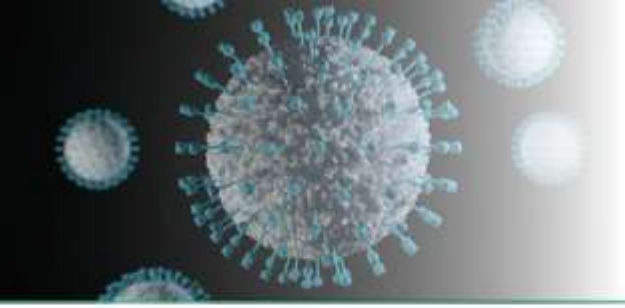


COVID-19 leaves traces

The legal implications of the pandemic for construction projects

Not only since 11 March 2020, the day on which the World Health Organisation (WHO) officially declared the "coronavirus" and its spread as a "pandemic", have the consequences and effects of the pathogen also been felt in the economy. The coronavirus SARS-CoV-2, which causes the disease COVID-19, has long since spread to countries all over the world, affecting all areas and industries. The construction industry has also been severely affected by it in the meantime. Contractors are threatened by empty stocks, difficulties in the delivery of supplies and building materials, sickness-related absences of staff or quarantine measures imposed by authorities. In the further course of pandemic plans implemented by the government, the isolation of entire regions (risk areas) and the associated sealing off of construction is a potential course of action. Clients also run the risk of suffering considerable liquidity bottlenecks and financing difficulties.

To this day, the pandemic has reached unprecedented proportions. For this reason, extensive case law is not at hand for the legal assessment of the impact on construction projects in this context. It should also be anticipated that a standardized assessment of the factual and legal situation is not possible and that the special features of each individual case must be taken into account.

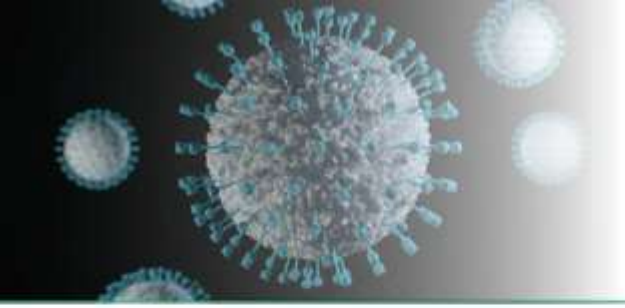
In this context, we would like to draw attention to a decree of the Federal Ministry of the Interior, Building and Community (BMI) dated 23 March 2020, which - with reference to federal building sites - addresses the legal consequences of the corona pandemic. The decree, which is immediately applicable, states, among other things, that all measures, which ensure that the construction sites continue to be operated, are of special importance. Essentially, it clarifies where a disruption to construction operations is attributable to the corona pandemic (force majeure within the meaning of Sec. 6 para. 2 no. 1 lit. c VOB/B). As these legal consequences result from the applicable laws and agreements (Building Site Regulation (BaustellenV), VOB/B), they also apply to all other construction sites.

Aspects for consideration

First, it should generally be noted that, at this stage, legal explanations on the effects of the coronavirus can only be given on a highly preliminary basis, as it is extremely difficult to refer to relevant case law. This is due to the measures associated with the coronavirus (ordinances/prohibition orders), which go far beyond measures taken in the context of past epidemics and therefore have completely different characteristics. This also affects the legal assessment of the overall situation.

1 Consequence of the classification of epidemics as “Force Majeure”

Neither the law nor the VOB/B (German Construction Contract Procedures Part B) contain a detailed definition of the concept of force majeure. As German law is applicable, the question of what is considered to be force majeure may be based on German court decisions, among others. According to the case law of the higher courts, a case of force majeure is deemed to exist “if an external event, which is caused by elementary natural forces or by the actions of third parties and which is unforeseeable according to human insight and experience, cannot be prevented or rendered harmless by economically acceptable means, even by extreme care which can reasonably be expected in the circumstances, and which cannot be accepted by the operating company due to its frequency” (according to the decision of the German Federal Court of Justice dated 22 April 2004 - III ZR 108/03; and its decision dated 17 February 2004 ibidem page 16). This includes epidemics and diseases (see decision of the German Federal Court of Justice dated 16 May 2017 - X ZR 142/15) as well as far-reaching official measures and embargos (e.g. decision of the Higher Regional Court Frankfurt am Main dated 16 September 2004 - 16 U 49/04).
COVID-19, or “coronavirus”, is therefore a case of force majeure.



