Noerr Corona Crisis Center

/How strong and reliable are lease agreements in the corona crisis

A practical overview of relevant legal question within the CEE

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TABLE OF CONTENTS

A. Is there any legislative rule regarding "Force Majeure" or "doctrine of frustration"?

Czech-Republic	Hungary	Poland	Romania	Slovakia
Force Majeure: Czech Civil Code ("CCC") defines the term indirectly (by interpretation of the § 2913 (2) of the CCC) as an exceptional unpredictable event whose effects cannot be prevented and which came into existence without the will of the parties. As a general rule, a force majeure event relieves of the liability for a breach of contract; if not explicitly excluded also, the statute of limitation period does not commence, and where it commenced it is suspended, if due to a force majeure event the entitled person may not pursue his claim in the last 6 months of the statute of limitation period (§ 651 of the CCC)..	**Force Majeure**: The Hungarian Civil Code ("**HCC**") does not define the legal term of Force Majeure itself, however, the party shall be relieved of liability for breach of contract if the breach occurred in consequence of circumstances beyond party's control and unforeseen at signing the contract, and there had been no reasonable cause to take action for preventing or mitigating the damage (§ 6:142 of the HCC).	**Force majeure:** Under Polish law (legal doctrine and jurisprudence, no statutory definition) a force majeure event is an event that is (a) external to the parties (b) impossible (or almost impossible) to predict and (c) whose effects cannot be prevented. As a general rule, a force majeure event relieves of the liability for a breach of contract (general rule of liability for lack of due diligence, Art. 355 Polish Civil Code; hereinafter "PCC"); also, the statute of limitation period does not commence, and where it commenced it is suspended, if due to a force majeure event the entitled person may not pursue his claim (Art. 121 PCC).	**Force Majeure:** According to the Romanian Civil Code ("**RCC**"), Force Majeure represents a cause of discharge of liability. It represents any external event which is unpredictable, absolutely invincible and inevitable (definition as per Art. 1351 RCC), such as calamities, armed conflicts, revolutions, strikes, etc. At the jurisprudential level, epidemics have also been circumscribed to situations of Force Majeure.	There is no legal definition of the term force majeure. In most cases, the term is defined in the respective lease agreements. In Slovakia there are various statutory regulations for lease agreements depending on the type of the leased property (e.g. office premises, logistic parks), so the consequences of force majeure need to be assessed on a case-by-case basis. Under generally accepted interpretations, an event of force majeure is an extraordinary, unpredictable, unavoidable event, not caused by any party. Under the interpretation of the Slovak Civil Code a party is not liable for its default, if the case for this default was beyond the party's control and unforeseen at signing of the contract. This is not applicable in cases, where the legal relationship is governed by the Slovak Commercial Code.

Czech-Republic	Hungary	Poland	Romania	Slovakia
Doctrine of frustration: Doctrine of frustration: According to §§ 580 et 588 of the CCC if the performance is impossible or it breaches the law or good morals at the time of the conclusion of the contract, the contract is absolutely void and no obligations arise. Furthermore according to the §2006 et seq. of the CCC, if the performance becomes impossible after that point in time then the contractual obligations expire by obligation of law. The performance is not impossible if it can be fulfilled under more difficult conditions, with higher costs, with the help of another person or only after a contractually specified time period. Claims for damages and/or unjust enrichment that a contractual party may have in the event that the contractual performance is impossible depend in general upon whether the impossibility occurred as a result of an event for which a party is liable, e.g. an event that the party caused. Generally force majeure has to be proven by the by the claiming party.	**Doctrine of frustration**: According to § 6:179 of the HCC, if performance of the contract becomes impossible, the contract terminates.	**Doctrine of frustration:** If the performance is impossible at the time of the conclusion of the contract, the contract is null and void (Art. 387 PCC). If the performance becomes impossible after conclusion of the contract then the contractual obligations expire (Art. 495 PCC). (Potential claims for damages or unjust enrichment in the event of the impossibility of the contractual performance are regulated separately; see Art. 387 §2, Art. 493 PCC and Art. 495 PCC).	**Doctrine of frustration**: As per the RCC, when a contractual obligation becomes impossible to be performed (permanently and completely), and such obligation represents an essential obligation, the contract is *de jure* terminated as of the moment of the event that generated such impossibility. On the other hand, if the impossibility of performing the obligation is temporary, the creditor can suspend the execution of its obligations or can obtain the termination of the contract in court. Such general provisions are included in the Chapter regarding the performance of the obligations (Art. 1557 of the RCC). Similar provisions are also included in the Chapter regarding the lease agreements of the RCC.	

