

Does the current situation give grounds for avoiding civil law liability in case of non-performance or improper performance (e.g. missing a deadline) of commercial contracts?

Considering the COVID-19 epidemic hazard, it's easy to imagine potential difficulties with performance of contractual obligations. That concerns in particular agreements the performance of which is spread over time (agreements for periodic services, such as weekly supplies of goods, or agreements with deadlines requiring substantial work input and time, such as construction contracts, complex agreements for a specific work). Are there any mechanisms in the Polish legal system that protect entities having contractual obligations?

1.1 SPECIAL ACT TO FIGHT COVID-19

The legislator seems to see the problem as the act of 2 March 2020 on special solutions to prevent, counteract and combat COVID-19, other infectious diseases, and resultant emergency situations ("**COVID-19 Act**") regulates the issues regarding contractual obligations of some entities.

Firstly, Article 13 of the COVID-19 Act provides for special rights to **tourist businesses** within the meaning of the act of 24 November 2017 on tourist events and related tourist services (Journal of Laws of 2019, item 548) in case of: (i) termination of an agreement on participation in a tourist event by the tourism organiser or (ii) withdrawal from such agreement by a traveller if it results directly from the outbreak of COVID-19. In such situation a tourist business is entitled to the return of contributions made to the Tourist Guarantee Fund upon an application filed not later than within 60 days from the withdrawal or termination of the agreement.

Secondly, Article 14 of the COVID-19 Act governs the issues of liability of some **entities from the transport sector** (e.g. railway station administrators, air, rail and road carriers), for instance in case of non-performance of an obligation as a result of reasonable measures taken by public authorities to counteract COVID-19. Pursuant to this special regulation, the entities mentioned above are not liable



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for damage caused by non-performance of an obligation as a result of such actions of public authorities.

Moreover, as announced by the Ministry of Economic Development on 10 March 2020, another special act is being drafted whereunder, among other things, penalties imposed on contractors and subcontractors under the Public Procurement Act for missing deadlines in performance of obligations will be lifted.

1.2 WHAT ABOUT ENTITIES FOR WHICH THE LEGISLATOR HAS NOT PROVIDED FOR SPECIAL PROTECTION IN LIGHT OF THE COVID-19 OUTBREAK?

Implementation of the above – narrow in scope – regulation regarding contractual issues, applicable to some, selected groups of entities, does not mean that in light of the epidemic only some industries will be protected. Other entities, even if no special regulation is in place, are protected pursuant to the general liability rules under the Civil Code¹.

(1) Negotiating and amending existing agreements

The step recommended to be taken in the first place to avoid disputes between the parties is starting negotiations in good faith seeking to adjust the provisions of the agreement to the current COVID-19 situation (in particular negotiations regarding postponement of contractual deadlines). Such amendments should be made taking into account realistic possibilities to perform the obligations in light of the epidemic hazard. It is important, however, that each amendment of the agreement requires consent of both parties. In more complex agreements parties often explicitly provide for the obligation to negotiate the terms of the agreement in a situation when the performance of the obligation under such agreement is substantially obstructed due to an extraordinary change in circumstances. In such case the parties should first of all act in accordance with the provisions of the agreement governing this issue.

(2) Lack of fault as basis for avoiding the liability

If no agreement is reached by way of negotiations and if parties did not regulate this issue separately, the liability for non-performance or improper performance of contractual obligations is so called **liability for fault** pursuant to Article 471 of the Civil Code. That means that a debtor (for instance a supplier, general contractor) may avoid liability if he proves that the damage occurred for reasons for

¹ Act of 23 April 1964 of the Civil Code (Journal of Laws of 2019, item 1145)

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which he is not responsible. In assessing this issue it is important to note that according to Article 472 of the Civil Code if from a special statutory provision or a legal transaction does not result otherwise, the debtor is liable for failure to act with due care.

The current epidemic situation may cause difficulties in performance of obligations by many entities. Moreover, it is possible that in the coming weeks more restrictions will be imposed due to the outbreak of COVID-19. In the event of improper performance of contractual obligations in such circumstances, the debtor may try to avoid potential formal and legal sanctions by claiming that he was not at fault, and demonstrating that despite acting with due care he was unable to perform the obligation.

