COVID-19 & CONTRACTS :
REMEDIES | PREEMPTIVE MEASURES

The current pandemic is causing a global economic slowdown and already significantly compromises the continued business operations of many industries.

The effects on contractual relations are direct and considerable: the volume of orders collapses, deliveries are no longer possible, deadlines are no longer met, liquidity is depleted while operating costs accumulate.

The parties to a contract may find it impossible to perform it on the agreed terms. What are the existing remedies and measures to be taken?

The following presentation is intended to provide an overview.

REMEDIES : SWISS CONTRACTS

These are agreements on transfer of ownership (sale, delivery, deposit, lease, loan, etc.), contractor agreements (construction, design, repair, etc.) or services provided exclusively in Switzerland, by Swiss players, and within Swiss territory. In this case, Swiss law will in principle be the only applicable law; it contains the following possible remedies.

REMEDY	EFFECTS
Clausula rebus sic stantibus	In contracts of duration, this principle provides the possibility of **having the contract amended** or **cancelled** if, owing to circumstances subsequent to its conclusion and unforeseeable, there is such an **obvious disproportion** between performance and consideration that the fact that one party persists in its claim appears **abusive**. [1] The principle also allows a party to **refuse its own performance**. [2]
Exception relating to the order of performance (*exceptio non adimpleti contractus*)	Pursuant to Art. 82 of the Swiss civil code (« CO »), a party to a bilateral contract **may not demand performance until he has discharged** or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date.

[1] Decision of the Swiss supreme court (“DSC”) 93 II 390
[2] DSC 127 III 300

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Subsequent impossibility	If the impossibility of performance exists at the time of conclusion of the contract, the contract is **null and void**[3]. If the impossibility occurs subsequently, even if it is subjective, it entails a duty to compensate the damage sustained by the other party, unless **the debtor can prove that no fault is incumbent on him**. [4] The duty to compensate the damage remains if the fortuitous event occurred while the debtor was in default. [5]
Termination for good cause of duration contracts	Any duration contract, whether open-ended or fixed-term, may be **terminated for good cause**, even in the absence of a specific legal provision[6]. The contractual limitation on the exercise of this right, for example by providing for a fixed binding duration of the contract, is null and void. The "cause" must be of sufficient objective and subjective seriousness; the contract is immediately terminated upon serving of notice.
Interim measures	Article 262 of the Code of Civil Procedure provides for the possibility for the court to order provisional (interim) measures when there is an infringement or a risk of infringement of a right that may cause damage that is difficult to repair. The court may issue an **injunction to cease and desist**, to **remedy an unlawful situation** or **order a specific performance**.

REMEDIES : CROSS-BORDER CONTRACTS

Where the contract has a foreign connection (e.g. domicile of the contracting party), the applicable law is determined by the applicable international conventions (e.g. the United Nations Convention on Contracts for the International Sale of Goods – "CISG"[7]) or, failing that, the rules applicable to the private international law of the state concerned; in Switzerland this will be art. 117ss of the Swiss Private International Law Act ("PILA")[8]. As a general rule, it will be the law chosen by the parties and, failing that, the law with which the contract is most closely connected.

If the contract is subject to an arbitration clause and in the absence of a choice of substantive law, the arbitral tribunal shall determine it by taking into account the closest connection with the dispute (Art. 187 para. 2 PILA), if necessary, by drawing on international commercial practices, whether codified (UNIDROIT Principles[9], PECL[10], Incoterms[11], or not (Lex Mercatoria[12]).

If Swiss law has been chosen or is applicable, each party will have the above remedies available in Switzerland.

If foreign law applies, the remedies shall be those contained in the applicable substantive foreign law (*lex causae*) or, alternatively, those contained in the international commercial practice.

3 art. 18 CO
4 DSC 82 II 332
5 Art. 103 al. 1 CO
6 DSC 122 II 262
7 https://uncitral.un.org/fr/texts/salegoods/conventions/sale_of_goods/cisg
8 https://www.unine.ch/files/live/sites/florence.guillaume/files/shared/publications/pil_act_1987_as_from_1_1_2017.pdf
9 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016
10 https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/
11 https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/
12 https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria)

Among the various legal traditions are the following remedies.

LAW	REMEDY	EFFECTS
	**Force majeure**	Contained in many international contracts, this clause aims at mitigating the consequences of **unforeseeable, irresistible and external events, over which the party availing himself of it has no influence**, and **which are the cause of the impossibility** for that party to the contract to perform. Such a clause establishes a legitimate excuse for non-performance and establishes a special liability exclusion regime for a specific case. The aggrieved party to the contract will not be able to demand performance of the service due during the period covered by the "force majeure" or claim damages for non-performance. Pursuant to the principle of party autonomy, the scope of the clause depends on how it is drafted and is subject to interpretation. The principle of force majeure is contained in Art. 79 CISG and thus applies, even in the absence of a specific provision in the contract, in the case of international sales of goods. It is also contained in several texts codifying international trade usages (Art. 7.1.7 UNIDROIT 2016; Art. VI.3 TransLex) as well as in the general conditions enacted under the aegis of international working groups (ICC Force Majeure Clause 2003[13]; Art. 19 FIDIC 1999[14]). The notion of force majeure is also contained in Islamic law[15]. This clause allows the obligee to **refuse the performance** and/or **exclude its liability** for non-performance.
	**Hardship**	This clause is also widely used in international trade and governs instances where external events occurring after the conclusion of the contract alter the initial contractual balance to such an extent as to unfairly disadvantage a party to the contract. These principles are reflected in international practice and can be found in Art. 6.2 UNIDROIT 2016, 6.111 PECL and VIII.1 and VIII.2 TransLex as well as in the ICC Hardship Clause 2003. In principle, the clause allows for the **termination of the contract** or the **renegotiation of the terms** of the contract.

