



Effects of the COVID-19 outbreak on contract law

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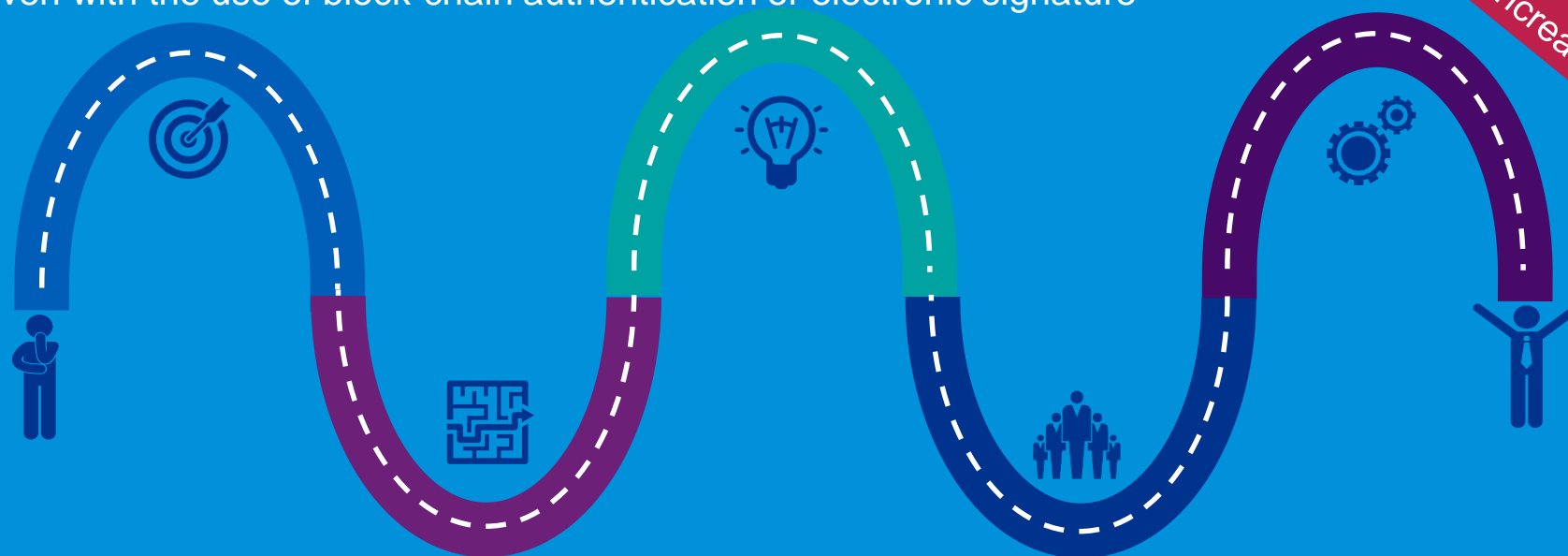


KPMG solutions for the Covid-19 situation



Over the past few days, we have worked with our experts to develop an "epidemic-proof" contractual solution:

- Various secure methods of concluding a contract
- Performance through a solid structure, combined with performance in instalments as required
- Continuous solvency stress test and third party verification / analysis
- Even with the use of block-chain authentication or electronic signature



The number of legal disputes is expected to increase!



Contracts in an extraordinary situation 1.



Force majeure + The contract becoming impossible + Amendment of the contract

In all cases, it **must be examined whether the specific contract** (and/or the attached standard contract terms) **contains a force majeure clause**, which will settle the issue, as it will **primarily govern the specific legal relationship between the parties**.

The issue of force majeure should be considered in the context of the exemption from liability for breach of contract. For example, if one of the contracting parties fails to deliver the ordered goods on time, they may be exempted from any consequential claim for damages. **However, this can only happen in exceptional cases where the party can prove that:**

- a force majeure event is the reason of failure to perform in time, so there is a de facto and direct link between the delay and the event of force majeure;
- the outbreak was not foreseeable at the time when the contract was concluded (this is unlikely in the case of new contracts concluded in February or March, since, in whole or in part, it was already foreseeable)
- he could not be expected to have avoided that circumstance or averted the damage (e.g. by trying to obtain the product from another source).

Each case must be considered individually, but as a general rule, force majeure cannot automatically be established based on the current state of danger. The thinking behind the regulation under the new Civil Code is not that either. Invoking force majeure requires careful examination since it is the party invoking it that shall bear the burden of proof that the above-mentioned conditions for exemption are met.



Contracts in an extraordinary situation 2.



Force majeure + The contract becoming impossible + Amendment of the contract

It is possible that the outbreak may render the performance of the contract impossible altogether, resulting in the termination of the contract between the parties. As a **general rule**, if neither of the parties is liable for the performance becoming impossible, **the provided service shall be returned or monetary reimbursement shall be provided** for the service provided prior to the termination of the contract.

However, please note that, as a general rule of civil law, the Covid-19 outbreak is not in itself a sufficient reference point for the contract becoming impossible.

Examining the additional circumstances of a particular case will determine whether it is lawful to invoke it, for example: timeliness, nature of the service, geographical issues, official measures ordered, specific individual circumstances, etc.



Contracts in an extraordinary situation 3.



Force majeure + The contract becoming impossible + Amendment of the contract

Contract to produce a work becoming impossible

To examine: in whose sphere of interest did the performance become impossible?

In the case of **contracts to produce work**, where **neither party is liable** for the performance becoming impossible, the risk-sharing shall be in accordance with the „spheres of interest”, as follows:

- the reason for the performance becoming impossible occurred within the contractor's sphere of interest: the contractor shall not claim remuneration
- the reason for the performance becoming impossible occurred within the client's sphere of interest, the contractor shall be entitled to the contractor's fee, but only to the amount reduced by cost savings
- the reason for the performance becoming impossible occurred within or outside of both parties' spheres of interest, the contractor shall be entitled to the pro rata fee of the work performed and costs.

The application of this latter rule is **the most probable**, but the division according to the spheres of interest of the contractor and the client may also play a role, depending on the circumstances.



Contracts in an extraordinary situation 4.



Force majeure + The contract becoming impossible + Amendment of the contract

Amendment of the contract by court

In a permanent legal relationship between the parties it is also possible to request the court to amend the contract if,

- due to a circumstance that occurred after the conclusion of the contract, the performance of the contract with unchanged conditions would harm his substantial legal interest, and
- the possibility of a change in the circumstances was not foreseeable at the time when the contract was concluded, the change in circumstances was not caused by him, and the change in circumstances falls outside his normal business risk.

In addition to the set of conditions that are difficult to meet, the court's discretion is also limited by the fact that the modification must not harm the substantial legal interest of either party.

Legislative intervention

- In order to avoid mass litigation similar to the foreign currency loans, legislative intervention may also become possible:
- The question is: Despite the uniqueness of legal relationships, can a common feature be identified beyond the factual presence of the Covid-19 outbreak, and can it be regulated? It might be problematic for the reason that the legislative intervention clearly overrides the parties' freedom of contract and is therefore of limited application.
- This type of legislative action is always preceded by mass claims for breach of contract, which is unlikely to happen in the near future.



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