



International Disputes: How to protect your company's operations during COVID-19

What obligations remain in place and what has changed over the last few weeks? And what are my options to help protect my company, my employees and still meet my duties as a director?

Businesses across the world run according to private agreements - supply contracts, leases, employment contracts and financing arrangements - and a local framework of laws. Some of the duties under those agreements and local laws have suddenly become impossible, or very difficult, to discharge. Government responses to the pandemic have choked off many businesses' revenues while leaving them liable to pay the rent, their staff and their suppliers. In normal times a business with no revenue and lots of obligations would be required to place itself into insolvency very quickly.

Insolvency and company law and the rules governing commercial contracts vary from jurisdiction to jurisdiction across Europe but in our experience across Europe the fundamental tension - between the need for businesses to do what they agreed to do and the need to preserve good businesses and avoid unfair and destructive outcomes - is the same across the continent.

Different systems will attempt to reach a fair outcome by different mechanisms and this can lead to very different results. By way of example, in many jurisdictions the Civil Code will set out a definition of 'force majeure', 'hardship' or 'unforeseen change' which may excuse a party from performing all or some of his obligations under the contract. In Common Law jurisdictions on the other hand the courts will be very reluctant to interfere in the operation of a commercial contract on the basis that the outcome has become unfair, though in some jurisdictions extraordinary legislative measures have been implemented to support commercial parties in these challenging times.

Some of the areas where we are seeing a lot of companies struggling to keep up with the rapid changes to local legislation include:

Large transactions – both buy-side and sell-side to unwind or push through specific transactions. This will involve a mixture of local law and an understanding what is strategically and commercially achievable in that environment.

Financing issues – in particular security enforcement issues and margin calls. There are already significant issues in this area.

Directors' duties – in particular in the context of potential insolvencies. Directors of companies face very volatile market conditions only partly mitigated by government support packages. Advice on these issues requires a detailed understanding of local insolvency and corporate law but also the dynamic local political environment.



Taylor Wessing disputes lawyers across Europe have the local expertise that can help cut through the complexity of the many local and international changes, as well as keeping you updated on what your options are and what duties have changed or remain firmly in place. Read on to find out the effect COVID-19 has had under different countries' laws.

Austria

Current restrictions (25 March 2020)

- There is a ban to enter shops and restaurants/bars (except for food, medicine and other vital products of daily need), effectively closing these.
- Everyone must work remotely where possible and are advised to not leave their homes for any reason other than work (where working remotely is not possible), shopping for daily needs and going for walks alone.
- When allowed to be in public, people must retain a one meter distance to other persons.
- Only a few towns (in the Tyrol, Salzburg and Upper Austria) are under quarantine.
- These measures will last at least until 13 April 2020, but likely will be extended.

Effects on existing contracts

- The effect will primarily need to be reviewed under the specific wording of each contract.
- There are, however, some statutory rights, particularly where contracts are silent on certain issues.
- Where contracts cannot be fulfilled there may be an exception of force majeure, usually by interpretation of the wording in the contract. Where contracts are silent on the definition of force majeure, parties prevented from fulfilling their contractual obligations may rely on Austrian precedents which held that the Sars Epidemic was a case of force majeure, so that COVID-19 will also qualify.
- Where the prevention to fulfilling a contractual obligation is temporary (whenever the crisis will be over) this may result in delay, whereas a force majeure exception (due to the lack of fault) may give relief for delay damages. The receiving party will have to extend reasonable deadlines before being able to rescind from the contract.
- Where the prevention is permanent contracting parties may be able to rely on the concept of total hindrance, being able to terminate contracts, usually at no costs. This may also apply if there is no force majeure clause.
- In case of service contracts the commercial risk of not being able to perform is shifted to the service provider; with an exception of the construction industry, where under many contracts it may be the principal who will have to bear the extra costs of closure of construction sites.
- Businesses whose premises are temporarily not fit for use (e.g. shops and restaurants due to the effective closure) may be exempt from paying rent for the time of closure.

