Legal opinion

Force majeure vs. rebus sic stantibus

In contracts of various kinds, especially between entrepreneurs, force majeure refers to a circumstance that frees both parties from liability for failure to perform their obligations under the contract. The concept of force majeure is not defined in the Civil Code Act of 23 April 1963 (consolidated text: Journal of Laws 2019, item 1,145 with changes) (henceforth "the Civil Code"), nor in any other legal act, even though some regulations make specific references to it. In the doctrine it is assumed that force majeure is an event 1) of an external nature, 2) whose occurrence could not have been foreseen at the time the contract was concluded, 3) and whose consequences could not have been prevented by taking reasonable precautions. All three conditions must be met simultaneously. In contracts, force majeure clauses are worded in different ways, but in most cases they are general clauses that include non-exhaustive lists of examples. Commonly cited examples include a flood, earthquake, terrorist attack, or war, but few contracts explicitly mention a pandemic. If a contract does not explicitly list a pandemic as an example of force majeure, then answering the question of whether the coronavirus pandemic can be regarded as one is not straightforward, as the situation is affecting different companies differently. Some have sufficient resources and are able to take appropriate countermeasures; others are required by law to be prepared for such an eventuality. So every case has to be considered individually.

The general provisions of the Civil Code pertaining to contractual liability make no reference to the concept of force majeure. In principle, under the Civil Code, a party's liability for failure to fulfil, or improper fulfilment, of its obligations under a contract is based on the principle of guilt. A force majeure event can be seen as an instance of an event that enables the creditor to avoid liability because of impossibility to ascribe guilt, however there has to be a demonstrable causal link between the force majeure event and the creditor's failure to fulfil, or improper fulfilment, of the contractual obligations. The failure to fulfil, or improper fulfilment, has to be shown to be a consequence of the force majeure event (e.g. a pandemic), and not of a party's failure to exercise the due care required in the circumstances. But this also means that the lack of a force majeure clause in a contract does not preclude the possibility of a party avoiding liability for breaches caused by the coronavirus pandemic; it can invoke the general provisions of the Civil Code and claim that its failure to fulfil, or its improper fulfilment, of the obligations under the contract was a result of circumstances outside its control. Again, the causal link has to be demonstrated. It should be kept in mind that in matters of contractual liability, there is a presumption of guilt – the burden of proof is on the party that fails to fulfil its obligations. In case the parties are from different countries, the law of the country the parties agreed to in the contract, and the relevant provisions of international law, are applicable.

In the specific case of construction projects and contracts, force majeure is often invoked to justify missed completion deadlines. If the contractor can prove that the deadline was missed because of the occurrence of a force majeure event – e.g., a large number of its workers fell ill, or were put under quarantine, due to the coronavirus pandemic – then it can be freed from liability for the detriment that the delay has caused to the investor. The investor can dispute this, and take the matter to court. The court then determines whether the contractor bears responsibility for the detriment, taking into account the nature of the force majeure event, the impossibility to fulfil the obligation, and the causal relationship.

Importantly, however, it does not follow directly from this that the investor can invoke force majeure to suspend a contract.

The Civil Code does not explicitly provide for the possibility to renounce, terminate, or suspend a contract because of the occurrence of a force majeure event. This can be achieved by applying the rebus sic stantibus clause, i.e. the "fundamental change of circumstances" clause. Under Article 3571 of the Civil Code, in cases where, due to a fundamental change of circumstances that the parties could not foresee when entering into the contract, fulfilment of the obligation would be excessively difficult, or threaten to cause glaring losses for one of the parties, a court may, taking into account the interests of the parties and the principles of community coexistence, influence the contract in three ways: indicate the way the contract should be fulfilled, indicate the amount of the performance claim, or even terminate the contract. For this clause to be invoked, four conditions must be met: 1) the obligation originates from a contract, 2) the change of circumstances is an extraordinary one, 3) the change of circumstances means fulfilment of the obligation would be excessively difficult or threaten to cause glaring losses for one of the parties, and the parties did not foresee that when entering into the contract, and 4) there has to be a causal relationship between 2) and 3). Parties may also try to invoke rebus sic stantibus when they are unable to come to an agreement on the basis of contractual provisions and a court ruling is necessary.

The Covid-19 pandemic is certainly an extraordinary event that can trigger rebus sic stantibus claims. The key thing will be to demonstrate that fulfilment of the contract would be excessively difficult or threaten to cause glaring losses for one of the parties, and that this is a consequence of an extraordinary event, the coronavirus pandemic. The burden of proof is on the party invoking the clause. It should be kept in mind, however, that the courts are operating on a limited basis at the moment, so this route may not prove satisfactory for entrepreneurs.

The current economic situation requires extraordinary legal measures. Until appropriate systemic solutions are devised and sufficient support provided to entrepreneurs, however, it is worth considering the legal options that are available, and above all to initiate negotiations with the counterparty. And if there is no will to settle, one may use the court route to try and alter or terminate the contract by invoking the fundamental change of circumstances clause.

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