

COMMERCIAL LAW ASPECTS

STATE OF
EMERGENCY

•
CORONAVIRUS
(COVID-19)



INTRODUCTION

In the context of a coronavirus pandemic and unprecedented measures taken by the state to deal with the crisis, the economic situation in Bulgaria is changing at a dynamic pace.

Dealing with the negative consequences requires adequate and timely action, which is why it is beneficial for any business to know the available legal options.

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MAIN POINTS:

1. Force majeure

Because of the coronavirus and the state of emergency, I am unable to fulfill obligations arising from contracts concluded before the pandemic had grown. How should I act and how can I avoid negative consequences?

When the performance of a contractual obligation is hindered by an unforeseen or unavoidable event of extraordinary nature, which has occurred after the conclusion of the contract, the institute of force majeure applies. The spread of coronavirus, as well as the acts adopted by the state to counteract it could constitute a force majeure event.

How could a force majeure event aid me?

Because the fulfillment of your obligation is hindered by a force majeure event, you will not suffer negative consequences for your default. The execution of all contractual obligations will be temporarily suspended, until the impossibility to perform those hindered by the event is terminated. A party can terminate the contract, should it deem that its interest could no longer be satisfied by such a late performance.

Do acts of public authorities constitute force majeure in this case?

It does because the inability to perform is objective, i.e. not only you but neither can anyone else fulfill this obligation. However, force majeure should be the cause of the default, for example, if you are obliged to deliver goods to Bulgaria, but at the later moment, their import has been prohibited with an act of a public authority.

How do I invoke force majeure?

Within a suitable period, you must notify in writing your creditors of the force majeure and its possible consequences for the performance of the contract. If you don't inform the other party, you would have to pay them for any caused damages. The notification could be sent by letter with a return receipt or tele-mail. To aid you in proving the force majeure event in possible civil proceedings, you could obtain a force majeure certificate from the Bulgarian Chamber of Commerce and Industry.

Does that mean that I don't have to reach out to the court?

There will be a need for legal intervention only if your creditor does not agree that force majeure event impedes the performance of any contractual obligations. Then, each of you will claim different legal consequences, for which a legal dispute could arise, that will have to be resolved by court or arbitration.

Because of the coronavirus and the measures taken by the state at the present moment my enterprise has no revenue. Is it possible to discharge myself from the fulfillment of my monetary obligations, for example, loan repayments, employee salaries?

Force majeure can't release a debtor from the obligation to perform monetary obligations, because according to Bulgarian law they are always possible to perform. Notwithstanding the foregoing, under the Law for the Actions During the State of Emergency, announced on 13 March 2020 by a decision of the National Assembly and adopted on 20.03.2020, until the cancellation of the emergency the debtors will not suffer the negative consequences of their arrears. This means that, even if you have agreed to, you will not be charged interest and you will not owe any penalties. Your lender will not be able to avoid the contract. If you have a bank loan, the bank will not be able to request early repayment of the entire amount of the loan until the state of emergency is over. Regarding the monetary obligations, you may find discussed below the application of the economic intolerance.

For the non-performance of what kind of obligation can I invoke force majeure?

Force majeure could find application, for example, when you have undertaken to deliver a specific item and the delivery is impossible because the state borders are temporarily closed.

Can I avoid the negative consequences if at the time of the force majeure I am already in arrears?

No. In that situation, you will owe the other party damages, unless you prove that even if you had performed the obligation on time, the other party would still have sustained the same losses.

The contract does not specify when there is a force majeure event. What are my options Can I invoke directly the Commercial Act?

Yes, if Bulgarian law is applicable, on the grounds of Art. 306 CA force majeure can be invoked by anyone, even though the specific contract does not have an explicit force majeure clause.

I have rented a premise to perform commercial activities in and I am unable to use it properly during the emergency. What should I do?

A landlord has many obligations, among which is to ensure the peaceful use of the rented item. Whether he is fulfilling this obligation depends upon the terms of the particular lease. They may have explicitly stated the specific use for which the premises were rented - for example, "for a retail outlet", "for a shop". In the absence of such a clause, we must take into account the normal purpose of the premises and whether there is an inability to use it for that purpose, given the state prohibition for visiting certain commercial sites.

In such cases, if the landlord cannot provide you with the undisturbed use of the leased property, the force majeure institute does apply and both parties will temporarily be relieved from their obligations.

2. Business frustration

The state of emergency caused by the coronavirus pandemic is extremely damaging for the economy and my business in particular. The contracts, which I have concluded before the National Assembly declared the state of emergency are now not only unprofitable, but also very unfair to me. What should I do?

The coronavirus pandemic emergency might constitute business frustration within the meaning of Article 307 of the Commerce Act. Business frustration occurs in the event of circumstances that significantly affect the economy and render the contract in contradiction with the concepts for fairness and good faith. Through the institute of business frustration, the law aims to prevent the performance of obligations which has become unjustified as a result of the economic deviations.

How will invoking business frustration help me?

Upon invoking of business frustration, the disadvantaged debtor may request the court (or if the contract contains an arbitration clause - the chosen arbitration court) to amend or to terminate the contract whose performance is compromised by the changes in the economic circumstances. It is up to the debtor to decide whether to seek an amendment or termination of the contract. The court can consider and eventually decree only that which the debtor has decided to request.

My company pays monthly installments on a loan, taken for its business activities. It pays also the monthly rent for the building in which its business is located. In the case of monetary obligations, I cannot be released from performance, because of force majeure. Is business frustration applicable to this type of obligation?

Unlike force majeure, business frustration applies to monetary obligations as well.

For what other kinds of obligations does business frustration apply?

Business frustration can be applied to any obligation - whether monetary or non-monetary, with single, continuous or periodical performance.

For example, you could invoke business frustration regarding:

- recurring monetary obligations – rental, loan or mortgage payments, remuneration of sales representatives, etc.

- non-monetary obligations that are performed periodically or continuously - periodic procurement of a certain service (e.g. cleaning and disinfection, maintenance, franchise, etc.), periodic deliveries of goods, etc.

You could also invoke business frustration if you are obliged to deliver certain goods to another trader, and the value of those goods has increased significantly since the occurrence of the coronavirus pandemic.

May I invoke business frustration if I am already in arrears in the event of the economic change?

No. To invoke business frustration, the debtor should not be in default and the performance of the obligation should be possible.

May I invoke business frustration to reduce certain obligations that I have already fulfilled?

No. The institute of business frustration applies only to outstanding obligations. Neither the amendment nor the termination of the contract could affect the obligations that have already been performed.

What do I have to prove so that the court amends or terminates the unfavorable contract?

Before the court, the debtor must prove the occurrence of a lasting and objective change in the economic circumstances that have existed at the time of the contract's conclusion. In the context of a coronavirus pandemic, such changes could be justified by the impediment of the economic activity in many industries, the lasting changes in the usual rhythm of life and the overall economic slowdown. You must also prove that it was not possible for these changes to have been foreseen when the contract was concluded. For example, if the contract was concluded shortly before the coronavirus appeared in Bulgaria, but after its pandemic spread to the rest of the world, the court will probably assume that these changes were foreseeable.

How will the court decide whether to grant my request?

It is up to the court to decide whether performing the obligation will be contrary to both the principles of fairness and good faith. For example, it would be unfair to perform an obligation when the equivalence of the benefits received by the parties is breached - when the debtor performs a burdensome obligation and receives less valuable goods. In breach of the principle of good faith is the performance of an obligation that is not socially justified and compliant with the requirements of honesty and integrity.

This text does not constitute a legal advice or consultation and should not be considered sufficient to resolve specific legal issues and cases.