B. Is there any statutory extraordinary termination right? And for the disruption of contractual basis?

Czech-Republic	Hungary	Poland	Romania	Slovakia
According to §§ 2226 et 2227 of the CCC, if the leased property ceases to exist during the period of lease(e.g. the tenant cannot use the assets due to Force Majeure), the lease shall end; no termination notice is necessary. The same shall apply, when the leased thing (e.g. property) becomes unusable, then (only) the lessee is entitled to terminate the lease (provided that the reasons are not attributable to the lessee).	In case the contract becomes impossible, it also terminates without termination notice (§ 6:179 of the HCC). There is no special termination right for the lessee other than those applicable in general cases (e.g. due to defects of the premises, state of the premises threatening health).	If the performance of a lease contract becomes **impossible** then the contractual obligations under that lease expire by operation of law; no termination notice is necessary (see above for the Doctrine of frustration). Further, there is a number of rather general lease termination rights that stem directly from the Civil Code. If a defect of the leased premises makes it **impossible for the tenant to use** the leased premises as intended under the lease agreement then the tenant may terminate the lease without notice (Art. 664 §2 PCC). If a defect of the leased premises poses a **threat to the health** of the tenant or members of his household or employed personnel, the tenant may terminate the lease without notice, even if at the moment of conclusion of the lease agreement he knew of the defect (Art. 682 PCC).	Termination rights of the tenant are rather general, not specially related to epidemics or disruption of contractual basis, however some of these may be applicable in these cases. Termination rights include: (i) the unilateral termination in case of lease agreements concluded for an undefined term; (ii) impossibility of using the asset (*de jure* termination); (iii) loss of the landlord title (*de jure* termination); (iv) death of the landlord or of the tenant (in case of a fixed lease term). (Articles 1816 of the RCC for point (i) above, 1818 of the RCC for point (ii) above, 1819 of the RCC for point (iii) above and 1820 para (2) of the RCC for point (iv) above). In the particular case of Corona crisis, point (ii) above will most probably represent a common reason invoked by the parties in order to obtain the termination of the contracts. However, such impossibility must be definitive and not temporary or must directly affect the use of the leased premises as agreed by the parties	No special termination right exists due to force majeure events. Generally, in case the contract becomes permanently impossible to perform, it terminates without termination notice (§ 575 of the Slovak Civil Code). It is though not impossible to perform, if it can be performed under worsened conditions, increased costs or delayed. Temporary restrictions with the pandemic will most likely be considered as a force majeure event and not an impossible performance of the contract.

Czech-Republic	Hungary	Poland	Romania	Slovakia
			(which it is unlikely to happen). In case the impossibility of using the leased premises is temporary, the lessee could obtain a reduction of the rent. On the other hand, if, from a measure ordered by the authorities, access to certain office buildings is forbidden, then the Force Majeure may be invoked to suspend the execution of the leases (*i.e.* for the disinfection as a result of positive case (s)). Even in this case, the court will make an analysis of the situation in each particular case.	
Disruption of contractual basis (*rebus sic stantibus*) applies to an extraordinary change in relations or greatly disproportionate change in the purchasing power of the parties. Moreover, with regard to the lease of an apartment, Art. 2287 CCC under which (only) the tenant is entitled in such case to terminate the contract, might apply. This can, however, be even applied to the lease of business premises.	Disruption of contractual basis may only result in termination if agreed and accepted by the parties.	The doctrine of the **disruption of contractual basis (*rebus sic stantibus*)** applies to an extraordinary change in relations (Art. 357^1 PCC) or a gross change in the purchasing power of money (Art. 358^1 §3-4 PCC). In the former case if due to an extraordinary change in relations the contractual performance becomes connected with excessive difficulties or would threaten one of the contractual parties with great losses and the contractual parties did not anticipate those when concluding the contract,	The doctrine of the **disruption of contractual basis (*rebus sic stantibus* or *hardship*)** is regulated under Art. 1271 of the RCC and grants the parties the possibility to renegotiate the agreements if the execution thereof becomes extremely onerous for them creating a gross disproportion between the rights and obligations assumed by the parties. The competent court may modify the terms of the agreement in order to restore the balance between the rights and obligations assumed by the parties	The **disruption of contractual basis** is recognized under the Slovak Civil Code, but only in relation to preliminary contract (§ 50a of the Slovak Civil Code).

Czech-Republic	Hungary	Poland	Romania	Slovakia
		then a court may: 1) change the manner of performance of the obligation or 2) determine the amount of the obligation, or 3) order that a contract be forthwith terminated. Typical “extraordinary changes in relations” cited in court decisions are a severe macroeconomic crisis, hyperinflation, a massive unemployment or a mass bankruptcies; some voices in the doctrine explicitly name an epidemic as an example as well.	or may even decide to terminate the agreement. However, hardship provisions may not be invoked by the party who expressly assumed the risk emerging from such event.	

