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COVID-19 PANDEMIC
IMPACT ON CONTRACTUAL OBLIGATIONS

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The current situation stemming from the novel coronavirus pandemic and subsequent restrictive governmental measures limiting undertakings in their business activities, has brought up many issues related to contractual relationships that need to be resolved. In the context of the current pandemic, for example this can include the impossibility to deliver goods or provide services due to sickness/absence of a larger number of employees, or the impossibility to provide goods or services as a result of governmental measures in relation to the extraordinary situation and state of emergency, as well as late payments, etc.

The status of contractual parties will always depend mainly on the wording of the respective contract; therefore, the following information addresses only some aspects and is only a general overview of selected instruments.

A. FORCE MAJEURE

Slovak law does not define the term "force majeure" (*vis major*), but based on practice of the courts it can be considered **an event that does not occur frequently and cannot be predicted or averted**, even with the utmost care of either party.

It is possible for contractual parties to agree on what events can be considered force majeure, what the consequences will be and how the parties should proceed should such event occur. If a force majeure event, as set out the contract, occurs that results in the breaching of contractual obligations, the other party generally won't be entitled to withdraw from the contract, claim compensation for damage or pay a contractual penalty (except in cases expressly agreed upon in the contract).

In general, the government's declaration of an extraordinary situation, state of emergency and introduction of measures with respect to the pandemic may be considered as force majeure. However, assessing whether force majeure has actually occurred, and its consequences, will always depend on the particular case (whether or not the force majeure is contractually regulated).

B. SUBSEQUENT IMPOSSIBILITY OF PERFORMANCE

In certain specific cases, a force majeure event (the pandemic) may cause a termination of an obligation due to the impossibility of performance.

Impossibility of performance must always occur after entry into the contract (i.e. the impossibility must be **subsequent**) and it must be **objective**, i.e. it cannot be caused solely by an individual inability to perform on the debtor's side (e.g. by their insolvency). Moreover, it must be a **permanent** impossibility to perform – if the performance was impossible only for a certain period of time (e.g. if the debtor was sick or under quarantine), this would probably not be considered an impossibility of performance, and the debtor would

be in delay. However, assessing whether there is a permanent or temporary impossibility to perform will again depend on the specific case. For the time being, however, it appears that the pandemic, including measures and other related facts, will be considered merely temporary in relation to most contractual relations. Therefore, the parties should not rely on a subsequent impossibility of performance without considering all the individual circumstances of the case. **In the event of impossibility of performance, the burden of proof is borne by the debtor**.

Generally, impossibility of performance does not apply in cases of monetary performance.

The debtor is liable for any damage incurred to the creditor as a result of the impossibility of performance. However, they can be relieved of this liability by proving the existence of liberation reasons (please see below).

C. LIABILITY FOR DAMAGE

Failure to fulfil obligations as a result of the pandemic or related circumstances can in many cases lead to an incurrence of damage.

A party that is unable to fulfil its contractual obligations as a result of the pandemic and as a result causes damage to the other party, may be relieved of this liability by proving the existence of **liberation reasons** under provisions of the Commercial Code. The following can be considered as liberation reasons: unforeseeable circumstances that (i) arose independently of the will of the liable party, (ii) prevent them from fulfilling their obligation, and (iii) cannot be averted or overcome by the liable party. **The burden of proof is always borne by the violating party**. The provisions of the Commercial Code concerning liberation reasons are of a non-mandatory nature and may be modified by the parties in the contract according to their preferences. Therefore, assessing whether the pandemic and related circumstances are liberation reasons will always depend on the specific contractual provisions.

However, please note that, unless otherwise agreed by the parties, under the Commercial Code the violating party must inform the other party of the nature of the circumstance preventing them from fulfilling the obligation and its consequences without undue delay. In case of failure to notify, the other party may be entitled to compensation for damage.

Where contracts are concerned, under the Civil Code the violating party may be relieved of the liability for damage by proving that **they were not at fault for the damage**. It can be assumed that the pandemic and related facts will, as a rule, exclude any fault – if the debtor proves that the damage actually occurred in a direct causal relationship with the pandemic. **In this case the violating part again bears the burden of proof**.

D. DELAY

If, in a particular case, it is not possible to consider the impossibility of performance and the breach also does not fall under circumstances foreseen in the contract, the violating party **will be in delay**.

In case of delay with fulfilment of a **monetary obligation**, the creditor is entitled to claim default interest in the amount agreed in the contract or in the amount stipulated in the respective government decree and lump-sum costs associated with the claim of the receivable (for contracts under the Commercial Code), or to claim default interest or a late payment fee (for contracts under the Civil Code). If the debtor is in delay with fulfilment of a **non-monetary obligation** (most often with the handing over or return of a movable asset), the risk of damage to the asset passes to them during the delay, unless it was already borne by them beforehand. These consequences occur regardless of the reasons for the delay. Thus, they will also apply in the event of a pandemic.

