What to do when COVID-19 interferes with your contract? A practical 5-step guide

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Many businesses have already taken the brunt of the pandemic while many others are yet to feel it. One thing is sure: few industries will remain unaffected.

Much has been said on the economic condition of companies, including about the forms of support available. But to us it is equally important to look at the current situation and business relationships from the perspective of a litigant. We can't overestimate the importance of having a robust preparation process in place that starts at the first signs of issues with contractual performance. We know from experience that showing a passive attitude in the early stages of the dispute will backfire when it reaches the courtroom. While this guide is designed to be universal, it seems especially important to implement the advice it offers now, when the market is in an extraordinary state of flux. Contracting parties should behave proactively now more than ever, as this can lead to a mutually beneficial renegotiation of their contract or at least allow them to better prepare for any future court battle.

We are pleased to offer you these practical guidelines. If acted upon, they should mitigate the risk of your contract being affected by performance issues.

Enjoy the read!

1. Prepare records

… and be really meticulous with this:

- start as soon as you notice any issues with contractual performance,
- critically review the documents and correspondence you have,
- think about the picture they present in terms of objective facts – if they ever get before the eyes of the judge, you must make sure they fully reflect your situation,
- pay special attention to facts that provide evidence of the other party's negligence or of performance obstacles, but also of the relationship between the breach and force majeure.

If you or the other party ultimately choose to go to court, the judge will look particularly closely at any links between

coronavirus and the breach of contract. You can safely assume that whatever caused the contractual delays or defaults will be where the dispute is fiercest.

So what are examples of evidence you should secure when you cannot perform your part of the deal?

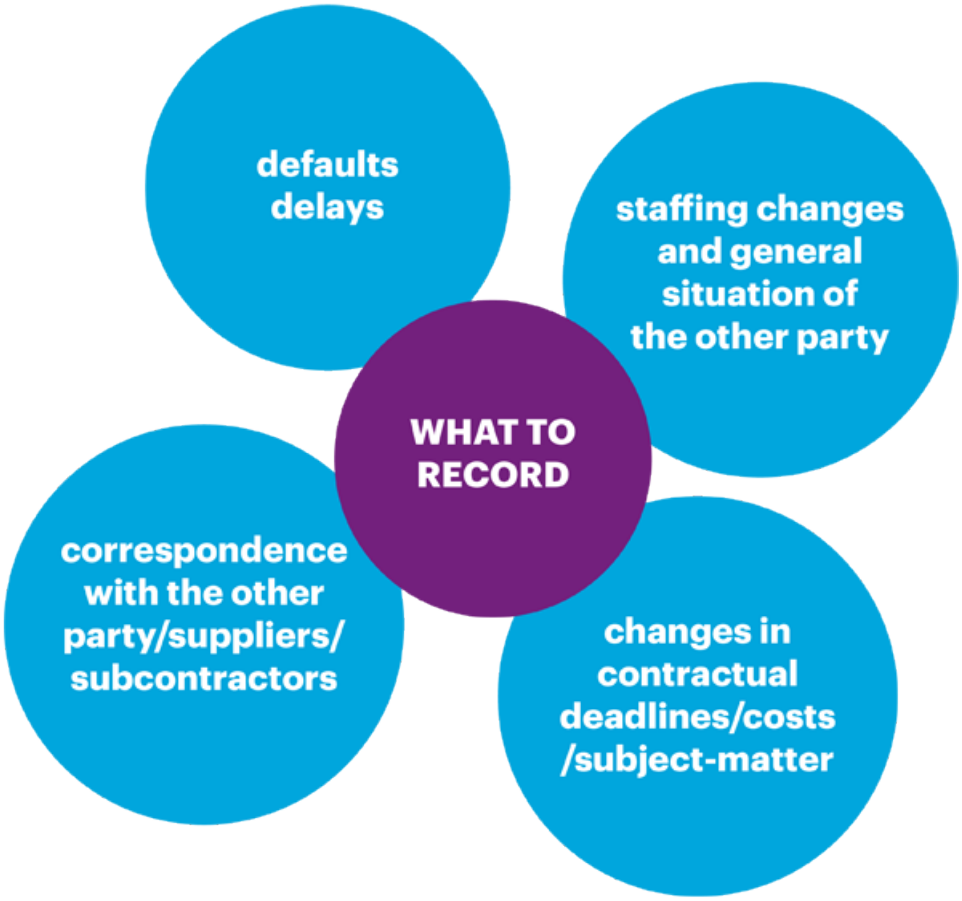
- evidence of a decline in the number of personnel working on the contract (not just your personnel, but also of your suppliers or subcontractors, if any),
- notices from your suppliers or subcontractors that they have delays in performing their own obligations due to COVID-19,
- correspondence with your suppliers indicating possible delivery delays,
- formal progress report on the project (executed with the involvement of the other party or a notary).

