



Dear clients,

a number of you have already contacted us with requests for legal advice regarding the impact of the current situation on further performance of your business activities. Therefore, we would like to provide you with a brief summary that answers some of the basic questions regarding the impact of governmental measures against the spread of coronavirus on the existing business supplier-customer contractual relationships governed by Slovak law.

Of course, the information below cannot replace a comprehensive legal assessment of a specific relationship; such assessment and its outcome always depend on individual circumstances of the particular case (terms of the specific contract etc.). Therefore, should your need for assistance in a specific case arise, please do not hesitate to contact us.

1. Substantial change of circumstances

The negative consequences of coronavirus and related measures may manifest on the side of either of the contracting parties. Slovak legal regulation on law of obligations is strictly based on the *pacta sunt servanda* principle (agreements must be kept) and with a few exceptions (e.g. Section 518 of the Slovak Commercial Code – contract on deposit of an item or Section 292 (5) of the Slovak Commercial Code – contract on future contract) does not recognize a general legal provision (so called “hardship clause”) which would, in the event of a substantial change of circumstances, allow the affected party to unilaterally amend any agreed upon contractual arrangement.

A Party which is despite of substantial change of circumstances objectively able to fulfil its obligation has in principle no other choice, but to comply with its obligation, unless, as a result of the substantial change of circumstances under which the contract was concluded, the initial purpose of the contract, which was explicitly stated in such contract (see below), has been frustrated. In this context, it is possible to apply institutes such as good manners or fair business relations, as exercise of any rights and obligations cannot be in conflict with good manners or fair business relations and no one shall abuse his/her rights against the interests of others, neither shall unfairly enrich himself/herself at the expense of others. The notions of good manners and fair business relations are not specifically defined in Slovak legislation, and therefore provide a relatively wide scope of application as well as a wide range for application of judicial discretion.

If, as a result of the coronavirus, a party is in default with the performance of its contractual obligation and it is not a case of impossibility of performance nor the contract provides for exclusion of default in case of non-performance in case of force majeure, as set out below, the other party has the right to withdraw from the contract. If the contract does not provide terms for such withdrawal, the other party may, in accordance with the applicable law, withdraw from the contract after granting the party in default an additional reasonable time period for performance of its contractual obligation (in case of an immaterial breach of contract) or without undue delay (in case of a material breach of contract).

2. Force majeure / compensation for damages

If a contract contains an arrangement according to which one or both contracting parties do not get into default with performance of the contract in case a force majeure event occurs, and this term in the contract also includes the occurrence of the coronavirus pandemic or the governmental measures related to it, then the affected contracting party does not get into default (breach of contract) and the other party has no right of withdrawal neither right to compensation of damage or to a contractual penalty.

If a contract does not contain a force majeure clause, then a higher power in the contract relations shall be still relevant, as, according to Section 374 of the Slovak Commercial Code, such force majeure event is a circumstance excluding liability for damages. In this case, however, in spite of the above, the party is in breach of a contract and must therefore take into account all the other consequences associated with it, such as the possibility of withdrawal from the contract by the other party or the obligation to pay an agreed contractual penalty.

3. Frustration of the purpose of the contract

Coronavirus-related governmental measures, which prohibit a range of activities, could also potentially frustrate the purpose of the contract as a result of a substantial change in circumstances under which the contract was concluded. If, as a result of the coronavirus and related measures, the essential purpose of the contract has been frustrated (provided that this purpose has been specifically stated in the contract), the party affected by the frustration of the contract pursuant to Section 356 of the Slovak Commercial Code may withdraw from the contract. A party that has withdrawn from the contract in this manner shall be liable to compensate damages incurred by the other party due to such withdrawal. Change in the (value of) assets of either party and change in the economic or market situation shall not be considered as a change of circumstances.

4. Impossibility of performance

Governmental measures related to coronavirus may, within the meaning of Section 575 of the Slovak Civil Code in conjunction with Section 352 of the Slovak Commercial Code cause also the termination of a contractual obligation due to the impossibility of its fulfilment. However, this is possible only provided that such obligation cannot be fulfilled even under more difficult conditions, with higher costs, with the aid of another person or after an additional agreed upon time period. The obliged party shall, without undue delay after becoming aware of the circumstance which makes performance of an obligation impossible, notify the other party of the situation. If a consideration (remuneration) for the failed (impossible) performance has been already provided, it must be reimbursed. Given that in the case of coronavirus, the contracting party has not caused the impossibility of performance, it will not be obliged to compensate the other party for damages incurred by it, unless the damages have been caused by the late notification of the impossibility to perform.

Last, but not least, we would like to point out that the existence of coronavirus and the measures against its spread are no longer an unforeseeable circumstance and therefore, when entering into new commercial contracts, we advise to take them into account and incorporate them adequately into drafts of contractual documents.

It is always the case when dealing with contracts that the contracting parties may agree on a number of issues differently from the written legislation so it is always necessary to analyse the specific contract directly and not to just follow the general rules resulting from the abovementioned applicable legislation.

Should any questions arise, we are available.

Sincerely,

BBH advokátska kancelária, s.r.o.