

Is COVID-19 considered to be as 'Event of Force Majeure'?

Is COVID-19 considered to be as 'Event of Force Majeure' by definition and what are the consequences?

To explore this, in the first place there are 2 options - whether the term is present in the contract or not.

A) Event of Force Majeure is included in the contract

1.) Event of Force Majeure in the contract

You can have a definition of Event of Force Majeure includes in your contract that means any event that is beyond the control of the Parties and their participants, unknown to and unforeseeable for the affected Party, including, but not limited to, unavoidable circumstances.

When the epidemic is not listed in the definition of an agreement, but it still belongs to 'unavoidable circumstances' and the other elements of the definition fits also the COVID-19 situation.

2.) Legal consequences of force majeure in the contract

In case of an Event of Force Majeure is prevented either Party from performing its obligations under the contract, under the regular conditions that the affected party shall

- as soon as possible after the occurrence of an Event of Force Majeure, inform the other Party in writing about the nature of the Event of Force Majeure, the date of occurrence of the Event of Force Majeure and the probable effects on contractual performance
- do its utmost for the mitigation of the effects of the Event of Force Majeure on the performance of this Contract;
- inform the other Party immediately about the cessation of the Event of Force Majeure, and shall continue to fulfill its obligations under this Contract;

In this case the performance of the obligations of such Party under the contract affected by the Event of Force Majeure shall be suspended until the cessation of the Event of Force Majeure and the Parties shall bear their own damages not attributable to the other Party and resulting from the Event of Force Majeure in connection with the performance of this Contract."

If the contract contains a valid and extended force majeure clause, this is to apply; however, if it is not extended enough and does not cover all the civil law possibilities regarding force majeure, then also Civil Code shall be applied.

B) Event of Force Majeure is not included in the contract

1.) Force majeure in Hungarian Civil Code

According to the definition of force majeure made by judicial practice (Curia), force majeure is an irresistible force cannot be prevented by human force. The commentary of Civil Code lists also epidemics as force majeure.

2.) Consequences of force majeure according to Civil Code

a) Exemption from the performance of a contractual obligation and exemption from the obligation to pay compensation (Second phrase of § 6:142 of Civil Code)

According to 6:142 of Civil Code, for damage caused by breach of contract, it is determined that whoever causes damage to the other party by breach of contract is obliged to compensate it; however, **the party shall be released from liability if it proves that the breach was caused by a circumstance beyond its control which was unforeseeable at the time of the conclusion of the contract and could not have been expected to avoid the circumstance or remedy the damage.**

(i) A description of the occurrence of force majeure, i.e. the circumstances of the event

Pandemic COVID-19 is an exceptional pandemic of an exceptional nature, unavoidable by the Parties, which the Parties could not have foreseen when concluding the contract, and which was due to external circumstances and events beyond the control of the parties.

All this is in line with the concept laid down by the Hungarian case law (Curia) that force majeure is an "irresistible force" of natural or human origin that is absolute in nature, i.e. cannot be averted by means available to the people.

(ii) Exclusion of party's liability, lack of applicability of legal consequences

That is to say, a Party cannot be required to pay according to the previous payment obligations until the economic effect on the party of the situation caused by force majeure ceases. Thus, the party is not liable for the legal consequences of non-payment under the effects of force majeure.

(iii) Mitigation, increased obligation to cooperate

As a party affected by force majeure, this must make all reasonable efforts to prevent, eliminate, avoid or mitigate the effects and consequences of force majeure as far as possible, and contracting parties, are required to cooperate more closely with eliminating or mitigating the effects of force majeure and, if necessary, developing reasonable alternatives.

b) Impossibility (Section 6: 179-180)

According to § 6:179 Civil Code, *under the heading of becoming impossible provides that if performance has become impossible, the contract shall be terminated. The defaulting party shall compensate for the damage resulting from the failure to notify.*) According to § 6:180 Civil Code, *if performance has become impossible for a reason that cannot be attributed to either of the parties, the monetary value of the services provided before the time when the contract was terminated shall be compensated. (If the other party did not compensate the monetary consideration provided for services already performed, the money shall be refunded.)*

The impossibility based on force majeure shall be considered regarding the services by the party. In view of this, during the period without the affected service, one party is unable to perform and did not fulfill its contractual obligations. This legal argument is of paramount importance, because **due to each parties inability to make the business available properly, the other party should charge no costs.**

c) Modification of contract by the court (§ 6:192 of the Civil Code)

According to § 6:192 Civil Code, either of the parties shall be entitled to request to have the contract amended by court order, if in the long-term contractual relationship of the parties performing the contract under the same terms is likely to harm his relevant lawful interests in consequence of a circumstance that has occurred after the conclusion of the contract, and:

- a) the possibility of that change of circumstances could not have been foreseen at the time of conclusion of the contract;
- b) he did not cause that change of circumstances; and
- c) such change in circumstances cannot be regarded as normal business risks.

The court shall have powers to amend the contract as of the date it has determined, at the earliest from the date of enforcement of the right to amend the contract before the court, in a manner to ensure that neither of the parties should suffer any harm in their relevant lawful interests in consequence of any change in the circumstances.

So as third legal consequence provided by Civil Code in the case of force majeure is that the court may modify the contractual relationship between the parties at the request of one of the parties. In the course of the negotiations, this legal institution can definitely be referred as an argument and a good card.

Do you have issues because of Covid with the fulfillment of you contract? Contact us, our lawey are civil law experts in that field too!