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The Polish government is putting the finishing touches to legislation aimed at supporting entrepreneurs in the time of the coronavirus disease 2019 (COVID-19) pandemic. The new legislation is divided into several parts and deals with aid through public sources, such as financing of maintenance of employment, microloans to SMEs, deferring payments of certain amounts due to public authorities, etc. The other part of the act deals with certain contractual legal relations between businesses (B2B) and with consumers (B2C).

The new act does not provide for a general solution amending the legal relationships between entrepreneurs. It provides for specific modifications of certain contracts (e.g. certain lease rents payable by tenants in large shopping malls) or allows contracts to be modified according to the will of the parties, within certain boundaries provided for by the law (e.g. contracts executed under the Public Procurement Law).

Although the act touches various contracts, it surely does not cover all types of contracts. What can other contracting parties, whose performance of contracts was, or could be, adversely impacted by the COVID-19 epidemic, do in order to avoid
bankruptcy or court-supervised reorganization? Below, we summarize certain principles regarding the non-performance of contracts in the existing situation.

Polish law provides several premises that allow a party to nonperform or request the variation of its performance without the obligation to pay damages.

**Definition of a force majeure and its effects**

The most important one is the occurrence of *force majeure*. Polish law does not provide for a definition of *force majeure*. Such definition has been created by Polish jurisprudence and courts – *force majeure* is an event that is unforeseeable, unavoidable, impossible to overcome and caused by an external force. Generally, if such event makes it impossible to perform, the party may exonerate itself from performance of the contract without obligation to pay damages to the other party.

Jurisprudence distinguishes three categories of events as being *force majeure*: acts of government; and natural disasters caused by forces of nature, such as epidemics, war and riots. However, court cases very often reveal that an event a layman would classify as *force majeure* is not deemed as such by the courts. Since *force majeure* needs to be unexpected and unforeseeable, one needs to review carefully whether the parties to a contract may invoke *force majeure* on account of COVID-19 events.

**Is the COVID-19 epidemic a force majeure?**

The occurrence of the COVID-19 pandemic, as well as limitations arising out of Polish law connected with counteracting the pandemic, is a *force majeure*. However, one needs to look at how such *force majeure* influences individual performance of the contract.

**Might the parties to a contract suspend or refuse performance because of the COVID-19 pandemic?**

It depends on the particular situation. Unless there is a particular legislation that so allows, each party should analyze case-by-case if such suspension or nonperformance is justified in a given case.

**Force majeure influence on contracts**

Under Polish law, the occurrence of *force majeure* that causes the impossibility of performance by a party may cause such party to be relieved from performance. *Force majeure* may be invoked to exonerate performance only if there is an adequate causal link between the *force majeure* and the impossibility of performance. Further, the impossibility of performance should be understood in terms of Polish civil law – there is a body of case law stating what the “impossibility to perform” means under Polish contract law.

**Is force majeure an event allowing the suspension of performance of the contract?**
Generally, under Polish law, the *force majeure* event does not lead to the suspension of performance of the contract, unless the contract so provides. Thus, the parties that do not have a *force majeure* clause in their contracts have to choose between negotiating with their counterparty to modify the contract terms, or invoking the hardship principle (see below).

**Is there an official certification of occurrence of force majeure?**

Although a state of an epidemic (as defined in applicable Polish law) was announced to exist by the Polish government, there is no system of official certification of the occurrence of *force majeure* in Poland, for the purpose of Polish civil law. The courts dealing with the case will likely apply the “known ex officio” concept with reference to the existence of the epidemic but the parties will still need to prove the influence of the epidemic on the performance of a given contract.

Having discussed the *force majeure* concept, we may turn our attention to the concept of hardship. Polish Civil Code provides for “hardship” (which is referred to by Polish lawyers as “*rebus sic stantibus*”). The law reads that when due to an extraordinary change of circumstances, performance by a party would be either extremely difficult or connected with a glaring loss for such party and the parties have not foreseen such circumstance when contracting, the court may modify the performance of, or terminate, the contract.

**Is the COVID-19 pandemic “an extraordinary change of circumstances”?**

Prior to this pandemic, the courts stressed that the change of circumstances has to be “extraordinary”, such as hyperinflation, a change of the state system, or other similar circumstances. The premise of “something being extraordinary” applies to circumstances meaning conditions in the country and not to the occurrence causing such extraordinariness. The change of circumstances should be permanent – temporary difficulties, even if material, are not sufficient. Further, such circumstances – should affect either the country or the entire group or groups. Thus, the situation should be analyzed case-by-case. Further, the petitioning party should demonstrate that performance would be extremely difficult or result in a glaring loss because of such extraordinary change of circumstances.

**Can the party rely on the “hardship” doctrine?**

The party may invoke hardship only before the court and only the court may amend the contract. Thus, the party seeking relief needs to file a lawsuit requesting the court to either amend or terminate the contract.

**When should the party seek the court protection?**

The prevailing case law is that the party should seek protection before performing its obligation, since the court may find that if the party had performed, there would be no possibility to intervene.

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