

Coronavirus Information Hub: FAQ Commercial Contracts

The following FAQ provide you with **general answers** from a substantive Swiss contract law perspective (excluding the Vienna Sales Convention, CISG) in connection with the COVID-19 pandemic. Every situation related to the COVID-19 pandemic is different from the next and there is not a single correct answer. In addition, your contract may provide for other rules or special statutory rules may apply. Whether these general answers apply to your case at hand requires an **individual case-by-case assessment** of the contract and the governing law of the contract (Swiss law might not be applicable).

1. How does the COVID-19 pandemic generally affect contractual obligations?

In principle, the parties are still obliged to meet their contractual obligations ("*pacta sunt servanda*"). Under the given circumstances, however, the parties' contractual obligations might be affected in different ways by the COVID-19 pandemic. In order to assess the possible consequences of the COVID-19 pandemic for contractual obligations, the parties must first analyse their specific contracts and the governing law.

1.1. ... if the contract contains a force majeure or similar clause?

Where the underlying contract contains specific provisions dealing with non-performance, late performance or onerous performance of contractual obligations due to events like the current COVID-19 pandemic (e.g. force majeure clauses), the wording of the clause must be analysed to determine

- whether or not the current situation qualifies as a force majeure event; and
- the legal consequences of a force majeure event. Force majeure clauses typically protect contracting parties (by exempting or suspending the affected party from the obligation to perform and from liability) where a contract becomes impossible, difficult or onerous to perform due to a force majeure event. For further information on force majeure clauses, please see question 10.

1.2. ... if the contract does not provide for force majeure or the like?

In the absence of a force majeure clause or similar contractual provisions, the available remedies under Swiss law vary.

Depending on the circumstances of the case, a party's obligation may for instance become permanently and objectively impossible (see question 2) or just useless (see question 4), a party could be in default (see questions 3 and 6), have a right to judicial contract adjustment (see question 5) or have a right to terminate the contract (see question 7).

2. What if a governmental ban prohibits the performance of a contractual obligation (e.g. the holding of an event)?

The COVID-19 lockdown ordered by the Swiss Federal Council until at least 26 April 2020 for instance prohibits public or private events and orders the closure of most publicly accessible establishments, such as brick and mortar stores, restaurants, coffee shops, bars, museums, travel agencies, hairdressing salons, etc. (see [COVID-19 Ordinance 2](#)). A party's contractual obligations may be affected by such ban.

If the underlying contract provides specific rules for such a scenario, such contractual provisions apply. If the underlying contract is silent on such a scenario and no special statutory provisions apply, one might distinguish as follows regarding the consequences of a governmental ban on contractual obligations:

- **Impossibility:** Impossibility must be of permanent, and not only of temporary, nature. As the ban is limited in time, only the performance of the contractual obligations which due to their nature or the parties' agreement must be performed *during the lockdown* (e.g. when time is of the essence/the contract provides for a fixed date) becomes permanently impossible.
- **Non-performing party is the addressee of the ban:** Usually, the performance of the contractual obligations by the party *directly affected* by such a ban (e.g. the holding of an event by the event organiser on a specific date) become *objectively impossible* ("It can't be done by anyone"). Such objective impossibility must be distinguished from subjective impossibility ("I'm sorry, I simply can't do it") where it would still be possible for another party to perform the service.

If the circumstances leading to the permanent impossibility are not attributable to the non-performing party (as it is usually the case with the ordered COVID-19 lockdown), the non-performing party is

released from its contractual obligation to perform and no damages have to be paid, but at the same time the non-performing party loses its contractual counterclaim (e.g. claim for payment) and is liable for repayment of any consideration already received. However, special statutory rules (such as e.g. Article 185 of the Swiss Code of Obligations on sales) may provide for different consequences.

