

COVID-19 & CONTRACT LAW

How to react in contractual relations?

ARST LAW FIRM

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Situation 1 : What to invoke if you can't deliver a good or provide a service?

Execution has become "impossible": *Force majeure*

Aim: not to be held liable in the event of non-performance and/or to invoke suspension or termination of the agreement (with restitution where appropriate).

Definition: contractual or legal, provided that it must be an event :

- beyond the control of the debtor;
- which could not reasonably have been foreseen at the time of the conclusion of the agreement;
- the effects of which cannot be avoided by appropriate measures;
- preventing performance of the contractual obligation.

Execution has become "unprofitable": Contingency

Aim: obtain a renegotiation (revision or adaptation of the agreement) or resolution of the agreement.

Definition : contractual or legal, providing three cumulative conditions:

- the need for a change in unforeseeable circumstances at the time of the conclusion of the agreement;
- a change which makes the performance of the contract excessively onerous;
- that the Party affected by the change in circumstances has not agreed to assume the risk.

Situation 1 : Warning points

The Force majeure :

- *Force majeure* can be difficult to characterize (complex legal concept);
- The contract may provide for the treatment of *force majeure*;
- In case of failure to provide this, the legal consequences (suspension or termination of the contract) depend on its effects.

The Unforeseeability:

- The possibility of invoking unforeseen circumstances may depend on the date of conclusion of the contract (before or after 1st October 2016);
- Unforeseeability can be difficult to characterize (complex legal concept);
- The contract may provide for the treatment of the unforeseen event or even exclude it;
- Failing this, the treatment of the contingency may, in the absence of amicable renegotiation, require the intervention of a judge who will revise or terminate the contract.

Situation 2 : What to do if you are waiting for the delivery of a good or the performance of a service that does not take place?

➤ **Compulsory execution (obtaining the intended execution)**

- Either by enforcing the penalty clause of the contract if one is stipulated;
- Or by asking the Court for an injunction, under penalty payment, against the other party, to have to perform;
- Or by having a third party to do so, at the expense of the other party.

➤ **Termination of the contract (release from the contract, necessity of a serious breach of contract)**

- Either by enforcing the termination clause of the contract if one is stipulated;
- Or by a simple notification to the debtor;
- Or by taking it to Court (longer).

➤ **Compensation for the consequences of non-performance (damages)**

- Either by invoking the penalty clause of the contract if one is stipulated;
- Or by taking the defaulting party to Court (longer).

➤ **Suspension of one's own obligations (plea of non-performance)**

- By refraining from performing for the time of the other party's default.

➤ **Price review**

- By requesting, after a formal notice, if and when performance has taken place, a change in the price in proportion to the poor performance (delay, quantity or quality).



Situation 2 : Warning points

➤ The choice between treatment modes

- Compatible treatment methods may be combined (e.g. resolution + damages, enforcement + price review);
- The choice between the treatment methods depends on different criteria (expectations of the contracting party, prospects of execution by the other party, risks associated with the treatment method, etc.);
- The possibility of invoking certain mechanisms may depend on the date of conclusion of the contract (before or after 1st October 2016).

➤ Conditions to be met

- The implementation of certain mechanisms requires a serious breach ;
- Some mechanisms require prior formal notice (resolution, price review, implementation of liability);
- Certain mechanisms are implemented at the risk of the contracting party (unilateral termination, exception of non-performance).

➤ Barriers

- The other party may invoke *force majeure* or unforeseen circumstances;
- The co-contractor may also be subject to restructuring and insolvency proceedings likely to paralyse the mechanisms involved.

