Possibilities of entrepreneurs: corona virus disease 2019

BMWC

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Contractual relations and force majeure

INTRODUCTION

Up to the time of writing this text more than 200.000 people have been infected with the corona virus around the world, while the death toll is more than 8.000. The virus appeared in China at the end of 2019 and has spread throughout Europe (including the Republic of Croatia) during February and March 2020.

Individual European industries have started feeling its effects even before the virus had set foot onto European ground (e.g. in view of problems with raw material supplies). However, the real problem started with its spreading on European ground and then to North America.

Namely, the virus has forced many countries into so far unimaginable steps, for example the closing of borders or the quarantine of whole states. So practically over night free movement of people, goods and capital was prevented, which for todays connected world (in which rarely any industry acts within only one state) represents a huge blow to business. The situation is also reflected in the financial markets where stock indices experienced a free fall.

Given the nature of the restrictions, the impact was most felt by the tourism sector as the provision of tourism services is virtually impossible. For example, TUI - the world's largest tour operator - has suspended most travel operations in the world, including package arrangements, cruises and hotel operations. TUI has invoked force majeure clauses to terminate contracts and/or freeze payments.

Therefore, the question is whether the corona virus Covid-19 is a force majeure, respectively, whether entrepreneurs are responsible for the delay or failure to fulfil their obligations caused by the virus.

Force majeure

contractual relations, projects and investments, and prevention of unintended consequences

Because "disruptions" to business at this stage will inevitably cause changes in certain business plans and delay, or even the inability of entrepreneurs to fulfil certain obligations at a later stage, the following questions arise:

- What happens if an entrepreneur is late with fulfiling their obligations or fails to fulfil them at all due to circumstances caused by the virus?
- Will an entrepreneur - who has not fulfiled its obligation - be liable for damages and if yes, when?
- What if a particular project or investment becomes unprofitable due to COVID-19 circumstances?
- Where are the answers to these questions – in the contract or in the law?

The first step

Determining the applicable law

The answer to the question what force majeure is, how it is proven and how it affects the obligations of the entrepreneur actually depends on the legal order applicable to the specific business (contractual) relationship.

For a start, it is necessary to check the contractual provisions on the applicable law, that is, the law applicable to the respective business relationship. If the contract does not contain such provisions, the applicable law shall be determined in accordance with the rules of private international law. (The rules of private international law in Croatia are governed by the Private International Law Act (Official Gazette 101/2017)).

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Advice:

Stop here and seek legal help from your internal legal team or outside legal counsel (lawyer).

Please note that this is an extremely important step in a situation where rapid and correct response is required for business sustainability.

The second step

the law of the Republic of Croatia is applicable! What are my options? Will I be held liable for damages if I could not fulfil my obligation? The investment became unprofitable for me - what should I do?

If you have verified that the law of the Republic of Croatia is applicable to the contract, it is important to keep in mind that the Croatian legal order did not prescribe a general definition of force majeure.

However, the Civil Obligations Act (Official Gazette 35/2005, 41/2008, 125/2011, 78/2015, 29/2018 (hereinafter: "COA") recognizes certain events that can be interpreted as "force majeure" and therefore the affected party will either not - automatically - bear all the adverse consequences or, under certain circumstances, be entitled to change its contractual position to some extent.

For example, the fulfilment of a party's obligation may become impossible, due to extraordinary external events occurring after the conclusion of the contract and before the due date of the obligations, which could not have been foreseen at the time of the conclusion of the contract, nor could have been prevented, avoided or eliminated by the party and for which neither party is responsible (Article 373, paragraph 1 COA).

Note that a temporary inability to fulfil an obligation does not, as a rule, abrogate the obligation to fulfil, but it may lead to an expiration of that obligation depending on its duration and the interest and expectations of the contractual parties.

The debtor will be relieved of liability for damage if he proves that he was unable to fulfil his obligation or that he was late in fulfiling his obligation due to such circumstances (Article 343 COA).

