SQUIRE PATTON BOGGS

COVID-19 and Contracts Governed by Slovak Law

Below, please find an overview of the key contractual legal issues that businesses operating in the Slovak Republic should consider in the current situation caused by coronavirus disease 2019 (COVID-19), commonly known as the "coronavirus" or COVID-19.

Manage Contractual Risks

1. **Review the terms of all *key/critical contracts* for risks and potential contractual protections.**
   a. Determine if provisions applicable to the current situation, in particular, if any *force majeure* clauses, are included in the existent documentation.
   b. If so
      i. What rights and obligations does the respective party have, e.g.:
         1. Suspension of performance
         2. Termination options
         3. Penalties and/or default interest
         4. Limitations of liability
         5. Events of default, or
         6. Right to renegotiate, and
      ii. Under what conditions can these be raised or claimed, e.g., time, form, monetary limitations, etc.
2. **Consider what measures can be taken under the generally applicable *Slovak law* provisions in order to protect your position.**
   a. Limitation of liability for damages

   The coronavirus might cause many contractual parties to fail to comply with their respective obligations. As a general rule, if a party breaches its contractual obligation, it shall compensate the other party or a third party beneficiary for damages.

   Then the next question is whether you can excuse your breach by relying on a *vis maior*?

The Slovak private law does not define *force majeure* (lat. *vis maior*, in Slovak: *vyššia moc*).

But the contracting parties may agree in their contracts that one or both contracting parties are not in delay with the performance of the contract in case of *force majeure*.

In practice, such provision would mean that neither party has claims against the other party due to breach of contractual obligation, i.e., neither party has the right to withdraw from the contract, nor is it entitled to damages, penalties or default interest.

It is reasonable to consider the current situation as an extraordinary and unforeseeable event beyond the control of each party and, thus, should be considered as *force majeure*. We also share this view despite the fact that not all measures announced by the Crisis Committee of the Slovak Republic, to slow down the spread of coronavirus, are legally binding.

In any case, we advise clients to examine each contract separately in order to know with certainty whether the occurrence of coronavirus, in conjunction with the measures of the Crisis Committee of the Slovak Republic, meets the definition of *force majeure* contained in a specific contract.

If yes, in order to rely on *force majeure*, it has to be ascertained that an obstacle in the form of coronavirus and related government measures were a primary cause of the breach.

In case of the absence of a *force majeure* clause in business relationships, there is an option of invoking exclusion of liability under Section 374 of the Commercial Code in case of special, uncontrollable and unpredictable circumstances.

The circumstance that excludes liability has to

i. occur independently of the will of the liable party

ii. has to prevent it from fulfilling its obligation

iii. it cannot reasonably be assumed that such circumstance could be overcome, and could not be anticipated at the time of formation of obligation.

In practice, it means that a party is not liable for damage resulting from breach caused by such an unpredictable and out of control obstacle.

b. Supervening impossibility of performance (in Slovak: *dodatočná nemožnosť plnenia*)

Unlike *vis maior*, impossibility of performance is addressed both in the Civil Code and the Commercial Code. As we are focusing on business relationships, we will omit impossibility of performance applicable to relationship governed by the Civil Code and will address only supervening impossibility of performance under Section 352 of the Commercial Code.

But applicability of this provision to the current situation is questionable.

The reason is that if a company is only subjectively incapable of performance due to obstacles on its side, while its obligations can be fulfilled through a third person, or with higher costs or in an extended period of time, performance of contractual obligations is not considered impossible.

But on the other side, the Commercial Code explicitly stipulates that the obligation becomes impossible due to changes in legislation of permanent nature and the word "permanent" is decisive. We are afraid that given the temporary nature of the measures adopted in response to COVID-19 (measures are currently restricted to 14 days only, although can be extended), impossibility of performance of contractual obligations resulting from such measures would not be excused, and Section 352 of the Commercial Code would not apply in such situation.

Regardless of the above, the applicability of this provision has to be analyzed on a case-by-case basis. But even if applicable, it does not pardon you from liability for damages. It would only give you a right to terminate the contract.

3. Amend contracts so they address the current situation.

Consider using explicit an infection/disease/epidemic/pandemic clause in all new contracts and, where possible, amend the existing contracts, which would give a right to suspend your performance and extend deadlines, should these special events and circumstances occur, so you do not become liable.

Given that pandemic is already present and its impact and COVID-19-related measures are already in place, it would not be possible to argue that such special circumstances were not foreseeable at the time of signing of the contract. Thus, you would not be able to resort to *force majeure* in any of the options available contractually or under the Slovak Commercial Code.

Contact

Silvia Belovičová
M +421 948 24 11 24
E silvia.belovicova@squirepb.com