



COVID-19 as a case of force majeure: Legal consequences and practical advice

1. COVID-19 – a case of force majeure

COVID-19 or more the Corona crisis can be classified as a case of force majeure. Force majeure is understood by the case law in Germany as an event that cannot be assigned to any sphere of one of the contracting parties, but that affects the living conditions of the general public or an undetermined number of people from outside and is objectively inevitable and unpredictable (see BGH, judgment of 22 April 2004 - III ZR 108/03). Diseases and epidemics are basically also included under this term (see BGH, judgment of 16 May 2017 - X ZR 142/15). Although the current developments can still be observed, the classification of the corona crisis as a pandemic by the WHO on March 11, 2020 should provide clarity and force majeure can be assumed.

2. Legal consequences of force majeure: interruptions to construction progress

The legal consequences of a case of force majeure are diverse and must therefore be examined in each individual case taking into account the respective contractual agreements. In this respect, cases of quarantine measures against the personnel, confinement in different countries, and in particular restrictions on travel of personnel, construction sites in risk areas, restrictions on movement of goods, etc. could be considered. Because these consequences of the Corona crisis can have an impact on the construction process and thus ultimately on the contractual obligation to fulfil agreed deadlines.

2.1 Principle: Interruption of execution and postponement of deadlines

In principal, the contracting party concerned is temporarily released from its contractual performance obligations in the event of force majeure, without the other contracting party being able to derive any claims for this.

The occurrence of force majeure can mean that there is no need to perform for a certain time. That means, contractual obligations – as performance of services, delivery of material, etc. - are suspended for the time being and reinstated after the extraordinary event has ended. This is the case if force majeure has unreasonably disturbed - rendered impossible - the provision of services (see Palandt-Grüneberg BGB Commentary, 79th edition 2020, § 313 BGB, paragraph 32). Such an interruption is conceivable above all in the event of difficulties in delivering materials or in the event of a loss of labour due to quarantine measures. However, so that a contractor can rely on this, he must - especially under the regime of the VOB/B contract - comply with his warning and notification obligation and report disabilities.

In accordance with Section 6 Paragraph 2 No. 1 c) VOB / B, a case of force majeure will result the execution deadlines being extended, under the condition of the contract involving the VOB / B. As a result, deadlines are postponed and, in case of doubt, have to be arranged entirely new.

Even if a case of force majeure basically only leads to a (temporary) release from the performance obligations and not to the creation of financial claims, when protective measures are ordered, they are not generally excluded insofar as they are legally justified on an individual basis.



2.2 Exception: Cancellation of the contract

In exceptional cases, the ultima ratio may even include the complete termination of the contractual relationship.

According to the principles of the expiry of the business basis in accordance with § 313 BGB, serious special situations can lead to adherence to the contract no longer being reasonable and appropriate (see Palandt-Grüneberg BGB-Commentary, 79th edition 2020, § 313 BGB, marginal no. 42). However, this major consequence only occurs if even a contract adjustment, such as a change in benefits or postponements, does not restore the distribution of original risks.

In addition, Section 6 (7) sentence 1 VOB / B includes a right of termination for both parties, provided that the interruption in construction lasts longer than three months or if it is certain that an interruption of more than three months is unavoidable (Leinemann-Leinemann / Kues VOB / B-commentary, 7th edition 2019, § 6 VOB / B, marginal 275).

3. Remote effect of COVID-19: official orders

Regardless of the actual existence of a case of force majeure official orders are also suitable, bring about the consequences outlined above.

In view of the situation in Italy, Austria, the Czech Republic, Poland and France where confinement has already been put in place and also government measures taken in Germany and by the EU, additional restrictions which would have an impact on the progress of the construction sites are possible

The official options for averting the dangers to individuals or the general public according to the Infection Protection Act (IfSG) are also extensive. This includes, in particular, the aforementioned quarantine measures against personnel, which can be ordered by the authorities in accordance with Section 30 IfSG. The implementation of such measures justifies a right to extend the construction period.

4. Practical advice

Due to the continuing spread of COVID-19, the consequences of the crisis cannot be estimated. However, the effects are also likely to affect the construction industry and, in addition to their own performance, also affect any subcontractors and supply chains.

In order to reduce far-reaching adverse economic consequences, the occurrence or existence of impairments due to COVID-19 should be notified to the business partner at an early stage. This should be done in good order by means of a "classic" disability notification ("Behinderungsanzeige"), as not to make yourself unnecessarily vulnerable. The legal information on force majeure or any specific quarantine measures ordered by the authorities should be used as a basis for argumentation. However, it should not remain purely abstract. Rather, it has to be concretely explained how the corona crisis has a negative impact on the respective fulfilment of the contract.



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