Besides that, debtor should notify the other party timely on the inability to fulfil its obligation, otherwise it could be liable for damages occurred due to missed or late notification (Article 348 COA).

On the other hand, if the circumstances did not disable fulfilment but made fulfilment of the obligation significantly more difficult or would cause loss to one contracting party, that contracting party may require modification of the contract or even termination (Article 369 COA).

Proving „force majeure"

It is necessary to show that:

- the event is of **extraordinary character**, and not something that could be expected as a regular occurrence of an event;
- **outside circumstances** are at hand, that is, circumstances beyond the control of the contracting parties (ie caused by third parties or without human influence);
- the event occurred **after the conclusion of the contract and before the due date of the obligation** you are considering;
- the event is **unpredictable**, and objectively unpredictable in the context of the business relationship you are in, or one that could not even have been foreseen by a conscientious contractual party - special emphasis is placed here on the fact that the event that occurred was unpredictable at the time of the conclusion of the contract; and
- failure **could not be prevented, avoided or remedied** by other measures, available means and methods.

It is a reasonable assumption that the virus and the course of events so far are extraordinary external events.

However, the question arises of its origin and unpredictability. For example, were the events caused by the virus predictable in January when the virus was just spreading in China and few took it seriously in Europe, or did they become predictable only at the end of February / March.

It is also important to ask whether the failure could be prevented, avoided or eliminated. For example, if we were to determine the unpredictability of the event, it is very likely that a carrier could not eliminate the inability to transport certain goods to, e.g. Denmark, which closed its borders. However, is an entrepreneur who provides a certain intellectual service and who is late in delivering an intellectual product (where the deadline is an essential part of the contract) entitled to invoke force majeure, even though he did not manage to provide a work environments to his employees neither in the office nor at home?

REMARK

The Croatian Chamber of Economy (HGK) no longer issues Force Majeure Certificates which served as evidence that contractual obligations could not be fulfiled due to extraordinary circumstances. According to the information received, they will not be issued with regard to the situation with COVID-19. It is therefore up to the Government to possibly determine the authority issuing the certificates and the procedure for issuing them.

Such certificates are usually not legally required unless it is strictly stated in the contract, but depending on business cooperation and good business practices, it may be accepted.

Proving „force majeure”

Therefore, it can be seen that it is not sufficient for the exemption from the fulfiling of obligations to establish that we were not able to fulfil the obligation due to the current situation with the virus, but also to establish when our obligation occurred (that is, whether we should already have been aware of the situation at that moment) and whether we could have prevented the failure to fulfil.

So, if you have already identified, at this stage, a business relationship where you will not be able to meet certain obligations and your company will record losses or risks of any kind, we advise you to prepare evidence as soon as possible from which you will be able to prove that the circumstances surrounding COVID-19 in your case are "force majeure", that is, external, extraordinary and unforeseeable circumstances that could not have been prevented or remedied, which arose after you entered into the respective contract. Of course, it should not be ruled out that certain facts will be harder to prove. For this reason, the prediction of the possibility of proof must be carried out at this early stage in order to predict as much as possible the losses that will result (the amount of damage that will probably have to be compensated to the other party or the flexibility of business cooperation - to what extent will it be possible to negotiate the modification of certain conditions).

You will terminate your contract with a one-sided extra-judicial declaration of will. Keep in mind that with the inability to fulfil your obligation, the counterparty's obligations are also extinguished. In the event of partial inability to fulfil, the other party will be able to terminate the contract if partial fulfilment does not meet its needs.

The same verification process should be applied if the other party - who was to fulfil the obligation - invokes force majeure as the reason for the non-fufillment of their obligation. Also, keep in mind that if the other party has exempted its obligation due to force majeure and you have fulfiled your obligation or part of it in the meantime, you have the right to a full return of what was fulfiled by subjective legal rights acquired without basis, or if the other party is only able to partially fulfil their obligation, to reduce your obligation proportionately (if partial fulfilment suits you).

The third step

what is contracted beyond the legal provisions?

