

## Report on Coronavirus as a *Force Majeure* under Czech law

### A. Preliminary

The whole world is grappling with the Coronavirus pandemic. As a law firm focused on travel, transport, and international business law, we have been discussing and providing solutions for a variety of problems arising from the Coronavirus situation in the past weeks. Corona-termination fees of package tours, corona-delay of goods delivery, corona-cancellation of cultural events, or corona-quarantine of employees – Coronavirus applies to all human and all business activities now.

Analyzing the problems of our clients, we have concluded that the pandemic and the measures taken in order to prevent or fight the pandemic around the world can be interpreted as a *force majeure* event under Czech law, and can lead to the following situations that are reflected in the respective legal concepts under the Act No. 89/2012, Civil Code:

1. a hardship to perform a contract,
2. a significant imbalance in the performance of one party,
3. a breach of a contract,
4. an impossibility of performance,
5. an impossibility to exercise creditor's rights.

### B. Goal of the report

This report will introduce you to the concept of *force majeure* under Czech law, and will describe (i) the five legal concepts applicable in the event of *force majeure*, (ii) their consequences on the existence of a contract, and (iii) the rights and duties of the parties to the contract.

### C. Definition and Main Criteria of *Force Majeure* under Czech Civil Code

The Czech Civil Code does not contain a definition of *force majeure*. Czech legal literature generally describes *force majeure* as all and any circumstances that have arisen independently of the creditor's or debtor's will, and which the parties could not have prevented or eliminated in the course of all their efforts. A similar definition of *force majeure* was given by the ECJ when it stated that "*the concept of force majeure must be understood as referring to unusual and unforeseeable circumstances, beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised. That concept must be considered in relation to the provisions of each regulation in which the term "force majeure" appears.*" (judgement of the ECJ from 5.2.1985, C-145/85, Denkavit). This definition is also applicable to Czech law. Both aforesaid definitions are based on the same main conditions: (i) extraordinary circumstances originating outside of the sphere of the parties, and (ii) the circumstances

could not be prevented. An event has to meet both conditions in order to be deemed a *force majeure*.

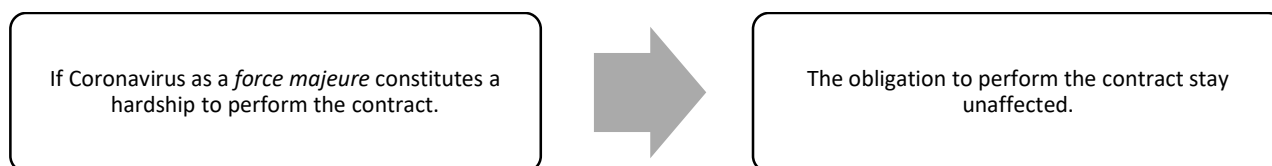
Taking the aforesaid conditions of *force majeure* under Czech law into account, the coronavirus pandemic as well as the protective measures adopted by the governments in reaction to the pandemic shall meet the conditions of *force majeure* under Czech law, as they are both outside of the sphere of the parties, and are unpredictable.

An announcement by the WHO or other international organizations can be helpful in establishing whether there is a *force majeure*; however, the event and a causal link between the event and the specific duties of the parties to the contract will be assessed on a case by case basis.

## **D. Concepts under Czech Civil Code Working with *Force Majeure***

### **1. Hardship**

Czech contract law is based on the general “*pacta sunt servanda*” theorem. Any deviations and changes to the contract due to *force majeure* need to be regarded as an exception and therefore interpreted restrictively. Hardship is defined as ‘performance that is more difficult than expected’. However, the difficulty cannot be extreme, otherwise either *clausula rebus sic stantibus* (see below No. 3), or subsequent impossibility of performance (see below No. 4) shall apply. According to § 1764 Civil Code a hardship does not influence the duty to perform in accordance with the contract.



### **2. Contract breach and damages**

In certain situations, a *force majeure* incident causes a contract to be performed with defects. It is a situation where the debtor's performance is delayed or only partially. As stated in No. 1, the existence of *force majeure* as a hardship does not change the duty to perform. However, according to § 2913 para 2 of the Civil Code, a debtor can be released to pay damages if the breach of the contract was caused by force majeure. The exemption from paying damages is expected to be invoked in various supply chain business relationships unless the respective provision of the Civil Code was excluded from the contract.