Which legal claims are associated with a case of force majeure and how they can be asserted depends largely on

- whether a case of force majeure has been expressly agreed by contract by means of a clause (for this purpose, see section 2 below),
- whether the VOB/B has been included in the contract, which is usually the case with **construction contracts** (see section 3 below), or
- whether neither a contractual clause nor the VOB/B have been contractually agreed, which is often the case with **planning contracts** (see section 4 below) and
- how the risk is distributed in the contract between the contractor and the client (see section 5 below).

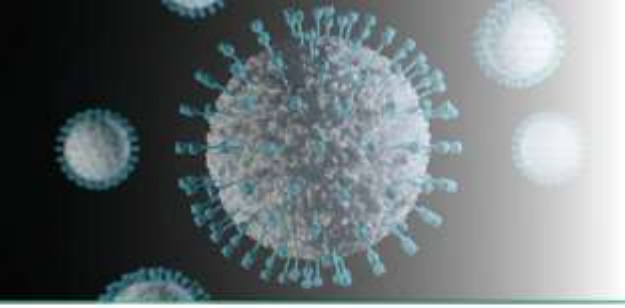
The legal consequences that may result from the assessment criteria set out in sections 2 to 5 are described in more detail in sections 6 to 10 below.

2 Contractual “force majeure” clauses

The starting point for the assessment is always the contractual basis between the client and the contractor. If the construction contracts contain a so-called force majeure clause for unforeseen events, acts of God or similar, even if these do not contain a clear provision on “epidemics, disasters and diseases”, the application of such a clause would already be considered, at least by way of legal interpretation of the respective clause. If one of the contracting parties wishes to invoke such a clause, it must immediately notify the contracting party in writing and, in case of doubt, also prove the existence of such force majeure.
If the contract contains a force majeure clause, the legal consequences must also be considered. In particular, two scenarios are possible: either the contract is automatically terminated or the contractual obligations are suspended for a certain period of time and reinstated after the end of the incident. In view of the (hopefully) very limited effects of the coronavirus in terms of the timeframe, a termination of the contract seems inappropriate.

3 Force majeure without contractual clause but with inclusion of VOB/B

This term is given meaning in **construction contracts without an express contractual clause by agreeing on the VOB/B**, as is common practice in construction contracts. In the VOB/B, the subject of force majeure is regulated, for example, in Sec. 6 in the case of obstruction and interruption of execution or in Sec. 7 (allocation of risks).
The legal consequence for the assumption of a case of force majeure may initially lead to the affected party being temporarily released from its contractual performance obligations.
However, it should not go unmentioned that in the past, higher court case law has occasionally allocated exorbitant price increases to the contractor's sphere of risk. The extent to which the limit is to be drawn depends on the individual case. As soon as one of the contracting parties is at fault, this can lead to an exclusion of the assumption of force majeure.



4 Contracts without a contractual clause and without inclusion of the VOB/B

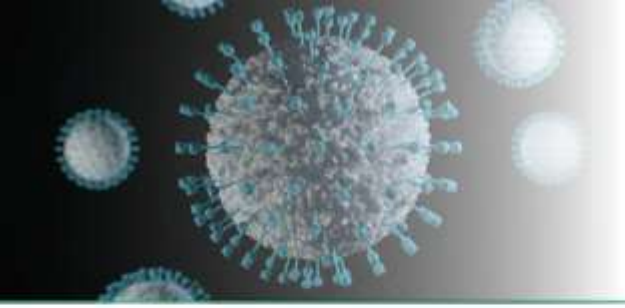
What is the assessment in case the **contracts do not provide for the inclusion of VOB/B**, as is the case in particular with **plannning contracts**? The German Civil Code (BGB) insofar does not contain any explicit regulation with regard to construction or planning contracts.
Since there is no explicit regulation of force majeure in building contract law, with the exception of the statutory regulations on road traffic and travel law, in such a case the normative principles of unreasonable disruption or even impossibility (Sec. 275 BGB) of the fulfillment of the service obligation can be applied or the statutory regulation of the discontinuation of the basis of the transaction (Sec. 313 BGB) can be used.
In this case, no claims can be derived for the other contractual partner from this.