Finally, in addition to the provisions on applicable law, it is also necessary to check whether obligations have been specifically agreed in cases of force majeure and how you have defined the term force majeure.

Namely, it is not uncommon for an agreement to contain a clause governing the term force majeure in such a way that it enumerates situations that the parties consider to be force majeure - therefore it is necessary to check whether a pandemic (epidemic) of disease is one of them.

However, even in such a case, the pandemic (epidemic) should be proven in accordance with the above mentioned parameters, but the fact that the parties have already included this circumstance in advance in the contract somewhat eases the process of proving non-/responsibility for damages, non-fulfilment or partial fulfilment. Also, such a clause may regulate the rights and obligations of the parties in cases of force majeure.

In addition, bear in mind that an event of force majeure can have a significant impact on running M&A transactions (acquisition of companies, contracts of merging or absorption of companies) with regard to eventual cancellation of the transaction, payment of lower price, etc. Proper and timely identification of available bargaining power and proper preparation for the further negotiation process at this time may prevent unnecessary investment losses in the coming period.

In any case, contractual consequences should be included in the „risk plan" in addition to the legal consequences.

Business organisation – labour law aspect

INTRODUCTION

Entrepreneurs, except for the prevention of business risk, are especially obliged to properly organize the business until the situation is normalised. Pursuant to the Labour Act (Official Gazette 93/2014, 127/2017, 98/2019 (hereinafter: „LA")) employers are primarily obliged to provide the employee with working conditions in a safe manner and in a manner that does not endanger the health of employees (Article 7 LA). Also, the employer is obliged to obtain and maintain facilities, devices, equipment, tools, place of work and access to the place of work, and organize work in a way that ensures the protection of the life and health of employees (Article 28 LA).

Currently up-to-date

Directions from the Ministry of Health and the Croatian Institute of Public Health

REMARK:

In this regard, we note that the Ministry of Health has already issued instructions for employers and employees related to nCoV diseases (Covid-19), Class: 008-02 / 20-09 / 1 Reg. Number: 381-09-92-20-1 on 28.2.2020. (link), which is now expanded with instructions for individuals, collectives and employers dated 10.03.2020 (link).

The most important measures of protection for employees and recommendations to employers are:

- obligation to maintain a distance of at least one meter during social interactions,
- avoiding close contact with anyone who exhibits symptoms of respiratory illnesses such as coughing, and adherence to hygiene measures,
- washing your hands more often with soap and water for 20 seconds, with mandatory use of hygiene gel at the end of hand washing, and in situations where it is not possible to wash your hands, maintaining hygiene using a hygienic gel containing 70% alcohol and similar measures,
- conduct risk assessment, provide workplace hygiene, and enable employees to recognize symptoms of the corona virus,
- inform employees of the steps they should take if they suspect they have been in contact with an infected person,
- provide and make available alcohol-based hand sanitizers in business premises,
- minimize business travel and conduct meetings via video (Skype, TelCo, etc.),
- ask employees to notify the employer if they have been at high-risk locations or have been in contact with someone who was at a high-risk destination, whether or not they show symptoms of the virus;
- monitor daily information and advice of local and national authorities, as well as news published by the World Health Organization (WHO), and keep employees informed in a timely manner.

Other possibilities that are available to the employer

However, what is troubling most employers at the moment is the fact that the business process has at least slowed down, if not completely stopped.

Therefore, the most important question for each employer is: What about the employees?

Most employers plan to answer this question at this stage either by organizing work at a separate place of work (work from home) or by using annual leave and / or unpaid leave for those employees who are entitled to it, but also, depending on state measures, business-conditioned termination notices or termination notices with a modified contract offer.

However, there is also a set of questions with regards to this issue and problems that need to be answered quickly in an emergency. Therefore, you will find below some questions and answers that may be helpful.

What are the obligations of employees in relation to performing the contracted duties?

