to business frustration claims, which the courts would decide on a case-by-case basis based on the good faith and fairness principles.	A substantial change in circumstances may potentially be invoked by the interested party in relation to contractual agreements entered into before the beginning of the outbreak. The court may rescind (or amend in exceptional instances envisaged by law) the agreement due to substantially changed circumstances at the request of the interested party if the latter succeeds in proving that all of the following four cumulative requirements are met, in particular that: (1) at the time of entry into the agreement the parties assumed that such change of circumstances would not occur; (2) the change of circumstances is caused by events which an interested party, acting with all due care and prudence, could not avert after they arose; (3) the performance of the contract would upset the balance of the property interests of the parties and deprive the interested party of what it expected to obtain at the time of entry into the agreement; and (4) it does not follow from the nature of the agreement or the business practices that the risk of the changed circumstances is to be borne by the interested party.

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Other legal tasks to perform	Notification to the other party. A failure to meet this requirement may trigger liability for damages.	Notification to the other party. A failure to meet this requirement may trigger liability for damages. The liable party needs to carefully check whether its inability to perform is indeed caused by the coronavirus outbreak.	Notification to the other party. A failure to meet this requirement may trigger liability for damages.	Notification to the other party. A failure to meet this requirement may trigger liability for damages.	Notification to the other party is necessary. A force majeure certificate might be obtained from the Chamber of Commerce and Industry.	Notification to the other party within a reasonable period of the force majeure event, its expected duration and the possible consequences, resulting from the non-performance. Failure of meeting this requirement would trigger liability for damages. A force majeure certificate might be obtained from the Chamber of Commerce and Industry.	A party that was not able to meet its obligations arising out of an agreement or law due to force majeure circumstances must give the non-affected parties a timely notice on the commencement and cessation of such circumstances. To document properly the occurrence of force majeure circumstances that hindered performance of the contractual or statutory obligation, the interested party should submit an application to the Chamber of Commerce and Industry (or to an authorised regional chamber of commerce and industry where relevant).

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