The coronavirus epidemic will likely have an economic impact and businesses may face problems performing public contracts on time. If that happens, will contractors be held liable for delays in contract performance?

Piotr Machnikowski
Indeed, it seems almost inevitable that economies will be hit by the spreading virus. As long as no infections were being discovered in Poland, the epidemic had little direct bearing on Polish companies, which had to cope mainly with complications in their supply chains, particularly if these involved vendors based in China or Italy. Now, however, as the number of infections grows and the government is introducing measures to curb the spread of the virus, we will be seeing greater absenteeism of employees, reduced productivity, restrictions in transport and the like, in many cases probably leading to delays in performance of contractual obligations. Also, businesses will see their revenues fall, making it harder for them pay their payroll, rent and bills for the goods they purchase.

How will this translate into their liability for contract performance? Well, this will first depend on what their contract says. In their contracts, undertakings often detail the circumstances triggering liability for faulty performance of their obligations, and it is only when nothing is said about this in the contract that Articles 471 et seq. of the Civil Code come into the picture. These require debtors to pay interest on delayed payments regardless of the reasons for the delay. Further consequences for delaying payments — including in particular contract rescission by the creditor or claims for damages — depend on whether the debtor was at fault.

As far as non-pecuniary obligations are concerned (such as delivery of things or performance of services), the civil code imposes liability only for culpable failures to perform. Thus, the most severe consequences of failure to perform an obligation on time, such as rescission of the contract by the other party, claim for damages or substitute purchase of goods or services at the debtor's expense, will not occur in the absence of fault.

It is important to remember here that the debtor must prove that it was unable to perform its obligations for reasons over which neither it nor its employees or subcontractors had control. A pandemic and the remedies implemented by state authorities to combat the spread of the disease are just such reasons. That said, they can only be invoked effectively when their actual impact in terms of preventing full performance of the contract is demonstrated.

Aldona Kowalczyk
The businesses that stand to be hit the hardest by the coronavirus pandemic are those competing for public contracts. The pandemic may hurt their condition, which is reviewed in tender procedures to verify that potential bidders will be in a position to perform the contract. For example, if dropping revenues result in a company falling into arrears with tax or social insurance payments, it could end up being barred from competing for future contracts. Another thing to bear in mind is that contracts made with public entities are subject to a variety of restrictions — not just legal in nature — such as those imposing limits on admissible amendments of contracts. Contracting authorities have to deal with excessive numbers of inspections and restrictive interpretations — often rooted in regulations that no longer apply —
of what is and what is not allowed. The decision-making paralysis that results in circumstances of this kind means that undertakings must expect to see discussions on the effects the epidemic may be credited as having on non-performance or improper performance of contracts — especially in the overly cautious, if not indeed conservative, public procurement market.

Can businesses avoid liability by claiming force majeure? What should they cite?

Piotr Machnikowski
If culpability is required for the debtor to be held liable, then whether or not the reasons why a contract was not performed are classified as force majeure or otherwise is of no great consequence. It is enough for the circumstances responsible for the failure to be beyond the control of the undertaking.

It is different when the contract provides that the debtor is liable regardless of its culpability or that its liability is excluded in the event of a force majeure event. If the contract explicitly excludes the debtor’s liability for force majeure, the debtor must demonstrate that the event classified as force majeure did in fact take place and prevented it from performing the contract in full.

If the contract says nothing about force majeure and instead provides that the debtor is liable irrespective of fault (“on a risk basis”), there will be a scope for litigation is open since it is not a foregone conclusion that force majeure excludes the liability we are talking about here — although the latter seems to be the prevailing view.

Aldona Kowalczyk
Contracting authorities often include force majeure provisions in their tender documentation (form contracts or essential terms of contract), defining what they mean by force majeure and describing in detail the consequences of force majeure events and the procedures that apply when events of this kind take place. Public contracts sometimes contain what is known as review clauses providing for events of an extraordinary nature whose consequences cannot be prevented. These clauses list admissible amendments to the contract, to be made by way of annexes. Various solutions may be adopted in this regard, and the issue of liability must always be examined in the context of specific provisions in each individual contract.

Force majeure events are not always defined in a contract. When that is the case, can the contractor invoke force majeure? Can the coronavirus epidemic be deemed force majeure?

Piotr Machnikowski
Nowhere is force majeure defined in Polish law and the concept itself is seldom used in Polish law, although it is fairly uniformly construed in the literature and the courts in their rulings. This is not to say, of course, that the concept is easy to use in practice, since the facts may differ very widely from case to case. Today it is usually assumed that force majeure is an event taking place outside the debtor’s enterprise, extraordinary in nature, and such that its consequences are not preventable. The definitions to be found in contracts are similar in vein, sometimes more extensive or including examples. It is reasonable to expect that a pandemic of a serious disease and extraordinary administrative measures introduced to combat it will be seen as meeting the criteria of force majeure.

