

# Disruption and non-performance of contractual obligations due to COVID 19 under German Law

March 24, 2020

Firm General and Europe

---

COVID-19 is causing significant interruptions to international and domestic trade with implications for commercial contracts. This advisory note discusses a number of applications of German contract law that may provide relief to parties unable to perform their contractual obligations. First, parties may allocate risk in their contracts associated with events outside of their control through the inclusion in the contract of a “force majeure clause”, a “reservation of being duly supplied” clause, or extraordinary rights for termination and/or for withholding performance. Second, should the parties have failed to include such clauses or should the event not fall within their respective definitions, the statutory law defenses of impossibility (*Unmöglichkeit*) or impracticability (*Unvermögen*) of performance, a temporary right to withhold performance, frustration of purpose (*Wegfall der Geschäftsgrundlage*), or extraordinary termination rights can provide relief.

## Force Majeure Clauses

The German Civil Code (BGB) does not include a statutory provision on force majeure. However, it has become customary in Germany for the contracting parties to agree on force majeure clauses. If that is the case, the content and the risk allocation of the clause determines its impact on the parties’ rights and obligations. Whether or not a force majeure clause applies to the COVID-19 scenario has to be identified by an interpretation of the force majeure clause, in particular with regard to the definition of a force majeure event. There may be cases where the parties have defined specific events like an epidemic or a pandemic as force majeure events and may have specified which rights and obligations exactly a party may have under the clause. If only the term force majeure (*höhere Gewalt*) is used and events like and/or an epidemic or a pandemic are not explicitly qualified as a force majeure event, the provision has to be interpreted - in particular on the basis of the wording, the purpose, and the logical context - as to whether COVID-19 can be qualified as a force majeure event in the meaning of the respective provision. If, for example the force majeure clause lists exhaustive examples which are qualified as a force majeure event and an epidemic or an pandemic are not listed, it might be argued that the parties had the goal to agree on a final list of force majeure events and that an epidemic or an pandemic shall not be qualified as a force majeure event. If, in contrast to that, the list is only exemplary, the COVID-19 scenario might be qualified as a force majeure event based on the principles which have been set forth by the German Federal Civil Court (BGH). According to the German Federal Civil Court (BGH) an event might be qualified as a force majeure event in case of an unexpected external event that is beyond both parties’ control, which has no operational connection and cannot be averted even by exercising the utmost care which can

reasonably be expected.<sup>1</sup> According to the German Federal Civil Court (BGH), an event belongs in a party's risk sphere if it only hits that party, even if the party is not at fault. Accordingly, when an authority made a mistake that caused the passport of a party to be listed in a no-fly list, this was seen as belonging in that party's risk sphere, while the prevention of a flight by the eruption of the volcano Eyjafjallajökull was held to be a force majeure event.<sup>2</sup>

The party relying on force majeure must have been unable to prevent the event (or to foresee it and prevent its consequences) using commercially reasonable means. For example, heavy storms in the North Sea are not uncommon in January and therefore, adequate precautions must be taken.<sup>3</sup> With regard to COVID-19 it might also make sense to distinguish between various consequences, e. g. legislative and governmental acts (shutdowns, travel restrictions), non-availability of employees due to COVID-19 infection.

In contrast to the German Civil Code (BGB), the UN Convention on the Sale of Goods (CISG) provides in Art. 79 that a party cannot claim damages for non-performance if the failure to perform was due to an impediment beyond the party's control and the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. If the contract falls within the scope of application set out in the CISG and the applicability of the CISG is not excluded in the contract, then a supplier/provider may rely on Art. 79 CISG.

#### **“Reservation of being duly supplied” clauses**

Clauses enabling the supplier to withdraw from the contract if his own supplier fails to promptly deliver are not unusual in supply contracts. They are mostly valid if the supplier can prove that the supply contract he himself was relying on constitutes a “congruent coverage transaction”.<sup>4</sup> He must pay back the consideration. In B2C contracts, certain formal requirements apply under sec. 308 no. 8 German Civil Code (“BGB”).<sup>5</sup>

#### **Contractually agreed rights to withhold or suspend performance or of extraordinary termination**

In project agreements or contracts for services, the contractor or service provider may have reserved the right to suspend or withhold performance or even to terminate in certain cases described in the respective clause.