Even in these extraordinary operating conditions, there is an obligation to apply all laws and regulations just like under regular conditions. The employee is obliged to comply with all safety and health measures in accordance with the LA, the Law on Occupational Safety and other laws and regulations (e.g. the Law on the Protection of the People from Infectious Diseases, which regulates the obligation to comply with the measures for protection against infectious diseases, which are prescribed by that law or regulations made on its basis).

The employee is – for the duration of the employment – obliged to inform the employer at all times about an illness or other circumstance that disables or substantially interferes with the fulfilment of his obligations under the employment contract or which endangers the life or health of persons with whom the employee comes into contact in the performance of the contracted tasks. Therefore, in the light of the newly emerged situation related to the virus corona pandemic, the employee is certainly obliged to immediately notify the employer of any change in his or her medical condition that may indicate that corona virus symptoms are present.

What are the obligations of the employer in organizing work in case of an exceptional situation?

Even in this emergency situation, the employer is obliged to provide the employee with safe working conditions and in a way that does not endanger the health of the employees, in accordance with special laws and other regulations, in the same way as regular working conditions.

In addition, in accordance with the Decision to proclaim the pandemic on the COVID-19 Disease Outbreak and the obligations under the Protection of the People from Infectious Diseases Act, the employer is obliged to follow the instructions of the Croatian Institute of Public Health (HZJZ) and the recommendations of the Civil Protection Staff of the Republic of Croatia and other competent bodies

Do employees have the right not to come to work because of the current situation with the corona virus?

If the employee is healthy, he is obliged to come to his workplace until he has reached a different agreement with the employer.

However, all employees with symptoms of respiratory illnesses (cough, sneezing, fever, shortness of breath) should be allowed to stay at home in accordance with additional instructions from the Croatian Institute of Public Health for individuals, collectives and employers from March 10, 2020. Also, a person who has been in close contact with a COVID-19 patient or a person suspected of contracting the disease (such as his or her colleagues with whom he or she is in direct contact with at work) during the last 14 days should be instructed to stay in self-isolation.

In addition, if the employer did not provide safe working conditions (in the form of soaps, hygiene gels and other as instructed by the competent authorities), the employee could refuse to work because of unregulated health and safety measures at work and at the same time be entitled to salary compensation, until the prescribed occupational health and safety measures are implemented. *(In addition, according to Article 95 (3) of the LRP.)*

Should employees go to work even if public transport is disabled?

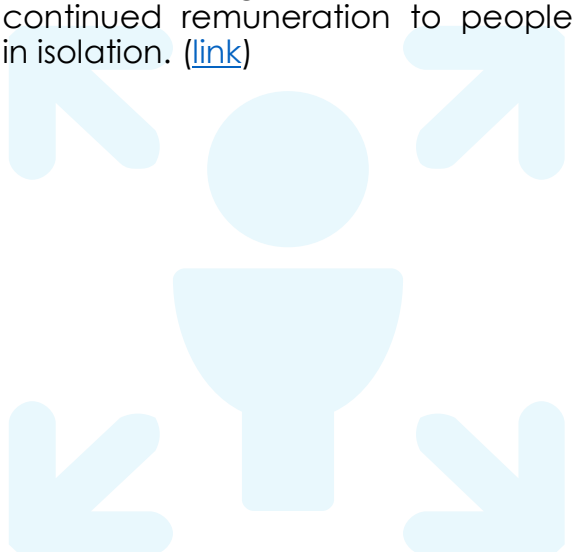
It is the duty of every employee to appear at the workplace at the time that was specified for him or her, whether public transportation is available or not.

Are employees who have children who go to kindergarden or school – if both are closed - required to come to work?

If kindergardens and schools are closed, that in itself is no excuse for an employee not to show up at work. Of course, in agreement with the employer, the employee may be allowed to work from home or take annual leave or unpaid leave.

Measures and actions in case the employee is identified as needing to be isolated?