5 Risk allocation

Whether and to which contractual partner a right can be derived from a case of force majeure also depends on the allocation of risks in the contract. Therefore, an interruption of the execution of the assignment is conceivable, especially in the case of difficulties in the delivery of materials or the absence of a party's employees due to illness or quarantine, but probably also of subcontractors' employees. If individual employees are absent due to illness with the "coronavirus", this is not sufficient and is comparable to the "normal" flu and the scenario therefore falls within the contractor's sphere of risk and, in case of doubt, must be compensated by working overtime. The mere "fear" of infection or cost-intensive replacement purchases are also not sufficient to justify an interruption in the execution of the assignment. With the current trend of the spread of the virus, however, the level of absent employees or subcontractors may already be exceeded in some cases and, as the spread continues, the number of these cases will increase. In this scenario, it is incumbent on the contractor to draw attention **in writing to the obstruction of the execution of the contract at an early stage by means of a notice of obstruction** within the scope of its duty to inform and warn.
The same applies to the contractor's risk of procurement for building materials and associated price increases. The risk must actually be attributable to the "coronavirus" and not, for example, to insufficient orders or poor planning.
However, it should not go unmentioned that in the past, the higher court case law has occasionally located exorbitant price increases in the contractor's sphere of risk. The extent to which the limit is to be drawn depends on the individual case.
As soon as one of the contracting parties is at fault, this can lead to an exclusion of the assumption of force majeure in this respect.

6 Extension of execution deadlines

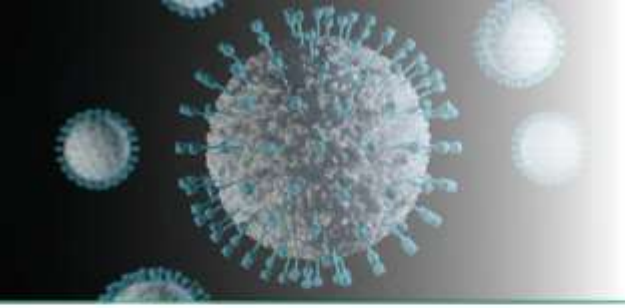
If the VOB/B is included in the contract, in particular Sec. 6(2)(1)(c) of the VOB/B applies, which leads to an extension of the execution deadlines in the event of force majeure (Kapellmann/*Messerschmidt* VOB, Part A/B, 7th edition 2020, Sec. 6 VOB/B, recital 29). Dates may be postponed or rescheduled.
Irrespective of the existence of a case of force majeure, official government orders to avert imminent dangers, e.g. under the Infection Protection Act (IfGS), such as quarantine measures regarding staff, may also justify a claim to an extension of the construction period.
In accordance with Sec. 6 para 1 VOB/B, the contractor must **immediately notify** its client **in writing** in order to reserve these rights if the contractor believes he is hindered in the proper execution of the service. In particular, it must be examined whether the obstruction is actually attributable to the coronavirus or whether the contractor might be at fault after all. If there is a circumstance leading to an extension of the execution period in accordance with Sec. 6 para. 2 VOB/B and if the obstruction is duly notified, the execution period shall be extended automatically, i.e. without any further declaration by either of the contracting parties. The VOB/B provides that the contractor, by way of issuing an obstruction notice, can unilaterally cause a prolongation of the



execution period. If obstructions and obstructive effects are obvious, the corresponding extension also occurs without further need for action. However, one should not rely on this “obviousness” and instead choose the safe way of written notification.
However, in accordance with Sec. 6 para. 3 sentence 1 VOB/B, the contractor is obliged to do everything that can reasonably be expected of him to enable the work to continue. In addition, he is obliged to continue the work once the hindering circumstances have ceased to exist and to inform the client accordingly.

