

Austria

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Can a Party be Excused from Contract Obligations by Citing the COVID-19 Pandemic?

This is an overview of recurring questions we currently receive from clients who have entered into contracts which provide for Austrian law as the law applicable to the contract and are now affected by the rapid spread of COVID-19 and the impact of government responses which have caused unprecedented disruptions to business on a global scale.

This situation poses problems for many of our clients, especially in connection with contractual obligations and possible consequences of non-performance. For companies that are considering relying on *force majeure* clauses or statutory remedies to terminate or adjust contracts, or those anticipating that their contractual counter-parties may do so, we provide answers to key questions on what remedies are available under Austrian law.

Challenges and contract types vary between industries and have to be assessed individually. But this short Q&A can serve as a first guide to assess the next steps in dealing with business partners in the current situation.

Q: Are my contractual obligations towards my business partners on standstill due to the current situation caused by the Coronavirus?

No. Parties still need to comply with their contractual obligations and contracts are not automatically terminated because of the Coronavirus measures. However, due to the current situation parties might be able to (unilaterally) terminate or adjust a contract based on contractual *force majeure* provisions or the fact that the basis for the contract has ceased to exist ("*Wegfall der Geschäftsgrundlage*"). What does this actually indicate?

- *Force majeure* is to be understood as unexpected external circumstances that prevent a party from fulfilling its contractual obligations. The underlying event must be unforeseeable and must not be the result of an action by the contracting party. A declaration of *force majeure* may – depending on the individual case – enable a contracting party to avoid liability for non-performance. The Coronavirus Crisis can be qualified as such a scenario. However, the exact starting point and the uncertain end point and therefore when the argument of *force majeure* can be successful, might be difficult to assess.
- If the basis of the contract has ceased to exist ("*Wegfall der Geschäftsgrundlage*") then a party may also withdraw from a contract without any negative consequences. This means that the termination of a contract due to the discontinuation or change of the basis of the contract presupposes such a fundamental change in the circumstances existing at the time when the obligation was entered into that insisting on the fulfilment would have to be seen

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as a violation of the principles of good faith. It has to be noted that this change (i) must not be temporarily, (ii) could not have been foreseen in any way and (iii) is not attributable to the sphere of the party invoking the change. Several contract types are subject to special statutory provisions such as leases, whereby in epidemic scenarios no rent has to be paid if the premises are unusable.

However, the described possibilities of termination are only an *ultima ratio*. This means that a party can only invoke these ways of termination if there is

- no contractual clause to the contrary;
- no applicable dispositive law (warranty, error, transfer of risk provisions, etc); or
- no possibility of supplementary interpretation of the contract,

which could be applied first.

Even if these conditions apply, the adjustment of the contract always has priority over an actual termination.

Q: In case I am not liable for damage due to force majeure, do I have to pay a contractual penalty?

This depends on the individual case, most contractual penalties are fault based and will thus not be triggered by *force majeure* events. In any case, an unreasonably high contractual penalty will be mitigated by the court by courtesy of mandatory mitigation rights.

Q: I was already in default with my contractual obligations prior to the Coronavirus outbreak. Can I still rely on the force majeure argument?

This answer has to be separated: The defaulting party remains liable for any damages or other negative consequences before the *force majeure* event. After the *force majeure* event, any party may rely on the *force majeure* argument to terminate or adjust the contract. However, this does not release the defaulting party from its liability for any damages caused due to the default before the *force majeure* event.

Q: I want to fulfill my obligations arising out of an existing contract, but due to orders by the authorities, I am objectively unable to do so. What should I do?

In case you cannot perform due to an order by the authorities or in case the performance is unreasonable due to important circumstances (e.g. because of the risk of infection), the contract can be terminated. The consequence is that the performances and payments need to be unwinded (each party has to give back what it has received). We recommend negotiating with the other party whether the performance might be possible at a later point in time.

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Q: Is the situation around the Coronavirus a reason for unilateral termination of existing contracts?

This depends on the individual case and the type of contract. The reasons for unilateral termination are often specified in the respective contract. Moreover, an adjustment of the contract comes first before a termination. In these scenarios, it is advisable to negotiate new terms and adjust the contract.

Q: Due to the significant change of circumstances, we would like to re-negotiate selected contractual obligations with our business partners. Is this possible?

Generally yes. But there usually is no obligation for the business partner to accept new terms.

Q: What if we undertake a commitment during the state of emergency contrary to the applicable governmental prohibitions?

Such a contractual arrangement will be null and void.

In addition, the executive forces have the possibility to impose administrative penalties and fines if the prohibitions are infringed upon.

Q: Under what circumstances is it obligatory to suspend or limit our business operations?

We recommend that you closely observe the current situation, as it is evolving quite rapidly and changing daily. If your business falls under the explicit prohibitions introduced by the Austrian Government, you need to comply with them and suspend the business operations as required. Please also analyze our [Client Alert](#) on this matter.

Q: Considering the current measures introduced by the Austrian Government, I am forced to close my business. Can I claim reimbursement of damages from the Austrian Government?

There is no definitive answer to this question now. Damage claims are not likely to succeed as long as the Government acted legally and without negligence. However, the authorities are working on compensation funds for any damages due to the current situation. We recommend you monitor the developments closely as the exact requirements are not known yet.

Q: Is there any impact on procedural or substantive periods?

Yes. The Austrian government is planning to interrupt all procedural periods until 30 April 2020. This means that all periods shall be interrupted and shall begin to run again in full on 1 May 2020.

Substantive statutory periods (statute of limitations, infringement of ownership, etc.) shall be suspended. Consequently, these time limits are extended by the period from the effective date of the Act until 30 April 2020.

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A corresponding Act will be passed today. We will inform you accordingly with our next client alert.

Q: Which steps should I take now?

1. Check the updates from the Austrian government on a daily basis.
2. Contact your business partners if you expect that you might not be able to fulfill your contracts. By doing this, you also comply with your duty to mitigate damages.
3. Review your contracts for any *force majeure* or extraordinary termination clauses.
4. Check if there is any remedy applicable to your individual case (warranty, error, transfer of risk provisions, etc).
5. Before terminating based on *force majeure* or because the basis for the contract has ceased to exist, try to adjust the contract with your business partner if possible.

If you have further questions, our specialists will be glad to help:



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