- **Non-performing party indirectly affected by the ban:** The performance of contractual obligations by the party which is only *indirectly affected* by the ban (e.g. supply of beverages to a caterer for the purpose of a specific event) is in principle *still possible*, even though it may have lost its purpose or may have become useless; please see question 4.
- **Temporary impossibility/default:** The performance of contractual obligations which can still be performed after lifting of the lockdown are, in principle, only delayed but remain possible. In case of a so-called temporary impossibility, the rules on contractual default apply; please see question 3. This might be different in case of continuing/long-term contracts.

Note that in principle, impossibility does not deal with economic hardship. Monetary payment obligations (cash/money debts) cannot become impossible as a matter of Swiss contract law and outstanding money debts remain payable.

3. What if a party has temporarily difficulties fulfilling its contractual obligations (e.g. delay) because of the COVID-19 pandemic?

A contracting party might encounter difficulties or even be prevented from performing its contractual obligations due to the COVID-19 pandemic. For example, a car producer might not be able to deliver a car to the buyer on time because its suppliers in turn have not delivered parts or because its employees are not working.

In such a scenario, performance of the contractual obligation is usually not objectively impossible (see question 2 above) and the *rules on contractual default* of the Swiss Code of Obligations apply. These rules provide – in short – for the following: If a party does not perform on time (and, where necessary, notice of default has been given under the contract), the counterparty may in its discretion: (i) continue to insist on performance and claim damages arising from the delay, (ii) waive performance and claim damages for non-performance, or (iii) withdraw from the contract. As a general principle, the non-performing party must pay damages only in the event that it cannot prove that it is not at fault.

4. What if the performance of a contractual obligation turns out to be useless for a contracting party?

Due to the COVID-19 lockdown ordered by the Swiss Federal Council until at least 26 April 2020 (see [COVID-19 Ordinance 2](#)), the performance of many contracts might turn out to be useless for one of the contracting parties. For instance, a coffee shop has ordered Easter decorations which it does not need now due to the closure order.

In principle, Swiss law requires that contracts be performed as agreed (“*pacta sunt servanda*”). This also holds true if the contract has in the meantime become useless for one of the contracting parties because of the COVID-19 pandemic. For the limited possibility to amend a contract, please see question 5.

It is, however, important to distinguish uselessness (see the above example of the Easter decoration) from loss of purpose: If a contractual service is useless, it can still be performed and the debtor can still accept it. In contrast, if a contractual service has lost its purpose, the contractual service is still possible, but the creditor can no longer accept it. Textbook examples are the deceased patient whom the called doctor can no longer treat as a result of death or the burnt down house which the called painter can no longer paint as a result of the fire. In cases of loss of purpose, the prevailing doctrine and the Swiss Federal Supreme Court apply the rules on permanent objective impossibility (see question 2).

5. What if the performance of a contractual obligation becomes onerous – can it be adjusted?

If the underlying contract provides specific adjustment rules for such a scenario, then these contractual provisions apply. A contract might for example provide for a right of the seller to adjust prices in case its suppliers raise their prices.

If the underlying contract does not provide for specific adjustment rules, the general principle “*pacta sunt servanda*” applies which means that contracts should be performed as agreed, regardless of whether the performance of the contract has become burdensome for a party.

Swiss contract law provides for only very limited exceptions to this principle, particularly in case of a *fundamental change of the circumstances* since conclusion of the contract which substantially alters the equilibrium of the contract, and such change was neither foreseeable nor avoidable by the parties, and results in an obvious imbalance to the detriment of one party (legal instrument of “*clausula rebus sic stantibus*”). Whether there is such a fundamental change of circumstances depends to a large extent on the specific case, however please note that the courts tend to apply such exception very restrictively. If this exception is applicable, the affected party has a right to request an

amendment of the contract, which would need to be demanded in court.

In any case, a contract can be amended by mutual agreement of the contracting parties. Such amicable solution is usually faster, more efficient and more beneficial for the future business relationship than a legal claim for contract amendment.