#### **Impossibility (Unmöglichkeit) or Impracticability (Unvermögen) of Performance**

According to sec. 275 par. 1 BGB a claim for performance is excluded to the extent that the performance is impossible for any person (*Unmöglichkeit*) or impracticable for the debtor (*Unvermögen*). If the party whose performance is impossible or impracticable is not alone or “overwhelmingly” responsible for this, the other party cannot claim damages. In the case of legislative or governmental measures which, for example, prevent production or the

---

<sup>1</sup> BGH, decision dated 16.05.2017 – X ZR 142/15.

<sup>2</sup> BGH, decision dated 18.12.2012 – X ZR 2/12; BGH, decision dated 16.05.2017 – X ZR 142/15.

<sup>3</sup> OLG Bremen, decision dated 08.04.1997 - 3 U 81/96.

<sup>4</sup> BGH, decision dated 22.03.1995 - VIII ZR 98/94.

<sup>5</sup> [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0945](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0945)

provision of services, it is quite conceivable that one party can successfully invoke the impossibility or impracticability of performance. The creditor can, however, reclaim the consideration if it has already been paid, unless one of the numerous exceptions apply that provide for an earlier transfer of risk to the creditor.<sup>6</sup>

If performance is only partly impossible or impracticable, the provisions apply only to the part that is impossible, unless the creditor has no interest in the part of the performance that remains possible.<sup>7</sup>

If the debtor cannot perform in the right manner, this also constitutes (“qualitative”) impossibility, unless the creditor has rights under a statutory warranty.

A temporary obstacle usually only leads to a temporary suspension of the obligation to perform. A delay of indeterminate length is considered to be equivalent to impossibility if it threatens the purpose of the contract and the other party cannot reasonably be expected to wait until performance becomes possible again.<sup>8</sup>

### **Right to refuse performance**

The debtor can also refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirement of good faith, is grossly disproportionate to the creditor’s interest in the performance (“factual impossibility”, sec. 275 par. 2 BGB). There is hardly any case law on this provision, but the threshold is certainly considerably higher than “commercially reasonable efforts”; the provision aims to cover cases in which it could be argued under sec. 275 par. 1 BGB that the performance is not entirely physically impossible.

The debtor can also refuse to perform obligations he must perform in person if performance cannot reasonably be expected on the basis of a weighing of his interests and the creditor’s interests (sec. 275 par. 3 BGB). It has been argued that this could apply during a pandemic if the employee or service provider would run a risk of being infected if he performed the work, at least the employer or principal has failed, or is unable to, take precautions that sufficiently mitigate the risk (taking into account the nature of the service, e.g., doctors and healthcare workers are expected to accept higher risks).<sup>9</sup>

### **Frustration of Purpose**

If circumstances that became the basis of a contract have significantly changed since the contract was entered into, and if the parties would not have entered into the contract, or would have entered into it with different contents if they had foreseen this change, then a party can demand modification of the contract to the extent that it cannot reasonably be expected to adhere to the contract considering all circumstances of the case, in particular, the allocation of risks under the contract (sec. 313 BGB).<sup>10</sup> If the contract cannot be

---

<sup>6</sup> Münchener commentary BGB/*Ernst*, 8. edition 2019, sec. 326 no. 10 et seq.

<sup>7</sup> BGH, decision dated 17.02.1995 - V ZR 267/93.

<sup>8</sup> OLG Karlsruhe, decision dated 14.09.2004 - 8 U 97/04.

<sup>9</sup> *Falter*, BB 2009, 1974 („Die Arbeitsleistung in der Pandemie“).

<sup>10</sup> [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p1146](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1146).

modified, or one party cannot reasonably be expected to agree to a modification, then the contract can be cancelled or, if it is a long-term contract, terminated.