### **3. *Clausula rebus sic stantibus***

Since 2014, § 1765 of the Civil Code, in certain cases, allows one contracting party to ask for the renegotiation of a contract with the other party. The conditions for claiming renegotiation of the contract are:

- there has been a substantial change in circumstances;
- this change could have not been reasonably foreseen;
- this change could not be affected by the party;

- this change occurred after the conclusion of the contract or the party became aware of it only after the conclusion of the contract;
- this change creates a gross disproportion in the rights and duties of the parties by disadvantaging one of them;
- this disadvantage consists either in a disproportionate increase in the cost of performance, or in a disproportionate decrease in the value of the subject of the performance; and
- the party has exercised the right to renegotiations within a reasonable time limit after the change of circumstances had to be ascertained, that time limit shall be deemed to be two months.

If the parties had not agreed within a reasonable time limit to amend the contract, the court may, at the request of the parties, decide to change the obligation or cancel it. The purpose is to give the disadvantaged party the opportunity to revise the contract, and to oblige the other party to deal with the proposal. Otherwise, there is a risk that the entire contract will be cancelled by the court. Even though this rule could be useful for both parties in the Coronavirus times, in practice it is one of the most excluded provisions in contracts. The consequence of exclusion of this provision is that each contract party has to bear all the negative (or positive) effects caused by the Coronavirus pandemic.



#### 4. Subsequent impossibility to perform the contract

The principle of subsequent impossibility of performance pursuant to § 2006 of the Civil Code affects cases where, after the creation of an obligation, an obligation becomes impossible to be performed. In such cases, the obligation is extinguished due to impossibility of performance. The provision does not apply to the opposite situation, when the debtor is ready to perform, but the creditor cannot accept the service. In the context of travelling, this has been and will most likely be questioned by the courts.



#### 5. Impossibility to exercise creditor's rights

In some specific cases, *force majeure* influences the limitation period. According to § 561 of the Civil Code, the limitation period does not run if the creditor could not exercise its right due to a *force majeure* in the last six months. After the *force majeure* obstacle is over, the limitation period shall continue to run and shall finish by the end of the sixth month. The parties can exclude this provision in the contract.



## 6. Others

In addition, *force majeure* can have special consequences in specifically regulated contract types. For eg. a contract for a piece of work where, under the § 2620 subs. 2, if an extraordinary and unforeseeable circumstance occurs that makes a completion of the work difficult, the court can, in its discretion, decide on a fair increase in price of the work, or the cancellation of the contract on settlement of the parties. This does not apply if one of the parties assumed the risk of a change in circumstances, or if it is a circumstance about which either of parties has previously stated will not occur.

### E. Burden of Proof

The burden of proof to establish a *force majeure* event shall be on the party that wants to rely on one of the situations and concepts described above to prove that there is an event of *force majeure*.

### F. What is the best course of actions recommended in case either party issues a notice of Force-Majeure?

If the contract is governed by Czech law, there are the following steps to consider for the parties to the contract.

1. As soon as you find out that the *force majeure* will affect your rights or duties, notify the other party to the contract in order to prevent damages.
2. Check whether your contract works with the concept of *force majeure*, whether it defines it or sets the conditions of its application.
3. Check whether your contract specifically excludes the applicability of *clausula rebus sic stantibus* or of the release to pay damages caused by *force majeure*.
4. Check whether it is the buyer, the supplier, or both who are affected.
5. Save any evidence that the lack of your performance, the gross disproportion in the rights and duties, or damage is caused by and only by *force majeure*.
6. In case of *clausula rebus sic stantibus* situation, exercise the right to renegotiate the contract within a reasonable time and not later than two months after you find out.
7. Both parties shall establish evidence about damages caused to them due to measures adopted by Czech government. There may be a possibility to claim compensation from the Czech government for the damages caused as a result of extraordinary measures adopted by Czech government.

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