

CONTRACTUAL INSTRUMENTS FOR PANDEMIC PROBLEM SOLVING



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Global (*unidroit*)

- Force Majeure
- Hardship

German Civil Code
(„BGB“)

- SECTION 275: Exclusion of the duty of performance
- SECTION 313: Interference with the basis of the transaction
- SECTION 314: Termination, for a compelling reason, of contracts for the performance of a continuing obligation

ARTICLE 7.1.7 *unidroit* (FORCE MAJEURE)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

ARTICLE 7.1.7 *unidroit* (FORCE MAJEURE)

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

ARTICLE 6.2 *unidroit* (HARDSHIP)

ARTICLE 6.2.1 (Contract to be observed) Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

ARTICLE 6.2.2 (Definition of hardship) There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

ARTICLE 6.2.2 *unidroit* (HARDSHIP)

ARTICLE 6.2.3 (Effects of hardship) (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.

Section 275 BGB: Exclusion of the duty of performance

(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

(2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

Section 313 BGB: Interference with the basis of the transaction

(1) If circumstances which 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, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

Section 313 BGB: Interference with the basis of the transaction

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

Section 314 BGB: Termination, for a compelling reason, of contracts for the performance of a continuing obligation

(1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period.

Section 314 BGB: Termination, for a compelling reason, of contracts for the performance of a continuing obligation

(2) If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated only after the expiry without result of a period specified for relief or after a warning notice without result. Section 323 (2) number 1 und 2 applies, with the necessary modifications, as regards the dispensability of specifying a period for such relief and as regards the dispensability of a warning notice. Specifying a period for relief and issuing a warning notice can also be dispensed with if special circumstances are given which, when the interests of both parties are weighed, justify immediate termination.

Section 314 BGB: Termination, for a compelling reason, of contracts for the performance of a continuing obligation

(3) The person entitled may give notice only within a reasonable period after obtaining knowledge of the reason for termination.

(4) The right to demand damages is not excluded by the termination.

Contractual provisions prevail

- Contractual arrangements override general rules and principles.
- As a result of private autonomy, contracting parties can formulate binding regulations.
- *In doing so, they should conceptually anticipate the risks of the transaction and agree on what shall happen in the event of occurrence.*
- If they do not do so, judges/arbitrators are unlikely to be inclined to intervene in the contract in their favor.

Thank you for your kind attention.

If there are any questions concerning a specific case, just contact me:

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