(3) Force majeure

Agreements with the stricter liability regime (liability independent of the fault) in accordance with Article 473 § 1 of the Civil Code, in practice provide for situations when a debtor may avoid liability. Here it is in particular possible to rely on the so called **force majeure**, usually defined as an extraordinary event, that could not have been foreseen or prevented even with due care. In case of agreements under which it is not possible to rely on lack of fault, the force majeure clause may be used to try to defend against contractual sanctions in light of the restrictions related to the epidemic.

(4) *Rebus sic stantibus* clause

An alternative mechanism that may be potentially used in the current situation is the so called *rebus sic stantibus* clause governed by Article 357¹ of the Civil Code. If due to an **extraordinary change in circumstances** the performance of an obligation entails excessive difficulties or exposes one of the parties to a serious loss, which the parties could not foresee when concluding the agreement, the court may, having considered the parties' interests, in accordance with the principles of community life, designate the manner of performing the given obligation, the value of the performance or even order termination of the agreement. It should be noted that in case of an agreement for a specific work Article 632 § 2 of the Civil Code provides for less stringent requirements than Article 357¹ of the Civil Code for increasing a lump-sum remuneration or termination of an agreement for a specific work if the performance of such agreement exposes the contractor to a serious loss due to an unforeseeable change in circumstances. Pursuant to the decisions of the Supreme Court, Article 632 § 2 of the Civil Code applies *per analogiam* to construction contracts.

There is no doubt that the current situation may be classified as an "extraordinary change in circumstances" within the meaning presented above. Nonetheless, given the special nature of said clause, in each case its application requires an in-depth analysis of the agreement and the

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circumstances to determine whether all other prerequisites have been met for application of the regulation being an expression of the *rebus sic stantibus* clause. Moreover, its application requires court interference hence its enforcement entails a longer procedure associated with plenty of formalities and financial expenses.

Since when applying the regulation based on the *rebus sic stantibus* clause the court should take into account the principles of community life, an entity which itself violates the principles of community life, for instance was in default in performance of an obligation when the regulation introducing the state of epidemic hazard in Poland was issued, may not rely on this regulation (so called clean hands principle).

(5) Consequential performance impossibility

Last but not least, there is also the so called **consequential performance impossibility**. Pursuant to Article 495 of the Civil Code which applies to reciprocal agreements, which constitute a vast majority of agreements in business transactions, if one of the reciprocal performances becomes impossible due to circumstances for which neither party is liable, the party which was to make the performance can't demand the reciprocal performance, and, if it had already received it, it is obliged to return it according to the provisions on unjust enrichment. If, however, the performance of one of the parties becomes only partially impossible, that party loses the right to the appropriate part of the reciprocal performance. However, the other party may withdraw from the contract if partial performance were meaningless to it due to the nature of the obligation or due to the purpose of the contract intended by that party and known to the party whose performance has become partially impossible. All other agreements are governed by Article 475 of the Civil Code based on which if a performance becomes impossible due to circumstances for which the debtor is not liable, the obligation expires.

It appears that in the current situation it can't be concluded that as a result of the restrictions imposed due to the outbreak of COVID-19 the performance already became permanently impossible. It can't be ruled out, however, that if the current restrictions remain in place for a longer time (or new ones are imposed), it will be possible to rely on this regulation.

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SUMMARY

The Polish legal system provides for several mechanisms to protect parties of the agreements in extraordinary situations. Nevertheless, such mechanisms are not so explicit as those provided for in the special acts adopted or announced in the recent days. It is, therefore, necessary to remember that each non-performance or improper performance of an obligation must be analysed individually to assess accuracy of a given legal mechanism. **There is no doubt, however, that it will be possible to avoid civil law liability in situations where circumstances obstructing the performance of certain contractual obligations are directly related to the outbreak of COVID-19.**

Having regard to the above, in the current situation it seems reasonable to thoroughly review crucial agreements and develop a strategy to take appropriate operational and legal measures to minimise financial losses arising from the current epidemic situation.

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