7 Claims for damages and compensation

Mutual claims for damages or compensation payments are generally likely to fail due to the lack of fault on the part of the other party.
The same applies to failure to cooperate on the part of the client. During the construction process, the client must submit execution documents, obtain public legal approvals and make the building site available and ready for execution. The client’s fault/responsibility is basically not a prerequisite for a compensation claim of the contractor in case of a failure to comply with the obligation to cooperate. In this context, however, uncontrollable external influences do not even fall within the sphere of risk of the client. Accordingly, an alleged claim for compensation on the part of the contractor, e.g. due to the failure to provide a building site or the obstruction caused by the official establishment of a restricted zone, should be excluded.
If the client or its representative cancels appointments that have already been agreed upon, such as construction site meetings, due to a potential risk of infection, this cancellation falls within the client’s sphere of risk. In this case, the contractor should inform the client in writing about the obstruction of the construction process and, as a precaution, reserve the right to claim additional costs or compensation.
When asserting claims for damages caused by delay due to the conversion of a business to a home office, a distinction must be made as to whether the conversion is due, for example, to an official order or other external decision-making authority or whether it is based on a decision made by the business owner itself. This difference has an effect on the question of whether or not any delay that may occur can be regarded as being caused by fault. If, for example, the operation of the contractor of a planning contract is quarantined by the local health authority, fault for delays in the client’s project should be rejected. If, on the other hand, a contractor refuses to meet a deadline on the grounds that travel is impossible because of the coronavirus, invoking force majeure may no longer be sufficient for protection against an accusation of fault for the resulting damage caused by the delay.
The situation could be different if further circumstances arise which speak against culpable conduct on the part of the contractor. Among other things, it is common legal practice that a debtor (in this case the contractor) does not have to put itself in unreasonable danger in order to fulfil its performance obligations. Also, an illness of the debtor that prevents performance regularly excludes fault with regard to a delay. In this respect, good arguments could certainly be put forward in order to defend against any claims asserted due to delays in performance. However, it cannot be predicted at present how a court would decide in such a case in connection with the coronavirus in the future. Therefore, a residual risk remains of having to accept liability for losses resulting from delays resulting from the conversion of operations to “home office”.
It should be noted that the existence of force majeure and other reasons which make the delay no longer attributable to fault do not invalidate the agreed contractual provisions. Therefore, the specific contractual agreements shall be decisive in each individual case. If the parties have contractually agreed that the contractor shall be liable for damages caused by the delay regardless of fault, the effects of the coronavirus would not change this, unless the parties have agreed on exceptions for such and similar cases. This will have to be examined in each individual case.
Contracts also often provide for the contractor’s obligation to inform the client in writing of impending delays at an early stage. Such written notice should be given without delay in order to minimise the risk of being accused of failing to give notice of impending delays later on.