Read more: https://austria.taylorwessing.com/en/documents/get/2193/covid-19-und-leistungst-rungen.pdf%20?show_on_screen



Court operations

- Civil courts basically have ceased moving cases forward. Hearings take place only in urgent cases, and are done by video conferencing, if at all possible.
- Criminal courts are also reduced to urgent cases.
- All court related deadlines (such as for appeals, filing motions or further particulars) are stalled until 30 April and will be reinstated at full length on 1 May. Deadlines for filing claims e.g. under statute of limitations are extended by the duration of the crisis.
- Arbitration tribunals are still in operation; the Vienna International Arbitral Centre (VIAC) continues to operate and has published guidelines for safe hearings.

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France

Current restrictions

A health emergency state has been ordered by the government on March 23rd, which implements several measure and follows the ban of all non-necessary shops and stores as well as lockdown unless for a few reason restricted to health urgency or purchase basic commodities that have been ordered in the past days. Smart-working is recommended every where it is possible.

The ministry of economy has announced measures concerning delay granted for tax payment and social contribution, annulment of certain tax on prior request, and delay in payment of rent, water, gas and power bills for small companies.

Effects on existing contracts

Force majeure

Since 2016, French Civil Code encompasses a right for a party to a contract who is suffering from the event of force majeure to suspend the performance of the contract, or, should the event of force majeure be permanent, to terminate the contract.

The event shall prevent the performance of its obligations when:

- It is out of control of the performing party;
- It was unpredictable at the moment of the signature of the contract;
- Deploys effects that cannot be managed and resolved by the party.

Case laws have issued several interpretations of these requirements. For now, jurisdictions have not been inclined to consider epidemic like SARS or Ebola cases of force majeure. A case by case appreciation is necessary in order to justify the event of force majeure.

In any case, a party does not need authorization by a court order to suspend or terminate the contract under force majeure conditions but is as of now entitled to invoke these rights on the ground of the Civil Code provisions, even if not provided in the contract.

Hardships events

French Civil Code also has statutory provisions concerning hardship events. It grants parties to a contract a right to renegotiate the contract in case of event which:

- Is unpredictable at the moment of the signature of the contract;
- Causes the performance of the contract to be unreasonably expensive, beyond what parties expected in the course of their discussions;
- Was not accepted by a party, as a matter of risk.



In this case, the party is allowed to formally request the other party to enter into fair negotiations, aiming at adapting the contract to the new circumstances. Should an agreement on new conditions not be found, the parties can alternatively terminate the contract, or file a judiciary request for modification of the terms of the contract or a termination. Thus, the judge will freely determine the date of termination of the contract as well as the consequences of such termination.

Wisely used, these instruments will be very useful for companies to face any unbearable consequence directly caused by Covid-19 epidemic.

Court activities

Due to the epidemic, all activities in civil and criminal courts are reduced to the treatment of the very urgent cases. All hearings in ongoing proceedings have been postponed to early June.

According with an ordinance dated as of March 25th, any act subject to a statute of limitation will be deemed to be accomplished during March 12th and a period of one month following the end of the health emergency statute, which is actually for a duration of a renewable one-month period from March 23rd.

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German law

Current restrictions as per order of 22 March 2020

- Citizens are urged to reduce contacts with other people outside the members of their own household to an absolutely necessary minimum.
- In public, wherever possible, a minimum distance of at least 1.5 m must be kept from persons other than those mentioned under the first bullet.
- Being in public areas is only permitted alone, with one other person (so not more than 2) not living in the household or in the circle of members of one's own household.
- The way to work, emergency care, shopping, visits to the doctor, participation in meetings, necessary appointments and examinations, help for other or individual sports and exercise in the fresh air as well as other necessary activities remain possible.
- Groups of people celebrating in public areas, in apartments and private facilities are unacceptable in view of the serious situation. Violations of the contact restrictions should be monitored by authorities and the police and sanctions are imposed in the event of infringements.
- Catering establishments will be closed. This does not include the delivery and collection of take-away food for consumption at home.
- Personal hygiene service providers such as hairdressers, beauty salons, massage parlours, tattoo studios and similar establishments will be closed, as physical proximity is essential in this area. Medically necessary treatments remain possible.
- In all establishments and especially those open to the public, it is important to comply with hygiene regulations and to implement effective protective measures for employees and visitors.