C. Is the tenant, by law, entitled to reduce rent or to similar claims?

Czech-Republic	Hungary	Poland	Romania	Slovakia
If the lessee cannot use the assets fully or only with considerable difficulties, according to § 2208 of the CCC they have the right to be forgiven the rent or to application of the proportionate decrease in rent. Above mentioned disruption of contractual basis (*rebus sic stantibus*) applies to such contracts as well.	According to § 6:336 subsection (2) of the HCC, no lease payments shall be made for the period when the leased premises cannot be used for reasons beyond the lessee's sphere of interest. Unless excluded the application of this provision, the lessee can refer to this clause to avoid payment. Commercial lease agreements usually contain provisions handling this case so it is not the HCC regulation, which is relevant in most of the cases.	If the leased premises have a **defect that limits the use intended** under the lease agreement then the tenant may demand that the rent be proportionally reduced for the duration of the defect (Art. 664 §1 PCC). For the application of the doctrine of the **disruption of contractual basis (*rebus sic stantibus*)** under Polish laws please see Point 2 above.	The only explicit regulation in the RCC regarding a rent reduction is in case the leased premises need urgent repairs which last longer as 10 calendar days, the rent shall be reduced proportionally considering the time and part of the premises which cannot be used by the tenant. (Article 1803 para (2) of the RCC). Please also see the answer to question 2 above. Further reduction claims can be based on the legal provisions regarding the hardship, solely when this possibility was not expressly excluded by the parties in the lease agreement.	It is necessary to differentiate between the impossibility to use the premises and the restricted use of the premises due to force majeure. If it is not possible to use the premises, the tenant is not required to pay rent. If their use is restricted, the tenant may request a discount (§§ 673 – 675 of the Slovak Civil Code). Commercial lease agreements usually contain provisions handling this case so it is not the statutory regulation, which is relevant in most of the cases.

D. Are MAC (Material Adverse Effect) clauses valid?

Czech-Republic	Hungary	Poland	Romania	Slovakia
Under the general legal principles of the CCC in connection with § 1764 of the CCC, the parties are primarily obliged to execute their obligations, even if circumstances change to the extent that the performance under the contract becomes steadily more difficult for either party. MAC clauses are generally allowed to allocate the risks of change in external circumstances, albeit in accordance with § 1765 (2) a contracting party may also fully assume the risk of change in circumstances. However, if such assumption of risks does not occur, then within the meaning of § 1765 et 1766 of the CCC, in cases of a substantial change in circumstances, which would result in a gross disadvantage of the affected contracting party (e.g. disproportionately increasing the cost of performance, or disproportionately reducing the value of the subject of performance), the affected party could invoke the right to negotiate a (i) contract change with the other party, or (ii) ask the court to change or terminate the	Yes, based on the general principle of freedom of contract by the parties (§ 6:59 of the HCC). As to regulatory framework, based on § 6:192 of the HCC the court may amend the contract if in the long-term contractual relationship of the parties, completion the contract under the same terms is likely to harm the party's relevant lawful interests in consequence of a circumstance occurred after the conclusion of the contract, provided, (i) that such change of circumstances could not have been foreseen at the time of conclusion of the contract, (ii) the party did not cause that change of circumstances, (iii) c) such change cannot be regarded as normal business risks. According to the court practice, however, courts are not entitled to modify contracts based on changes *affecting the given economy as a whole* or changes affecting *every person of one special type of contract*. Therefore, it is questionable whether possibility of general amendment by the court is appli-	Under Polish law **MAC clauses are generally allowed** (Art. 353^1 PCC constituting the principle of the freedom of contract and its limits); thus the parties may agree that one or both of them be released from the obligation to perform the contract as a result of a contractually defined MAC event. However, a MAC clause may not negate the principles of social coexistence (public policy) and the very nature of a particular legal relationship (e.g. the clause must satisfy some minimum standards of commercial rationality, it may not put one contractual party under the total subjugation from the other contractual party etc.) (Art. 353^1 PCC); any rights stemming from a MAC clause may not be asserted in contravention of a socio-economic purpose of that right (contractual rights cannot be used in a manner that is abusive; Art. 5 PCC).	Pursuant to the RCC, the parties are obliged to execute their obligations, even if their execution has become more onerous, either due to the increase of the costs of performing their own obligation or because of the decrease in the value of the counter performance. However, if the execution of the contract has become excessively onerous due to an exceptional change of the circumstances which would make it manifestly unjust, the court may order: (i) adaptation of the contract or even (ii) termination of the contract. The above remedies only applies if: (i) the change of circumstances took place after the execution of the contract; (ii) the change of circumstances and its extent were not and could not be reasonably considered when executing the contract; (iii) the debtor did not take the risk of changing the circumstances; (iv) the debtor tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adaptation of the contract. (hardship provisions	Yes.

Czech-Republic	Hungary	Poland	Romania	Slovakia
contract. With respect to the substantial change in circumstances the affected party must prove that it could not reasonably have anticipated or influenced such a change in circumstances and that the fact occurred (or became known) only after the conclusion of the contract. However, the above possibility does not apply to contracts where the parties have excluded its application (or part thereof), which is often the case.	cable. The above possibility is only applicable for amendment but not for termination of the contract.		expressly regulated by Article 1271 of the RCC)	

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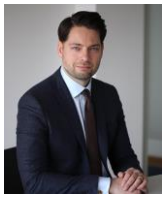

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