The borderline between the right to refuse performance according to sec. 275 para. 1 BGB on the one hand and the right to demand modification or to terminate due to frustration of purpose according to sec. 313 BGB is not that clear. However, the prerequisites for a modification or termination of a contract based on the frustration of purpose principle according to sec. 313 BGB are as follows:

- The circumstances which have become the basis of the contract have significantly changed.
- The change(s) which have resulted in a significant interference of the basis cannot be allocated to the risk sphere of one of the parties. The delimitation of risk spheres can result from the contract, the purpose of the contract and non-mandatory law. As a rule, the production and delivery of products is assigned to the supplier's sphere of risk, which is why he usually has no right to demand an adjustment of the contract. However, the risk of unforeseeable legislative changes is not to be borne by a specific party and therefore can lead to frustration of purpose.<sup>11</sup>
- Finally, adherence to the un-modified contract must lead to an unacceptable result that is quite simply incompatible with law and justice and must therefore not be reasonable for the party concerned. This requires a comprehensive balancing of interests under consideration of all circumstances.<sup>12</sup>

If the contract can be performed, but the creditor has lost interest in the performance due to an unforeseen event, this usually does not lead to frustration of purpose. The financial and economic consequences of war or disaster (rather than the war or disaster itself) do not lead to frustration of purpose.<sup>13</sup> This is particularly relevant for loans. However, there is a case in which an Appeals Court has held that frustration of purpose can apply if a company's survival is threatened due to an external event (calculation error by a third party).<sup>14</sup>

### **Extraordinary Termination Right for Long-Term Contracts**

For long-term contracts, an extraordinary right of termination also exists under sec. 314 BGB, which has essentially the same requirements as sec. 313 BGB.

So far, only scholars appear to have discussed the question of whether a party to a long-term contract that cannot reasonably be expected to continue adhering to the contract first must seek an adjustment of the contract under sec. 313 BGB, or if it can terminate immediately under sec. 314 BGB.<sup>15</sup> This could be relevant to many long-term contractual relationships affected by the pandemic.

---

<sup>11</sup> BeckOK-BGB, Bamberger/Roth/Hau/Poseck, 53th ed., no. 54.

<sup>12</sup> BGH, decision dated 11.10.1994 - XI ZR 189/93.

<sup>13</sup> BGH, Urteil vom 30. 9. 1952 - I ZR 83/52.

<sup>14</sup> OLG Düsseldorf, Urteil vom 07-11-1995 - 21 U 12/95

<sup>15</sup> Münchener Kommentar BGB-Gaier, 8. Auflage 2019, § 314 BGB no. 22.

### Right to withhold due to uncertainty (sec. 321 BGB)

Under sec. 321 BGB, a party to a mutual contract which is obliged to perform first may refuse performance if, subsequently to the contract being entered into, it becomes apparent that the party's right to receive the consideration is in jeopardy because the other party now has insufficient means to perform.<sup>16</sup> The right to withhold does not exist if the other party provides the consideration or security.

The Federal Civil Court (BGH) has applied the provision by analogy in a case in which the parties to a contract had agreed to exclude the right of setting off.<sup>17</sup> The court allowed one party to set off a claim against a claim of the other party because the other party's financial situation had deteriorated (*Vermögensverfall*).

### COVID-19-related legislative actions by the German legislator

The Germany Federal legislator intends to introduce in Art. 240 EGBGB

- a temporary right to withhold payments in favour of consumers and small businesses to prevent them from losing their homes (or, respectively, business premises) and supply of basic utility and telecommunications services,
- a limitation of landlords' termination rights if tenants are in default of payment as a result of the pandemic,
- special rules regarding default and termination for consumer loans.

### Conclusion

The above discussion covers only the basic principles of law regarding force majeure clauses, the doctrines of impossibility or impracticability, and the excuse of frustration of purpose. Whether and if so, to what extent the principles may apply, depends on the circumstances of the respective case. For further legal analysis specific to your claim or set of circumstances, please reach out to Covington's Frankfurt office.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Firm General and Europe practice:

**Lars Lensdorf**  
**Moritz Hüsich**  
**Ulrike Elteste**

+49 69 768063 30  
+49 69 768063 453  
+49 69 768063 364

[lensdorf@cov.com](mailto:lensdorf@cov.com)  
[mhuesch@cov.com](mailto:mhuesch@cov.com)  
[uelteste@cov.com](mailto:uelteste@cov.com)

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.

---

<sup>16</sup> [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p1175](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1175).

<sup>17</sup> BGH, Urteil vom 19-09-1988 - II ZR 362/87.