All these measures will have a minimum duration of two weeks.



Effects on existing contracts

- **IMPORTANT:** The effects arise primarily from the specific wording of a contract.
- German law does not know the term “force majeure”. Therefore, it only becomes relevant through a specific clause in the contract. It must be examined whether the corona pandemic constitutes a case of force majeure within the meaning of the respective clause. In case the clause just mentions “force majeure” without listing any special cases, jurisprudence defines it as an “external event that cannot be avoided even by exercising the utmost care that can reasonably be expected”. In several decisions, epidemics have already been classified as such force majeure. Depending on the content of the clause, the legal consequences may then be any rights of withdrawal, a (temporary) suspension of the contract or claims for damages.
- In case of no overriding contractual provisions, the scope of rights and obligations is determined in accordance with sections 275 and 313 of the German Civil Code (BGB).
- Section 275 BGB provides that a claim for performance is excluded if performance is (also just temporarily) impossible for the debtor or for anyone else. Furthermore, the debtor may refuse performance according to this section if it requires an effort that is grossly disproportionate to the creditor's interest in performance. However, debtor is obliged to first try to purchase the missing supply parts elsewhere, even if only possibly at a higher price.
- According to section 313 BGB, an adjustment of the contract can be demanded if circumstances that have become the basis of the contract have subsequently changed so seriously that one party cannot be expected to adhere to the unchanged contract. If the adaptation of the contract is not possible or reasonable, the disadvantaged party may also withdraw from the contract. This provision, however, is the absolute exception since the seller bears the procurement risk.
- If non- or late-performance is caused due to restrictions based on the corona crises the debtor will most likely not have to pay damages due to lack of fault.

Read more: <https://deutschland.taylorwessing.com/en/insight/rechtliche-konsequenzen-des-corona-virus> and <https://deutschland.taylorwessing.com/en/coronavirus-implications-on-agreements>

NEW: The Federal government introduced a “moratorium” on the fulfilment of contractual claims for a transitional period, which will entail fundamental amendments to contract law. On March 25th the German Parliament (Bundestag) unanimously adopted the law that now needs to be approved by the Federal Council (Bundesrat) which is planned for Friday March 27th. Key elements are:

- With respect to contracts concluded before March 8th, the defaulting party may in principle be granted a temporary right to refuse performance of the contract (Leistungsverweigerungsrecht) until 30 June 2020 if the defaulting party can no longer fulfil its contractual obligations as a result of the pandemic, without jeopardising its livelihood or the economic basis of its business. This right to refuse performance of the contract shall, however, only be granted to consumers, very small businesses, small businesses and medium-sized companies, i.e., to companies with fewer than 250 employees and a turnover of less than EUR 50 million or with an annual balance sheet below EUR 43 million.
- With regard to arrears of rent existing for the period from 1 April 2020 through 30 June 2020, landlords may not terminate the lease if the arrears exist due to a pandemic.
- For consumer loan agreements, the lender's claims for repayment, interest or redemption of a loan falling due between 1 April 2020 and 30 June 2020 are deferred for a period of three months by operation of law from the date on which they fall due. This shall apply to the extent that the borrower suffers a loss of income due to the crisis, which makes it unreasonable to expect the borrower to provide the services owed, whereby a connection between the loss of income and the pandemic is presumed by law.



- The statutory obligation to file for insolvency is to be temporarily suspended until 30 September 2020 if the reason for insolvency is based on the effects of the corona crisis and there is a reasonable prospect of restructuring.

If it turns out that the period from April through June 2020 is not sufficient to cushion against the economic consequences of the crisis, the possibility is granted to extend the periods mentioned above.

