



## Fact sheet on temporary inability to perform due to COVID-19

### 1. What is it about?

In many industrial sectors, the COVID-19 pandemic may render the performance of contractual obligations **more difficult**. However, scenarios in which the performance of a contract during COVID-19 will finally become impossible should be rare. Therefore, this fact sheet only deals with the temporary impossibility to perform.

### 2. What should be considered as a general rule?

- According to case law, **force majeure** is an exceptional and unavoidable event that is not within the risk sphere of either party. The term "*force majeure*" does not appear in statutory contract law.
- The **COVID-19 pandemic** is generally considered to be a force majeure event.
- The COVID-19 pandemic can trigger **various or no legal consequences**. The effect, if any, of the pandemic must be examined on a case-by-case basis.
- **Contracts generally remain binding** as long as nothing is done. Inaction can therefore be expensive.
- For evidentiary reasons, it is recommended to communicate with the contractual partner **in writing**.
- Contracts should be scrutinized for provisions dealing with force majeure events. Such **contractual provisions** take precedence over the statutory rules.

- For some **types of contracts**, special provisions may apply in case of force majeure events (Section 4).
- If no **specific statutory or contractual provision** is applicable, the general rules on default and the principles developed by the Federal Supreme Court come into play (sections 3, 5 and 6).

### 3. Temporary inability to perform

- The creditor is, in principle, free to grant the debtor a **deferment of payment**. However, the creditor is generally not obliged to do so, even if the debtor runs out of money as a consequence of COVID-19.
- If the performance can only be rendered with a delay (i.e. no longer on the agreed date) because, for example, the sub-suppliers cannot deliver or because it is necessary to wait for governmental measures to be lifted, the **provisions on default of the obligor** are applicable (Art. 102 *et seq.* CO).  
**In particular, those provisions provide:**
- It is, in principle, upon the creditor to put the debtor in default by means of a reminder. If a certain date of performance was agreed upon, the debtor is in default upon the expiration of such date.
- The defaulting debtor must prove that the delay occurred **without its fault**, e.g. that the cause of the delay is the COVID-19 pandemic.

- If the debtor **cannot prove that it is not at fault**, the debtor is liable for the damage which the creditor has suffered as a result of the delay, and from then on, in principle, also for acts of God (e.g. damage or destruction of the object).
- The debtor must take all **reasonable measures** to timely perform its obligations, such as finding other sub-suppliers or reorganizing its business.
- If the **debtor does not act or acts too late**, the debtor is liable for the delay caused by its inactivity.
- If the debtor knows that it will not be able to perform timely, the debtor should **inform the creditor in a timely manner**. Otherwise, the debtor may be liable.
- If the debtor can prove that it is not to be blamed for the delay, the debtor is released from the obligation to perform until it can or should be able to perform. In such a case, the debtor is, in principle, **not liable** for the consequences of the delayed performance.

#### 4. Important specific provisions

- In connection with delays in performance caused by force majeure, the statutory provisions concerning purchase and work contracts may come into play:
  - **Purchase contracts:** Art. 190 and 214 CO contain special provisions concerning delayed delivery and payment, respectively.
  - **Work contracts:** Art. 365(3) CO obliges the contractor to notify the employer of anticipated delivery delays. In case of exceptional circumstances, an adjustment of the contract price or dissolution of the contract can be demanded (Art. 373(2) CO).
- **Other types of contracts**, such as donation (Art. 250(1)(ii) CO) or mandate agreements (Art. 404 CO), contain revocation and termination options, respectively, that can be exercised to escape obligations.

#### 5. Adaptation of the contract

- The parties are of course free at any time to adapt the contract to the new conditions by **mutual agreement**.
- In the event of extreme effects on the balance between performance and counter-performance, there may be an entitlement to the **adaptation of**

**the contract** based on the principle of *clausula rebus sic stantibus*.

- The **requirements** to be met for an entitlement to a contract adaptation based on changed circumstances are high. On the other hand, the effects of COVID-19 are immense and exceptional.
- The **elements to be shown** are i) fundamental change of the circumstances since the conclusion of the contract, ii) serious disturbance of the equivalence between performance and counter-performance, iii) the change was neither foreseeable nor avoidable, iv) no contradictory behavior (e.g. unconditional performance of the contract despite the exceptional circumstances).
- For **example**: Unreasonably high additional costs incurred by the debtor as a result of measures taken to regain his ability to perform (e.g. considerably more expensive sub-suppliers).

#### 6. Termination for cause

- According to the Federal Supreme Court, **continuing obligations not regulated by law** (e.g. recurring supply contracts) can be terminated with immediate effect for cause.
- A termination for cause presupposes that the performance of the contractual obligation became unbearable for economic or personal reasons due to the changed circumstances.
- It is conceivable, **for example**, that the other party refuses to agree to a contract adaptation on the basis of *clausula rebus sic stantibus*, although the conditions for an adaptation would be met.
- However, it is **unclear** whether such a termination would be upheld by a court as there is no comparable precedent yet.

#### 7. Checklist

- I. Examine the impact of the pandemic on the contract at issue.
- II. Clarification of the legal situation (contractual force majeure/pandemic clause? applicable provisions?).
- III. Examination of measures to remedy the default.
- IV. Communication in writing with counterparty for evidentiary reasons.

A **checklist for liquidity shortages** due to COVID-19 can be found [here](#).