In the case of isolation, the employee may agree with the employer to work from home, and if this is not possible, the chosen doctor will determine that he or she is temporarily unable to work. In the event of temporary incapacity to work due to isolation, the employee is entitled to continued remuneration at the expense of the Croatian Health Insurance Fund (hereinafter referred to as „HZZO") from the first day of exercising that right. The HZZO has issued guidelines on the procedure for submitting a claim for continued remuneration to people in isolation. (link)



Can an employee refuse to go on a business trip to infected areas?

The Ministry of Health's website contains, among other things, recommendations for emergency travel outside the country. Therefore, whether or not an employee can refuse to go on a business trip to an infected area depends primarily on whether the trip is unavoidable / urgent and whether the trip is urgent or not will be determined on a case-by-case basis. It is also important to mention here that a large number of countries have closed their borders to foreign nationals in order to prevent the spread of the corona virus, so it is dependent on this fact, whether or not business travel is possible at all. However, when sending employees abroad, the employer should certainly provide appropriate safety measures.

What options with regard to business organisation are available to employers at the time of the corona virus pandemic?

Employers have several options available:

- organisation of work in a separate place (work from home),
- redistribution, change, shortening of working hours,
- use of holidays and unpaid leave,
- arranging days off,
- break in employment,
- termination of employment.

How can an employer organize working hours in these extraordinary conditions?

In case of disruption of the employer's business activities caused by the epidemic, the employer may, for the purpose of preserving jobs, in accordance with the LA, introduce an unequal working hours schedule, modify the existing working hours schedule, introduce shift work, redistribute working hours, organize work in smaller groups and similar.

It is possible to arrange with an employee to shorten work hours from full to part-time, but in this case it is necessary to negotiate a written agreement or appendix to a fixed-term employment contract, indicating that it is made due to extraordinary circumstances caused by a pandemic, and solely for the purpose of preserving the workplace of employees.

What does a separate place of work mean and what are the most important guidelines for organising such work?

A separate place of work is considered to be either the employee's home or other premises other than the employer's premises. The employee cannot make his own decision to work from home. The LA prescribes the mandatory content of a written contract of working at a separate place of work, and therefore we propose to employers to sign an appendix to a contract of employment that will define all the necessary conditions of work at a separate place of employment, which are not defined by the existing employment contract. The appendix may be concluded for a fixed period, with the indication that it is concluded for the purpose of regulating employment rights and obligations concerning the place of work, and solely due to extraordinary circumstances resulting from the corona virus pandemic.

In the case of organisation of this type of work, the employer is obliged to take all measures of occupational safety and provide the employee with safe working conditions in the separated place, which means that the employer has the obligation to make a risk assessment for jobs performed in the separated place of work. If administrative, office or similar tasks are performed at a separate place of work, for which by the Rules for Developing Risk Assessment (Official Gazette 112/2014, 129/2019) the risk has previously been assessed and documented as low risk, and which the employee regularly performs in the employer's premises, there is no obligation to produce a risk assessment for this type of work.

Given that employers in the current situation are, we might say, forced to organise work in a separate place (work from home), and we know that an apartment, house or other space where a employee can perform low-risk jobs is not a facility intended solely for work, we are of the opinion that, in this emergency situation, the employer cannot be required to fulfil all safety requirements for the place of work in terms of occupational safety and health regulations. However, in any case, the employer must take care that the safety and health of employees is not compromised at any time.

It is forbidden to contract work at a separate location for jobs where, with the application of health and safety measures at work, it is not possible to protect the employee from harmful influences.

An employee must not be prevented from exercising his / her right to daily, weekly and annual leave while working in a separated place, and the employer is obliged to keep proper records of working time for such employee. There is no obstacle for such records to be kept by the employee himself, but the responsibility for accurate record keeping lies solely with the employer.

What are the employer's options with sending employees on holiday or unpaid leave?

The employer can make the decision to use annual leave based on which the employees will be temporarily removed from the workplace and thus he can provide them with an increased protection against infection with the corona virus. However, in accordance with the provisions of the LA, despite the emergency situation, the employer is still obliged to notify the employee of such holidays at least 15 days before using them (Article 85 (4) LA).