Read more: <https://deutschland.taylorwessing.com/en/insight/gesetzese Entwurf-zur-abmilderung-der-folgen-der-covid-19-pandemie-im-zivilrecht>

Court operations

- Civil courts predominantly postponed oral hearings, however, due to their judicial independence they are free in their determination. All other procedural handlings continue.
- Criminal courts also reduced to urgent cases.
- Arbitration tribunals are still in operation and increasingly use modern ways of communication including case management conferences and hearing per video conference.

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The Netherlands

Current restrictions (25 March 2020)

- All public gatherings and meetings are prohibited until 1 June 2020 (excluding funerals and certain weddings).
- Shopkeepers and public transporters are obliged to take precautionary measures to ensure that people keep sufficient distance from each other.
- Hair dressers, beauty salons and other professionals which have close contact with individuals are prohibited to work until 6 April 2020.
- Schools are closed until 6 April 2020.
- Restaurants, bars and casino's need to be closed until further notice.
- Offices must do teleworking where possible. People are advised to remain in their homes were possible and solely do shopping for daily needs.

Effects on existing contracts

- **IMPORTANT:** The effects arise primarily from the specific wording of a contract.
- There are, however, some statutory rights, particularly where contracts don not have provisions for unforeseen circumstances.
- Where contracts cannot be fulfilled there may be an exception of force majeure stipulated in the contract, usually by interpretation of the wording in the contract.
- Where contracts cannot be fulfilled and where no exception of force majeure is stipulated in the contract, parties prevented from fulfilling their contractual obligations possibly can invoke the exception of force majeure.
- Where the prevention to fulfil a contractual obligation is temporary (whenever the crisis will be over) this may result in a delay, whereas a force majeure exception may give relief for loss due to delay. The receiving party will have to extend reasonable deadlines before being able to rescind from the contract.



- Where the prevention is permanent, contracting parties may be able to rely on the concept of total hindrance under the force majeure, being able to terminate contracts (partly or as a whole), usually without costs.
- In cases where contracts can be fulfilled, but where the current circumstances were not foreseen in its provisions and create a real hindrance for one or both of the parties it is possible to ask the court to decide how this unforeseen circumstance should be dealt with in perspective of all relevant circumstance.

Court operations

- Civil courts basically postponed all oral hearings. Oral hearings only take place in urgent cases. Nonetheless, all other procedural handlings continue.
- Criminal courts are also reduced to urgent cases.
- Arbitration tribunals (for example the Dutch Arbitration Institute) are still in operation.

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UAE

Court operations

The parties to a dispute may find themselves in a situation where they have the final hearing of their matter scheduled during the coming months, and are concerned about whether that hearing can go ahead.

We have received more enquiries about whether a hearing that was supposed to take place in person can be conducted entirely by way of videoconference, so as to avoid protracted delay. Attendance at a hearing via videoconference is becoming more common in the UAE, with the DIFC-LCIA Arbitral Rules make specific provision for it, the UAE Federal Law 6 of 2018 on Arbitration referring to “modern techniques” of communication, and both the DIFC and On-shore UAE Courts conducting hearings electronically. However, these means tend to be used only on smaller interlocutory matters where there is no witness evidence, or where one of the witnesses cannot attend the hearing in person for cross-examination.

The conducting of an entire hearing (which may last from a number of days to a number of weeks) by videoconferencing is less common, and there are a number of questions you will have to ask yourself to decide whether the option is right for your case. The following are some of the suggested considerations:

- The number of locations from which people will be calling (two or three video links may be achievable, but nine or ten may be technologically cumbersome);
- The time zones in which the various attendees are located;
- Do all of the attendees have reliable internet connections with the requisite bandwidth;
- Are VOIP services permitted in your country (for instance, in the UAE, only certain VOIP providers are licenced);
- Will you have to refer to a large number of documents and, if so, how will these be shared;
- Does the law of the seat of your proceedings permit use of videoconferencing? If not, this may be raised on enforcement on any judgment or award;
- What protocols need to be agreed for the swearing and affirmation of witness evidence, so that there can be no disagreement on enforcement about whether witnesses were properly called;
- If your team is in multiple locations, can you securely conduct sidebar discussions when you need to discuss tactics and approach;
- Will the use of technology be detrimental to the flow of complex cross-examination;
- If using a specific provider who provides virtual hearings, does it require the attendees to have specialist equipment.



