

FORCE MAJEURE – A HUNGARIAN PERSPECTIVE DURING COVID-19 TIMES

Since Hungarian law does not explicitly regulate Force Majeure situations, its legal framework is mainly determined by judicial practice, according to which, Force Majeure is defined as an **irresistible force of natural or human origin, that is absolute in nature and that cannot be suppressed by means available to humans**. In Hungarian legal practice, sometimes, one can find Force Majeure clauses in contracts; however, these clauses are broadly applied only when one of the contracting parties or the governing law originates from the common law system or when Anglo-Saxon type documentation is applied, as well as in GTCs. If a Force Majeure clause is included in a contract, then it shall be **adjudicated on the basis of its actual wording**.

As a general note, we would like to underline that neither the COVID-19 nor the measures taken by the Government to defeat the pandemic in themselves justify the non-fulfilment of a contractual obligation. In order to be exempt from the consequences of breach of contract by revoking Force Majeure, the party has to prove that the extraordinary circumstances created by the COVID-19 pandemic have a direct effect on their business and permanently or temporarily exclude the performance of their obligations.

Given the fact that there is no specific regulation on Force Majeure in Hungarian law, in order for one to avoid the result of the breach of contract, **two legal institutions can be invoked** depending on the purpose of the parties and the nature of the contractual obligations. When the party's obligation is adversely affected by the event beyond its control but does not render it completely impossible, such as late or partial performance and the contracting party has no intention to terminate the contract, it is practical to refer to **exculpation**. On the contrary, **the doctrine of impossibility** shall be applied when the party intends to deviate from the contract since it is fundamentally impossible to perform due to legal, physical or economic impediments. This implies that deciding on which doctrine to trigger when the contract is affected by an event such as the COVID-19, the contracting party must value its goal and the existing circumstances.

To be exempt from the consequences of non-performance or default, **the breaching party shall prove** that (i) there is a cause for the breach of contract which was beyond its control, (ii) this cause was not foreseeable at the time of the conclusion of the contract, and (iii) it could not be expected from the party to evade or prevent the cause. By applying these provisions of exculpation, it is crucial to demonstrate that the party was not able to overcome the event or avoid the damages arising from such event. In practice, this means that in the case of exculpation, the party must prove that it was impossible to fulfil the contract by using the original sources or finding new sources at the time of the event, whereas, in the case of impossibility, the impediment has to be permanent. With respect to foreseeability, it may be challenging to meet this requirement for contracts signed after COVID-19 became a world pandemic (or at least when it became a huge pandemic in Italy making headlines in the world), as the court could argue that the event was predictable at the contracting time.

It is important to note that **adequate evidence is essential** in both cases, hence, contracting parties who seek to invoke these provisions are urged to collect evidence, such as company documentation on the event and its effects, the measures taken to prevent/mitigate the consequences, as well as a timely notification on the event sent out to the contracting party.

It is an interesting Hungarian phenomenon that **the Hungarian Chamber of Commerce issues Force Majeure Certificates** upon the request of a party. We do not see the legal basis for this and note that contracting parties have to be careful when relying on these certificates in a judicial proceeding as the evidentiary value attributed to them is questionable. The implication of the provisions depends on the court, as it expected to assess every case individually, with specific regard to the nature of the contract, the existing circumstances and the casual connection between them and COVID-19, as well as its actual effect on (non-)compliance.

This communication offers general comments on legal developments of concern to business organisations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

Should you have questions in connection with the above or a Force Majeure issue under Hungarian law, contact your usual point of contact at Forgó, Damjanovic & Partners or write to us at office@fdlaw.hu.