13 https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/

14 https://fidic.org/sites/default/files/20%20Clauses%2017%20to%2019.pdf

15 Mhd SYAHNAN, Force Majeure in Islamic Law of Transaction: A Comparative Study of the Civil Codes of Islamic Countries. TSAQAFAH. 9. 1. 10.21111/tsaqafah.v9i1.37 (https://tinyurl.com/forcemajeureislamiclaw); ALBRAK, HODA & ABD GHADAS, ZUHAIRAH & ASUHAIMI, FARHANIN & UDIN, NURZIHAN. (2018). The Principle of Force Majeure in Shariah: A Special Reference to Saudi Contract, *in* Turkish online journal of design art and communication, 8. 1097-1106. 10.7456/1080SSE/150 (https://tinyurl.com/forcemajeureshariah).

LAW	REMEDY	EFFECTS
	**Frustration doctrine / Force majeure**	According to the frustration doctrine: "*Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do*" (National Carriers Ltd. v Panalpina (Northern) Ltd. [1981] AC 675, 4)[16]. The effects of frustration are to **discharge the obligation** of the defaulting party, both parties being **absolved from their future obligations** without incurring any liability for breach of contract. In American law, frustration doctrine is also accepted[17] as a common law principle and is found in §265 of the Second Restatement of the Law on Contracts[18]. The concept of force majeure is also contained, in matters of sale, in art. 2-615 of the Uniform Commercial Code[19], which influences the laws codifying the law of contract in all the American States. It introduces a **liability exclusion** clause.
	**1467 CCIt**	In the Codice civile italiano ("CCIt")[20], art. 1467 provides that: "(1) In contracts of continuous or periodic performance or of deferred performance, if **extraordinary and unforeseeable events** make the performance of one of the parties **excessively onerous**, the party who owes such performance may request **termination of the contract**, with the effects provided for in article 1458. (2) Termination may not be required if the resulting burden is part of the normal risk of the contract. (3) The party against whom dissolution is required may avoid it by **proposing an equitable modification** of the conditions of the contract. » Article 1468 ITC provides that in the case provided for in the preceding article, if only one of the parties has stipulated obligations, he may demand a **reduction in his performance** or a **change in the manner of performance**, sufficient to restore it on an **equitable basis**.

16 https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd7b5
17 See Claire-Michelle SMYTH/Marcus GATTO, Contract law : a comparison of Civil Law and Common Law jurisdictions, Business Expert Press LLC, Ney-York 2018, chapter 6.
18 https://en.wikipedia.org/wiki/Restatements_of_the_Law
19 https://www.law.cornell.edu/ucc/2/2-615
20 https://www.codice-civile-online.it/

LAW	REMEDY	EFFECTS
	**313 BGB**	Under German law, § 313 of the Bürgerliches Gesetzbuch ("BGB")[21] provides that "*where the circumstances on which the contract is based have changed substantially after the conclusion of the contract, so that the parties would not have concluded the contract or at least would not have concluded it on the same terms if they had acted with full knowledge of the facts, an* ***adaptation*** *may be requested in so far as the performance of the original contract cannot be required of one of the parties, having regard to all the circumstances of the case and more particularly to the contractual or legal distribution of risks*". Where **adaptation** of the contract **is impossible** to achieve or cannot be required of either party, the defaulting party may declare the contract rescinded *ex tunc*. Rescission is replaced by termination (*ex nunc*) in the case of a contract of indefinite duration.
	**1195 /1218 CCFr**	The concept of force majeure is governed in French law by Article 1218 of the French Civil Code ("CCFr")[22], the provisions of which are as follows: "*there is force majeure in contractual matters when an event beyond the debtor's control, which could not reasonably have been foreseen at the time of the conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents the performance of his obligation by the debtor.* ***If the impediment is temporary****,* ***performance*** *of the obligation* ***shall be suspended*** *unless the resulting delay justifies termination of the contract.* ***If the impediment is permanent****, the* ***contract is terminated*** *by operation of law and the parties are discharged from their obligations under the conditions laid down in articles 1351 and 1351-1.*" Inspired by German law, the revision for contingency is one of the novelties of the reform of contract law brought about by the Order of 10 February 2016, which came into force on 1 October 2016. The new article 1195 CCFr, provides as follows: "*if a change in circumstances unforeseeable at the time of the conclusion of the contract makes performance excessively onerous for a party who had not agreed to assume the risk, that party may* ***request a renegotiation of the contract*** *from his co-contractor. It continues to perform its obligations during the renegotiation.*" In the event of refusal or failure of the renegotiation, the parties may **by mutual agreement request the judge to adapt** the contract. Failing this, a party may request the court to **terminate the contract** on the date and under the conditions fixed by the court.