Although this is an emergency situation, and sending employees on annual leave is actually a compulsory measure for the employer, we advise that the employer obtain written consent from the employee for the proposed time and manner of using annual leave, by which the employee accepts the annual leave schedule without observing the statutory deadline, and because of an extraordinary new situation.

Other options available to the employer are paid or unpaid leave. The employee's entitlement to paid leave is determined by the provisions of the LA, and most employers regulate this issue in more detail via rules of procedure. In the event that the rules of procedure or the employment contract stipulates that the employee is entitled to paid leave in the event of extraordinary unforeseen circumstances, then the employer has the right, in agreement with the employee, to implement this possibility.

In the case of unpaid leave, it can only be granted at the request of the employee *(Article 87 LA),* which means that an agreement is required between the employer and the employee whereby the employee agrees to such a solution to the new situation. Unless there is an employee's demand for unpaid leave, the employer cannot use this legal option as a measure to reduce the cost of business.

Can the employer advise the employee to use leave days instead of paying out overtime?

LA prescribes the right of employees to an increased salary for harsh working conditions, overtime and night work, as well as work on Sundays, public holidays or any other day for which the law stipulates that they are not working days. The possibility of granting a day off to an employee instead of paying an increased salary for overtime is not regulated by the LA, but may be subject to the regulation of a collective agreement, rules of procedure, or by an employment contract, just like it is the case with the amount of the salary increase for the harsh working conditions referred to in Article 94 LA.

The legal right of an employee working overtime is exclusively the right to an increased salary. Therefore, the use of a day off in lieu of the payment of an increase in overtime wages, provided that such a possibility is regulated in the manner described above, can only be considered if the employee agrees.

What rights does an employee have in the event that the employer terminates work?

The employee is entitled to a continued remuneration during the termination of work caused by the fault of the employer or due to other circumstances for which the employee is not responsible *(Article 95 LA)*. In the event that the employer interrupts work in the current situation caused by the corona virus pandemic, employees are certainly entitled to continued remuneration as if they were working.

The employer is not obliged to pay the salary or continued remuneration only in case of unpaid leave (for which a written request by the employee is necessary), and in the case of temporary incapacity to work due to isolation of employees, in which case the continued remuneration is paid from the first day by HZZO funds.

Is it possible to transfer employees between employers for the purpose of facilitating business and temporary care for employees?

The temporary transfer of employees between employers is possible in accordance with the provisions of the LA, but only in case of affiliated employers within the meaning of the provisions of the Companies Act. Furthermore, according to the LA, the transfer of employees to another employer is allowed solely for Temporary Employment Agencies. Therefore, despite the extraordinary circumstances, there is no possibility of an unilateral decision by the employer to relocate or transfer his employee to another employer, except in the above cases.

Dismissal of employment contract as a last resort?

We believe that this measure is really the last resort for any employer in the current situation, and that no one is thinking about it at the moment. The Government of the Republic of Croatia has proposed to the Croatian Parliament the first package of measures to assist the economy, with the aim of helping employers and preserving as many jobs as possible. The Croatian National Bank is also implementing a series of measures to ensure the stability of the exchange rate and to ensure the liquidity of the Kuna.

In case employers still cannot retain a certain number of employees despite the implementation of the above measures and possibilities, they have the possibility to terminate their employment contracts. In doing so, despite the emergency situation and the circumstances in which they find themselves, employers are obliged to comply with all provisions of the LA governing termination of employment due to dismissal (type of dismissal, justified reasons for dismissal, notice periods, severance pay, etc.).

Against this background, we emphasize that in the event of such a situation, the issues of termination of employment contracts are considered on a case-by-case basis and that no hasty decisions should be made under the pretext of extraordinary circumstances in which you find yourself as an employer. In order to avoid unintended consequences in the form of possible litigation, our team is at your disposal at all times to resolve any contractual termination situations in the best possible way for all contractual parties.

Contact us via our support email if you have further questions 0-24:

coronadesk@bmwc.hr