Checklist for contractors

COVID-19, and the restrictions introduced to end the pandemic, can have particular issues for contractors, whose projects may stall due to, for instance, the quarantining of labour, key members of the team being stuck abroad, delays in supply chains, and delays in receiving approvals and signoffs. Here is a brief checklist of things you can do to help you support any delay claims you may need to submit in due course:

- Check whether the pandemic falls under the definition of “force majeure” in your Contract, and how this will affect any claims – force majeure events usually award time, but not costs [Please note that whether the COVID-19 pandemic constitutes force majeure as a matter of law is dealt with separately below, but your contract may have a specific, limited definition of force majeure which will be applied].
- If it is not force majeure, which provisions of the Contract may entitle you to claim?
- Check your contract for the notice provisions relating to claims, and ensure that you are providing notice not only on time, but with the amount of detail required by the Contract.
- If claims need to be substantiated in due course, keep as many records as possible, including any circulars and directives from authorities which may relate to the suspension of work.
- If the Contractor's Representative provides letters suggesting that works should continue, or pointing to the Contractor as the cause of delays, ensure that all letters are responded to in detail.
- Make sure that you continue to comply with any provisions in the contract relating to the security of site and health and safety, to the extent you are not restricted.
- Ensure that all licences and authorisations remain current and are not permitted to lapse.

Force Majeure v Frustration

The UAE Law does not provide an exhaustive list of events which may constitute force majeure and it is currently unclear whether COVID-19 will be treated as such. However, your contract might already provide a definition of force majeure, and the events that will be captured by it, meaning that it is important to familiarise yourself with the terms of your contract before relying on such provisions.

If you are intending to rely on force majeure to excuse your performance of a contract, it is important to note that UAE law states that a party relying on such an argument must demonstrate that the event or circumstance of the force majeure was both i) unforeseeable, and ii) rendered performance impossible for both parties (i.e. it does not simply make performance harder). This does set a relatively high standard and, particularly if your contract contains force majeure provisions, those terms are likely to be interpreted and implemented strictly.

If relying on force majeure it is also necessary to understand the effect of successfully making a claim. In most construction contracts, for instance, the existence of a force majeure event can permit the suspension of performance by the parties whilst the event or circumstance of the force majeure is ongoing, and may result in an award of time, but not costs. If the force majeure remains for a specified period of time, it may also permit termination. However, under UAE law, once force majeure is proven, the contract is deemed rescinded (i.e. parties revert to their pre-contractual positions, and where possible, damages are to be awarded).

This means that contractual provisions relating to force majeure can provide more flexibility where a situation (such as the COVID-19 pandemic) is temporary, and there is a possibility that works may resume. On that basis, if your contract does not provide for force majeure, and you believe that performance may resume in future, you may consider it unnecessary to bring a claim for force majeure as it could result in the entirety of the contract being prematurely cancelled.

If you therefore believe that claiming force majeure is not viable in your specific circumstances, you can always investigate a claim for frustration, i.e. a claim that the performance of the contract is rendered more onerous as a result of unforeseen events. This can result in compensation being payable. Often your contract will provide a gateway for this type of claim, the most common in construction being where there is an “upsetting of the economic balance of the contract”, or where, for instance, costs are incurred as a result of complying with government directive or law. The contract will usually refer to and provide an appropriate remedy



but, under UAE law, the Courts can make an adjustment to the contract to reflect the change in circumstances, such as under Article 249 of the UAE Civil Code grants the judge a wide discretionary power to amend the parties' obligations in respect of the economic balance of the contract, which may be preferable to having the contract cancelled via a force majeure claim.

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UK

Please visit our dedicated COVID-19 page [here](#) for further information on the UK legal implications.

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