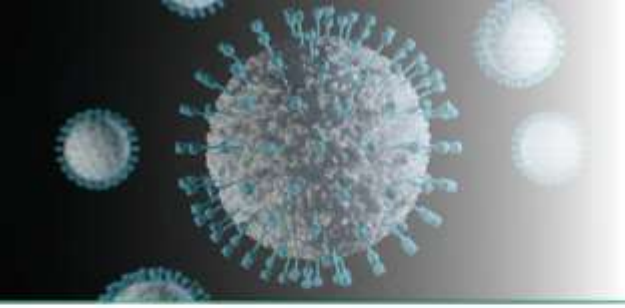


8 Termination

Difficulties in financing the construction project or liquidity bottlenecks due to the pandemic alone do not constitute grounds for termination. The financing and liquidity risk is borne by each party itself.
Both the provisions of the BGB and the VOB/B grant both contracting parties an extraordinary right of termination. According to this, the continuation of the contractual relationship until the completion of the construction project must be unreasonable for the terminating party, taking into account the circumstances of the individual case and weighing up the interests of both parties. Here, too, a general approach to a solution is out of the question. Instead, the constellation of the respective individual case must be taken into account.
However, a hasty declaration of termination of the contractual relationship is not advisable. A possibly invalid extraordinary termination may well be interpreted as an ordinary termination, so that in such a case the contractor could demand full remuneration or enable the Client to terminate the contract for good cause.
In addition, both contracting parties have the right to terminate the contract in accordance with Sec. 6 para. 7 sentence 1 VOB/B in the event of an interruption of the services lasting longer than 3 months. This shall also apply if an interruption of more than 3 months is unavoidable (Leinemann-Leinemann/*Kues*, VOB/B, 7th edition 2019, Sec. 6 VOB/B, recital 275).
According to Sec. 6 para. 6 sentence 1 VOB/B, the lost profit of the other contracting party is only to be reimbursed in case of gross negligence or intent.
It should be noted in this context that a right of termination only exists in the event of a complete interruption of the construction work in the sense of a prescribed interruption to construction or the closure of a construction site. Termination in the event of existing delays or difficulties in the construction work is not justified by Sec. 6 para. 7 VOB/B.
However, the continuation of construction work is also possible during the Corona crisis, even if this might be associated with restrictions.
In particular, in the decree of the Federal Ministry of the Interior (Bundesinnenministerium, BMI) dated 23 March 2020, it is pointed out that all construction sites under federal control must continue to be operated despite the corona pandemic. The same applies to all other construction sites.

9 Interrupted construction and cancellation of the contract / loss of the basis of the transaction

In constellations that will probably prove to be absolute exceptions, when a contractual adjustment is no longer sufficient due to changes in the service agreements or the timeframe, termination of the contractual relationship also appears to be possible by applying the principles of the elimination of the basis of the transaction according to Sec. 313 BGB. According to this, continuation of the contractual relationship would have to be unreasonable and no longer appropriate (Palandt/*Grüneberg*, BGB, 79th edition 2020, Sec. 313 BGB, recital 42). This would be the case if the original contractual allocation of risks could no longer be restored. At the moment, this cannot yet be assumed, but can also not be ruled out for the unforeseeable developments of the future.
The client cannot assert liquidity shortages in the event of force majeure or disruption of the basis of the transaction as a reason to interrupt construction work. The liquidity risk must be borne by the client.



10 Cancellation of the contract, in particular withdrawal by the client according to Sec. 323 BGB

Withdrawal from the contract is possible if a due service is not provided or not provided in accordance with the contract, e.g. a partially rendered or a defective service.
“Due service” shall be determined by the deadline specified in the contract, however, changes to the deadline, such as those stipulated in Sec. 6 para. 2 VOB/B must be taken into account.
Coronavirus will often lead to a delay in performance. Since a partial service will usually already have been provided for exisiting contracts, a withdrawal from the entire contract can only be considered if there is no longer any interest in the partial performance (Sec. 323 para. 5 sentence 1 BGB). As a consequence, in the event that the client is interested in the service rendered, the client can only declare withdrawal with regard to the service not rendered. This is of particular importance in the case of building matters, because in the event of delayed construction work, the interest of the client in the performance rendered generally continues to exist. In principle, the interest continues to exist if the client has the construction work completed by another contractor. It will therefore be difficult to justify a withdrawal pursuant to Sec. 323, subsection 1 if partial service has already been provided.

11 Conclusion

In view of the uncertainty of developments for all parties involved, it is only advisable for the parties to inform each other as early as possible by means of an obstruction notice in the event of difficulties or impairments that are in the process of arising. At the same time, however, it is also necessary to create a basis for presentation and proof for the situation that arises in each case, for example by means of "force majeure certificates" or written official orders. A detailed documentation and archiving of the construction process disturbances with a specific indication of the time, place and type of the disturbance is therefore indispensable. Even in cases of doubt, precautionary information and documentation must be provided.
Premature notices of termination should be avoided, particularly with regard to the financial consequences of ineffective terminations.
In case of currently concluded contractual relationships, separate precautions and provisions should be taken, especially with regard to (extended) execution periods, generous "construction time buffers" and price increases. Contracts currently being concluded should no longer be covered by the considerations of unforeseeability to be assumed for the assumption of force majeure.
The current momentum should at least be taken as an opportunity to always include a contractual agreement in the form of a force majeure clause for extraordinary events in future. The experience of the present will lead to the consequence that the assumption of an unforeseeable circumstance due to a pandemic and the phenomena associated with it will no longer appear to be possible without further ado.

PLEASE FEEL FREE TO CONTACT US!

Further insights on the coronavirus in crisis:

https://deutschland.taylorwessing.com/de/coronavirus

Your points of contact

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