21 http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf
22 https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721

LAW	REMEDY	EFFECTS
	**137/138 TBK**	Under Turkish law[23], Article 136 of the Turkish Civil Code (Türk Borçlar Kanunu[24] - "TBK") provides that if performance becomes impossible for reasons beyond the control of the obliged party, the latter is **released from the obligation** that has become impossible. Article 137 TBK provides that if the contract is made partially impossible, the party liable for the obligation made impossible is **released from that obligation**, the other obligations remaining, unless it is to be assumed that the contract would not have been concluded if the parties had known that the performance in question would have been impossible, in which case **all obligations fall**. Art. 138 TBK provides that a party may request **termination** of the contract or its **adaptation** (i) in the event of an unexpected event which the defaulting party should not have expected, (ii) which has occurred for a reason beyond his control, (iii) which causes an imbalance which puts that party at an unreasonable disadvantage and (iv) provided that that party has taken care to include a hardship clause in the contract or has not yet performed, unless he reserves his rights[25]. For the rest, Turkish law **recognises the force majeure clauses** stipulated by the parties[26].

23 See also Ilhan HELVACI, Le droit turc du contrat, Schulthess, Genève Zurich Bâle 2018, p. 62 N° 10.2.
24 https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6098.pdf
25 Decision of the 13th civil chamber of the Turkish supreme court No E.2012/8250 K.2013/2623 dated 7.02.2013.
26 Decision of the 15th civil chamber of the Turkish supreme court No E. 2005/2684 K. 2005/3640 dated 16.6.2005.

PREEMPTIVE MEASURES

In the event of difficulties in fulfilling its part of the contract due to the current COVID-19 pandemic situation, the following measures can be taken:

➔ **Verifying whether the contract includes a "force majeure" and/or "hardship" clause and the scope and effects of such clauses.**

The effects of these clauses, or failing that the solutions provided for by law, may vary significantly: be it a right of termination, of rescission, of temporary suspension of the obligation, an exclusion of liability or a right to renegotiate or adapt the contract.

➔ **Analysing what is the most favourable effect for one's own economic interests**

Each type of remedy has a different impact on the continuation of economic relations. Account must also be taken of other contracts on which the problematic contract depends; for example, sales contracts affected downstream by the termination of a contract for the supply of goods upstream. Similarly, the termination of a sales contract by successive deliveries will generally be a sensitive matter; the termination of a contract for the supply of work to purchasers who have already disposed of the contract because of accumulated delays will also probably be highly contentious. Making a choice depends on economic and often strategic factors which must be examined in the medium term.

➔ **Checking whether the implementation of the clause requires formal notification to the contracting party**

Under Swiss law it is possible to tacitly waive one's rights, especially if one adopts a passive or contradictory stance[27]. The concept of tacit waiver of rights is also known in international trade practice[28]. If a party finds itself in difficulty or faced with a case of force majeure and continues to perform or shows passivity, it may be successfully argued before a court or an arbitration tribunal that, in doing so, it has tacitly waived his rights.
It is therefore recommended to formally invoke the selected remedy in writing and as soon as possible.

➔ **Contacting the contracting party to invite him to renegotiate the terms of the contract.**

A contract shall only be complied with as long as it is not agreed with the other party that it should not be so. Contacting the other party early to renegotiate the terms of the contract can often resolve complex situations favourably.

➔ **Taking the necessary steps to mitigate one's own damage**

The obligation to mitigate one's own damage is a well-known principle both in Swiss law[29] and in international commercial practice[30]. The party to the contract who is aggrieved by a non-performance on the part of the party claiming to be in a situation of force majeure or hardship must immediately take all alternative measures to reduce its economic loss (resale of the goods, relocation of the thing, performance of the work by a third party etc.). Failing this, there is a risk that it will not be able to recover his entire loss, even if the non-performance of the other party proves to be at fault, e.g. because the conditions of force majeure were not met.

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27 DSC 131 III 439 reason 5.1 p. 443; DSC 127 III 357 reason 4c/bb; DSC 106 II 320 reason 3.
28 Cf. art I.1.3 TransLex (Forfeiture of rights) and art. 1.8 (Inconsistent behaviour) and 6.2.3 UNIDROIT 2016.
29 Cf. art. 42 al. 2 CO ; Benoît CHAPPUIS, l'indemnisation des mesures préventives, *in* WERRO/PICHONNAZ, Le dommage dans tous ses états, Ed. Stämpfli, Berne 2013, p. 180.
30 Art. 7.4.8 UNIDROIT 2016, art. 9:505 PECL; art. VII.4 TransLex (Duty to mitigate).

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