Your evidence-gathering efforts should focus primarily on trying to demonstrate that – absent coronavirus – you would have performed duly, on time and at the pre-agreed price.

What should be your main course of action if it is the other party that is in delay or in default?

- secure evidence of defaults, such as delays, decreased delivery volumes, less frequent deliveries,
- make sure it is not the case that the other party fell in default already before the pandemic only to use the current situation as a pretext. Demand that they provide detailed explanations (in writing or at least by email) of how their problems are related to COVID-19,
- closely monitor the other party's actions. Check for any other contracts it is performing; maybe it has just won a major one and is now shifting resources to it,
- be careful when accepting any notices or new contractual deadlines or terms.

All of this "paperwork" is unfortunately necessary, because if contractual performance is seriously disturbed and renegotiation fails, you may well soon find yourself in litigation. And if you do, be aware that Polish civil procedure is extremely formalized so that you will have to comply with a number of evidence requirements. For example, it is a rule of procedure in commercial matters that written evidence takes precedence, so you will not be able to rely only on oral witness or party evidence given in court.



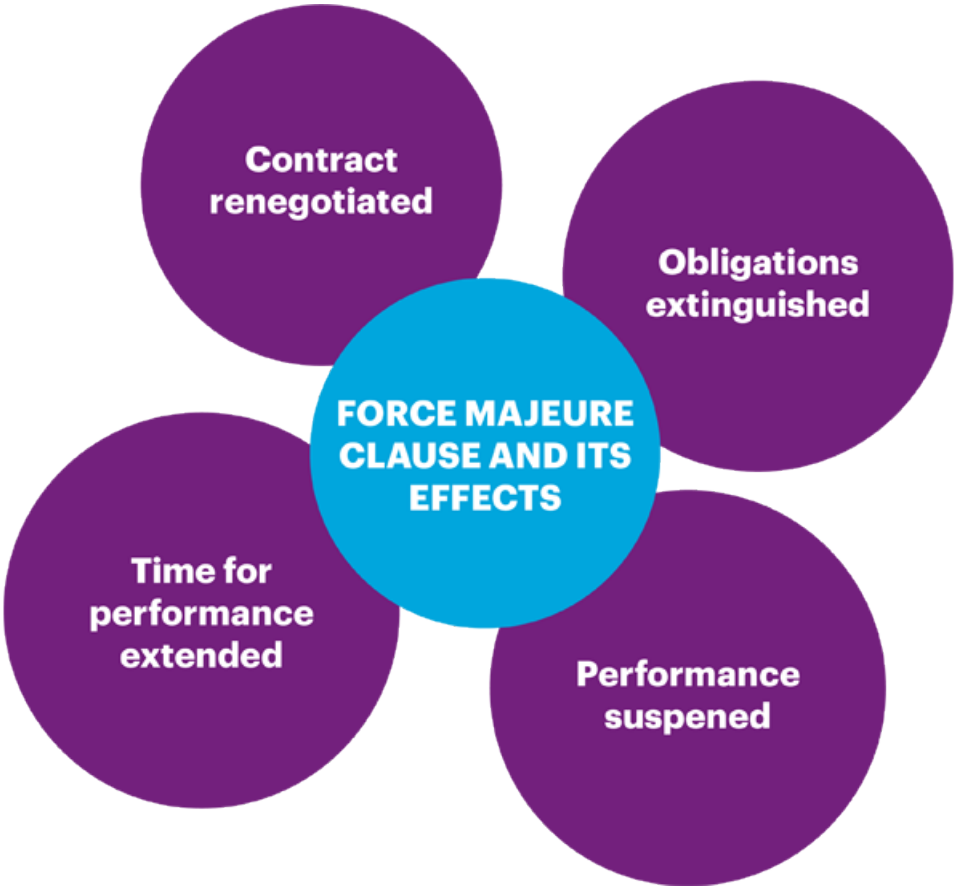
2. Check your contract

… and find out about your rights and obligations in your specific situation.