6. What if the contracting counterparty does not pay an outstanding debt?

In principle, Swiss law requires all debtors to be able to pay their money debts. Creditors can make claims for due debts against debtors (see [FAQ Restructuring and Insolvency](#)). A creditor may, however, first engage in talks and negotiations with the defaulting debtor. Possible remedies could be to agree on a payment in instalments, or to grant the debtor a deferral of the payment (moratorium). If the negotiations are protracted, it is advisable to send a payment reminder to ensure that the rules on default apply.

7. Can contracts be terminated due to the COVID-19 pandemic?

There might be a right to extraordinarily terminate a contract due to the COVID-19 pandemic in the following cases:

- **Contractual provision:** The underlying contract may provide for an extraordinary termination right in case of such a scenario.
- **Special statutory provisions** might apply in case of certain specific types of contracts.
- **Termination on serious grounds:** In case of a continuing/ long-term contract, such contract may be terminated extraordinarily on *serious grounds*, e.g. if the continued performance of the contractual obligations would become unbearable for one party. The COVID-19 pandemic might under certain circumstances constitute such a severe ground. However, in long-term contracts, the COVID-19 pandemic will often only be considered a “hiccup” which – taking into account the whole contract over its entire term – does not render the performance of the contract as a whole unbearable.

Termination of a contract may only be of limited help if the terminating party is still interested in the contract as a new contract would need to be negotiated after the crisis.

8. The Swiss Federal Council's ban on events: What are the effects on agreements?

Regarding the Swiss Federal Council's ban on events and its effects on contractual performance and payment obligations, please see our [Newsletter 132](#).

9. The Swiss Federal Council's order to close publicly accessible establishments: What are the effects on rental agreements?

Regarding the Swiss Federal Council's ban on operating publicly accessible establishments (see [COVID-19 Ordinance 2](#)) and its effects on the tenant's obligations to pay rent, please see [FAQ Real Estate](#) and our [Newsletter 136](#).

10. What is a force majeure clause? Does the COVID-19 pandemic qualify as a force majeure event?

In connection with the COVID-19 pandemic, “force majeure” is frequently referenced, a term which is often used in international commercial contracts. Typically, force majeure clauses protect contracting parties (by exempting the affected party from the obligation to perform and from liability) in situations where a contract becomes impossible, difficult or onerous to perform due to events outside the affected party's control.

Swiss law in principle recognises and uses the term force majeure (*höhere Gewalt*) without expressly defining what it means. It has different meanings, effects and preconditions, depending on the jurisdiction and on the wording of the contract.

Force majeure clauses typically list a series of examples which “inter alia” qualify as force majeure – such as political events like governmental actions, war, embargos, terror attacks, or natural disasters like earthquakes, storms and floods. Whether the current COVID-19 pandemic qualifies as a force majeure event cannot be answered in a general way, but depends first and foremost on the wording of the respective clause in the contract as well as the will of the contracting parties.

If a party can successfully invoke a force majeure clause, the effects and consequences also vary from contract to contract depending on its wording. The contracts typically provide for a suspension of the respective obligations of the parties, a right to amend the terms of the contract (e.g. prices) or even a right to extraordinarily terminate the contract.

Please also see question 1 for further information on contracts with/without a force majeure clause.

11. Should force majeure or similar clauses be added to existing and new contracts?

If you wish to amend an existing contract or add a clause to future contracts or contracts currently being negotiated, we would recommend for you to clearly address the current COVID-19 pandemic and provide specific remedies or a general adjustment or termination right/mechanism for it. Adding a general force majeure clause will most likely not be sufficient as the force majeure event must not have been foreseeable at the time of the conclusion or amendment of the contract (which would be the case for any COVID-19 related events). However, please bear in mind that no single clause can legislate for every eventuality and ramification caused by COVID-19.

Even if your contracts are not directly affected by the COVID-19 pandemic, you may want to review the terms of your existing contracts and contract templates (including your general terms and conditions) to add wording which addresses the potential impact of epidemics, pandemics or other force majeure events on the ability to perform your contractual obligations. You may want to also keep this risk in mind in the future when drafting and negotiating contracts.

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[Coronavirus Information Hub](#)

Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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