

## Entrepreneurs in the coronavirus era

### Contractual obligations and the consequences of non-performance

The epidemic emergency announced in Poland as from 14 March 2020 due to the spread of COVID-19 does not affect the validity and sustainability of legal relationships. However, the solutions adopted by the legislator have, or in the long-term will have, an impact on business, not only in transport or catering, but also in most other sectors of the economy. Before discussing the solutions to allow entrepreneurs to survive these difficult times, it is worth looking at these regulations that are currently in force.

Entrepreneurs are currently asking the following and similar questions:

- Can I terminate, withdraw or temporarily suspend the performance of a contract that I am unable to perform due to COVID-19 epidemic and, e.g. the solutions adopted regarding the way my employees work?
- Under the current circumstances, can I charge the contractor contractual penalties for any delay?
- Am I liable for damage caused by the delay or non-performance of my obligations to my counterparties, customers or financing entities, if related to COVID-19 epidemic?
- If and how can I enforce a service that I have already paid for that cannot be performed? Or am I entitled to claim back part of the benefit?

In terms of contractual liability, the circumstances of each case will determine whether a given solution will apply or whether liability may be limited or excluded. Therefore, the answers to the above and other questions may vary in different circumstances.

Once the facts have been established, the first question is what is the specific reason for the delay, non-performance or improper performance.

[Does delay in performance give us the right to withdraw from the contract?](#)

In general (a specific contract may provide otherwise), if your counterparty commits a qualified delay in the performance of an obligation under the contract, you may set him/her an additional period for the performance, with a warning that if such a period expires ineffectively, you will be entitled to withdraw from the contract.

Alternatively, immediately or after the ineffective expiry of the additional period, you may request performance of the obligation and compensation for damage resulting from the delay.

You are not entitled to the above rights if the delay in performance is due to circumstances for which the contractor is not responsible.



## Is COVID-19 a circumstance that allows to avoid liability for any delays in performing the contract?

If the non-performance or improper performance of the agreement is due to circumstances for which the party in question is not responsible, then the general rule that each party to the agreement is obliged to remedy the damage resulting from the non-performance or improper performance of its obligation does not apply.

The occurrence of a force majeure event is a typical circumstance which leads to a lack of liability for the resulting damage if there is a causal link between the damage and the force majeure (i.e. the event actually had a direct impact on the occurrence of the damage), and if the agreement does not contain other specific regulations in this respect (e.g. limitation of "force majeure" to specific cases or the place where they can occur).

The Polish regulations do not contain a definition of force majeure. According to Supreme Court jurisprudence, force majeure is an event which is: (i) external, (ii) impossible to predict and (iii) impossible to prevent (or whose effects could not be prevented). An epidemic, such as the COVID-19 pandemic, is therefore a typical example of such an event. It is one of the most frequently cited examples of force majeure alongside events such as fires, floods or war.

However, the definition of force majeure is often found in the contract itself, so the classification of a given event as force majeure must be made from the content of a given contract.

The mere occurrence of a situation that meets the requirements of force majeure is not enough. In order to be exempted from liability for non-performance of the contract, it is still necessary to prove that the COVID-19 epidemic had a real impact on the inability to perform the contract.

For example, a software company will not be released from its liability for failing to complete a computer program on time solely by invoking the fact of an epidemic. It must still prove that because of the epidemic and the related limitations, e.g. a key group of programmers cannot return from vacation or has been quarantined.

Force majeure is an exception to the principle of performance in accordance with the contract, so invoking it should be carefully considered.

## What to do if everything indicates that the contract may not be executed due to COVID-19?

If so, the following questions should be answered:

- Whether the agreement allows to invoke an epidemic as a force majeure?
- How has the COVID\_19 epidemic affected the activities of the contracting party and its subcontractors?
- What actions were or may be delayed?
- Do actions that are delayed due to an epidemic have a direct impact on meeting contractual deadlines?
- Can the effects of delays be demonstrated and their impact on the duration of the contract be predicted?
- Is there documentation (evidence) to prove the delay?
- Has appropriate notice of a force majeure event been given to the other party with the proper procedure?

**If you have any questions regarding these issues or otherwise, please contact Bird & Bird at: [covid19@twobirds.co.uk](mailto:covid19@twobirds.co.uk)**