You will need to review your contract to see what cases you and your opponent can build. Read the terms of your contract to consider your further steps and predict the other party's strategy. This should help you prepare properly for negotiations or litigation. So, what should you check first of all?

- does your contract provide for any contractual penalties for delays?
- is there any Force Majeure clause in your contract?
- if there is, is there any agreed procedure to be followed to invoke Force Majeure (e.g. you need to notify the other party of a Force Majeure event preventing your timely performance, or otherwise lose your right to claim Force Majeure)?
- what are the agreed consequences of Force Majeure? Are the parties' mutual obligations to be extinguished or are the parties required to renegotiate?
- what is the risk allocation for Force Majeure events? Perhaps your or the other party's liability for them is to be absolute under the contract?

If your contract is silent on Force Majeure, you might want to consider some other options under civil law. Perhaps, if it fits your circumstances, you might want to consider such remedies as subsequent impossibility to perform or an extraordinary change of circumstances, or simply some general rules on contractual (non)-performance.



3. Talk

…to the other party and do not hold back from it. It won't be easy to talk but the faster you put your cards on the table, the better. As soon as you see you might have problems with timely performance, give your business partner a heads-up. Start remedial action promptly – first, in order to try and save your contract, and second, to make sure the other party does not go to court.

- how to communicate in a crisis?
- always rely on writing for your arrangements. Even if you and the other party agree on further steps by phone, make sure that what you agreed is confirmed, at least by e-mail,
- take the initiative: suggest a new contract completion date, additional security or financial terms,
- see to it that your communications are clear and not unduly late.

What happens with your contract going forward and your liability may both depend on how you communicate with the other party. If you put off notifying delays to your partner, your might hear that you failed in your duty to collaborate on the contract. This might translate into how much the other party demands from you in contractual penalties or damages.

4. Be on the safe side

… whichever party to a dispute you are.

If you are the party in default:

- consider negotiating a new deadline or terms of remuneration - your partner is unlikely to go court, unless they have no other choice,
- offer additional contract performance security to the other party,
- if you feel that your partner is becoming increasingly intransigent in their negotiating position, start monitoring relevant courts, or you might be surprised with a sudden interim relief motion.

If you are the creditor:

- check your contractor's current financial standing – make sure it has not deteriorated recently and check whether your contractor has other creditors,
- think how COVID-19 might affect the other party's financial standing in the months to come. Perhaps you should consider requesting additional contract performance security,
- act if you have any concerns about the other party's solvency, especially if you charge contractual penalties or intend to seek damages.

If you conclude that the situation is ripe for action, you will have a number of options to make the other party perform their side of the deal.

5. Prepare yourself

… because quite soon you might be faced with a court case or might start considering one yourself.

Before that happens, check:

- which court is the right one to hear your case,
- what costs you need to be ready for,
- how long you will need to wait for the judgment,
- what remedy you can seek and what counterclaims you might expect,
- the odds of your winning the case,
- whether you have secured all the evidence you need. Perhaps you might need help from a technical expert.

Once you are done with all this “soul-searching”, you might decide that going back to the negotiating table would be the better option after all. Alternatively, you might conclude that the current situation is not your fault. Whatever business decision you might take, if you follow these guidelines, you should be in a much better situation than your opponent.

What can you do?

Once you know your arguments and evidence, you should look at a number of options:

- file an interim relief motion seeking an order of performance – if, of course, you still see a chance for your contract to be continued and doing so makes business sense to you,
- file an interim relief motion seeking attachment of some of your debtor’s assets (including a bank account) – if you have a claim for contractual penalties or damages,
- file for an order for payment in summary proceedings if you have unpaid invoices for your goods or services – while these,ast-track proceedings come with some formal requirements attached, they offer two major advantages:
  - court fee is 75% lower than the regular claim fee.Once issued, the payment order doubles up as a security that is enforceable on its own, without any additional writ of enforcement.

These are just the most common examples of steps you can take, adaptable for virtually any case. It might turn out,

however, that your contract requires a hybrid or bespoke solution.

Deciding on the next steps you should take to streamline enforcement of your claims will depend not only on the particular claims you have, but also on how well you have managed to implement these guidelines.

Good luck!

Your Key Contacts

Magdalena Wątroba
Counsel, Warsaw
D +48 22 242 57 21
magdalena.watroba@dentons.com