In addition, as a result of the delay, the creditor may be entitled to **withdraw from the contract,** provided that the statutory conditions are met.

In case of contracts under the Commercial Code, the creditor may immediately withdraw from the contract if the contract has been **breached in a substantial way** and they timely informed the debtor about the withdrawal. In other cases (i.e. if it is not a substantial breach of the contract or if the creditor

did not utilize the withdrawal under the previous sentence), the creditor may withdraw from the contract if the debtor doesn't fulfil their obligation within an **additional period** provided by the creditor. The length of the additional period must be proportionate to the circumstances; in particular, it must enable the debtor to actually fulfil the obligation.

Withdrawal from the contract does not affect the obligation of the debtor **to compensate creditor for damage** which was incurred by violation of the obligation. However, the debtor can be relieved of liability by proving the existence of liberation reasons (and in the case of contracts under the Civil Code by proving that they were not at fault for the damage), as stated above (part C).

Abovementioned consequences of delay were substantially affected by a so-called Lex Corona (Act No. 62/2012 Coll. as amended) which allows undertakings to apply for a provision of temporary protection. In this regard, if one party applies for granting of temporary protection pursuant to provisions of Lex Corona and **the court issues to this party a confirmation on granting of temporary protection** and simultaneously **the delay occurs between 12 March 2020 and 12 May 2020, the other contractual party shall not be entitled to terminate the contract, withdraw from it or refuse to fulfil the agreed performance due to such delay**.

Lex Corona also stipulates an exception from this rule in case another contractual party would directly jeopardize operation of its business by non-termination of the contract, non-withdrawal from the contract or non-refusal of fulfilment. It also does not rule out a right of the other contractual party to terminate the contract, withdraw from the contract or to refuse fulfilment due to delay of the contractual party under a temporary protection which occurred after 12 May 2020.

It also cannot be excluded that the **creditor will fall into delay** in connection with the pandemic, for example, if they fail to accept the duly offered fulfilment or to provide necessary cooperation. In such cases the creditor is liable for any damage caused to the debtor. The creditor can be relieved of their liability by proving liberation reasons (for contracts under the Commercial Code) or by proving that they were not in fault of the damage (for contracts under the Civil Code). For the time of creditor's delay, the debtor cannot be in delay.

E. CONTRACTUAL PENALTY

In case of **contracts under the Commercial Code**, the existence of liberation reasons generally doesn’t affect the obligation to pay a contractual penalty. Thus, if the debtor was relieved of the liability for damage by proving the existence of liberation reasons, they would not also be rid of the obligation to pay the contractual penalty (if it was agreed in the contract). Furthermore, an eventual withdrawal from the contract doesn’t affect the obligation to pay the contractual penalty.

In the case of **contracts under the Civil Code**, the debtor is not obliged to pay the contractual penalty provided that they were not at fault for violating the obligation. However, the parties may agree otherwise in the contract. The obligation to pay the contractual penalty ceases to exist by a valid withdrawal from the contract. However, it does not cease to exist if it arose prior to the withdrawal from the contract due to an earlier violation of the contract.

F. DEFEAT OF THE CONTRACT'S PURPOSE

A defeat of the contract's purpose is possible **only in cases of agreements under the Commercial Code**. If the parties explicitly agreed the basic purpose of the contract therein and simultaneously an external change of circumstances under which the contract has been concluded occurs and this purpose is thus defeated, the party affected by the defeat may **withdraw from the contract**. Whether the pandemic and related facts can be considered as a change of external circumstances which causes a defeat of the contract's purpose must be assessed while considering all individual aspects of the case. The withdrawing party is generally obliged to compensate the other party for the damage caused by the withdrawal.

G. MUTUAL CONTRACTS

It can also be expected that as a result of the pandemic, one of the parties refuses or is unable to fulfil a

mutual contract, i.e. such contract from which both parties are mutually indebted. In such case the Commercial and Civil codes stipulate that the fulfilment can only be claimed by a party which has already fulfilled their obligation.

In the case of **gradually contingent obligations** (i.e. obligations where one party is obliged to perform after the fulfilment of another party), the law allows – under the particular circumstances – that the party that is supposed to fulfil its obligation first and which fears that afterwards their contractual partner won't fulfil their obligation, withholds their own fulfilment. However, if one contractual party has been granted a temporary protection pursuant to Lex Corona, withholding of the fulfilment by another party will not be allowed. A contractual party probably would not be able to withhold its own fulfilment only because another party under a temporary protection did not fulfil its obligation yet. The exceptions we mentioned in part D. above in respect to Lex Corona shall also apply in this case.

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We are continuing to monitor the situation, and it cannot be excluded that the above conclusions will be subject to changes, depending on the legislative development. We will be happy to assist you to resolve new issues and to create favourable conditions for your business under the current situation.

If you have any questions, please contact your usual partner in PRK Partners or contact directly the partner of PRK Partners' Bratislava branch, Miriam Galandová (email: miriam.galandova@prkpartners.com, tel.: +421 911 492 222).