Is force majeure something that also applies to contracts made under Public Procurement Law?

Aldona Kowalczyk
Public procurement contracts are civil law contracts, with the Public Procurement Law explicitly requiring the provisions of the Civil Code to be applied to them. So what we said earlier about contracts applies to public procurement contracts as well. However, we must bear in mind that the latter are somewhat special in nature, as they are subject to the Public Procurement Law and public entities are subject to certain restrictions, which do not apply in ordinary commercial relationships. Each contractor must always start off examining the issue of force majeure by looking at what the contract says on the subject.
Another thing to bear in mind is that, under the applicable laws, a circumstance which could not have been foreseen by the contractor acting with due care warrants an amendment to the contract. This follows from Article 144(1)(3) of the Public Procurement Law, which also provides that the amendment may not exceed 50 percent of the originally defined contract value. A contract may therefore be amended pursuant to this provision of statutory law regardless of the wording of the contract. I am of the view that the coronavirus epidemic and its consequences should be seen as a circumstance of the kind discussed here. This view also seems to be supported by the recitals to the classical public procurement directive (Directive 2014/24/EU) referencing “unforeseeable” events. Needless to say, everything I just said applies to contracts concluded in procedures commenced before the coronavirus began to spread.

What may be the formal consequences of rescheduling contract completion due to a force majeure event? Will an annex have to be made to give effect to a contract amendment of this kind?

Piotr Machnikowski

The very occurrence of a force majeure event or some other circumstance absolving the debtor of culpability does not in itself change the content of the contract. The only consequence here is that the late performance or some other breach of the contract is justifiable and does not trigger liability. Sometimes this is not enough, though, and the parties concerned need to come up with a binding description of their respective rights and obligations in the new situation. When that is the case, they will need to arrive at a settlement if they are unclear or in dispute over the impact of past events, or enter into an annex to their contract regulating their future cooperation. However, Polish law does not obligate parties to renegotiate their contracts when circumstances change. Some contracts contain a clause requiring them to do so, but if not, a party may try to argue that this obligation follows from good customs and the principle of loyal contractual cooperation (collaboration of the parties) as expressed in Article 354 of the Civil Code — especially when the contractual relation is long-term in nature. Courts of arbitration are particularly eager to enforce these rules and principles upon undertakings. As a last resort, a party may request a court to modify its obligations (the manner of obligation performance or the amount of the performance) or even to dissolve the contract under the rebus sic stantibus clause (Article 3571 of the Civil Code). This is possible in the event of an ‘extraordinary change in circumstances’ — an exceptional event that a diligent businessperson could not have foreseen at the time of conclusion of the contract and that makes performance of the contract excessively burdensome or exposes a party to serious losses. The Covid-19 pandemic will doubtless sometimes fit the definition of an ‘extraordinary change in circumstances’.

Are there any time limits for proposing contract amendments? Can anything else be done other than invoking force majeure?

Aldona Kowalczyk

To begin with, one must, of course, look at the contract to see if it says anything about the matter. There are no statutory deadlines for notifying the other party that a force majeure event has taken place. In most cases, when force majeure and its consequences are defined in the contract, there are also provisions in the contract setting out the deadline for and manner of notifying the business partner of the relevant event having taken place and describing the way forward for the parties. If there is nothing on the issue in the contract, the duty to inform the other party of difficulties encountered in performing one’s contractual obligations should be seen as stemming from the principle of collaboration of the parties laid down in the Civil Code.

Piotr Machnikowski

Disputes are to be expected over performance of contract, with parties pointing to the impact of the pandemic as the reason for their failure to perform the contract properly. The courts will not only have to examine the legal grounds for claims of this kind but also whether the economic disruptions caused by the virus outbreak did indeed impact the performance of the given contract. To do this, the court will need evidence, which must be provided by the party citing the pandemic. So there are two things which are of paramount importance for the debtor at this stage. Firstly, the
debtor must act to mitigate the effects of the adverse external circumstances, such as a pandemic, and the effects of
the measures implemented to counteract them, since it is under obligation to act diligently to minimize the impact of
the said circumstances on contract performance. Secondly, the debtor must document the obstacles preventing
proper performance of its obligations and the consequences these have in order to be able to demonstrate them if a
dispute were to arise over the performance of the contract.

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