

CONSTRUCTION CONTRACTS
IN THE COVID-19-PANDEMIC

AS OF 18 MARCH 2020

1. Introduction

- 1.1 Over the past few days, the governments of Austria and many other countries around the world have adopted a number of far-reaching measures designed to contain, or at least slow down, the further rapid spread of the novel corona virus SARS-CoV-2, and the disease COVID-19 triggered by it, in order to prevent the health system from becoming overloaded because of an excessive number of patients requiring treatment at the same time. The aim of all these measures is to significantly limit contacts between people in physical proximity, and thus reduce the transmission of the virus.
- 1.2 These measures have an extensive impact on the economic life of businesses, both in terms of their contractual obligations and in their role as employers. This document summarizes how being in default under a construction contract can affect principals and contractors in the construction industry.

2. Sources of Law

- 2.1 The **contract** between the principal and the construction company is the primary legal authority. The Austrian General Civil Code (ABGB) contains the default regulations for service contracts, but they are not mandatory and can be superseded by contractual agreement. In practice, the parties often choose to waive these provisions and expressly agree that ÖNORM B 2110 will apply (general contractual provisions for construction works and building services). Therefore, **each construction contract must be individually assessed** in order to determine which legal provisions apply.

3. The Austrian General Civil Code and Construction Contracts

3.1 Non-performance - § 1168 ABGB

- 3.1.1 Construction contracts usually stipulate work to be completed by a specific date.¹ Non-performance could result, for example, if a delayed performance of the construction contract is no

¹ Cf. *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 1104 ff.

longer possible. **If the work is not performed at all**, § 1168 ABGB regulates who bears the economic risk of non-performance (the "price risk" or "performance risk").²

- 3.1.2 The party responsible for the non-performance generally bears the economic risk:
- (a) If the reason for non-performance is attributable to (within the sphere of) the principal, the construction company generally **retains** its claim to remuneration.³
 - (b) If the reason for non-performance **cannot** be attributed to the principal, the construction company generally **loses** its right to remuneration.⁴
- 3.1.3 A force majeure⁵, such as, in our view, the current COVID 19 pandemic, **cannot** be attributed to either party.⁶ However, this does not necessarily mean that all consequences of the pandemic will be considered as cases of force majeure, or that contractors are entitled to stop construction activities.
- 3.1.4 A contractor generally loses its right to remuneration if it fails to fulfil the contract because: the contractor has too little or no material available as a result of a pandemic; the contractor cannot provide a sufficient number of workers; the contractor cannot provide services because of official bans (e.g. work in quarantined areas); etc.
- 3.1.5 Given these general principles, each instance of non-performance must be examined to determine whether it is attributable to a party, or a neutral cause like force majeure. In our opinion, **suspending construction activities would not currently be justified in every case**. Only a close review of the facts can determine whether a contractor is legally obliged to take precautions against running out of building materials, regardless of the COVID 19 pandemic, making the reason for non-performance attributable to the contractor.
- 3.2 **Delay in performance of a construction contract - §§ 918 et seq. ABGB**
- 3.2.1 §§ 918 et seq. ABGB provide guidance where the fulfilment of a construction contract, or individual stages thereof, is delayed because of the current COVID 19 pandemic.⁷
- 3.2.2 If the contractor cannot meet the deadline in the contract, for whatever reason, the principal has, in principle, the **right to withdraw from the contract or insist on performance**.⁸

² § 1168 ABGB; *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 1136 ff; *Kletecka in Kletecka-Schauer*, ABGB-ON^{1.03} § 1168 Rz 1 (as of 01.01.2018, rdb.at).

³ *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 1136; However, the purchaser must allow the amount that he has saved by not fulfilling the construction contract to be credited to his account.

⁴ *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 1138 ff.

⁵ Cf. Der Standard 2020/10/01; RIS-Justiz RS RS0027309; OGH 19.12.2000, 1Ob93/00h; quoting further authorities.

⁶ Cf. *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 1138.

⁷ Cf. *Kletecka in Kletecka-Schauer*, ABGB-ON^{1.03} § 1168 Rz 47, 49 (as of 01.01.2018, rdb.at).

⁸ *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 243, 245.

3.2.3 The customer can only withdraw after having given the contractor a **reasonable amount of time** to perform the work.⁹ What is reasonable depends on the specific circumstances.¹⁰ If the restrictive measures to contain COVID-19 last for a long time, a withdrawal will probably not be justified for at least several weeks thereafter, in order to give contractors reasonable time to complete their work.

3.3 Damages from withdrawal or delay

3.3.1 Under certain **conditions, the client may be entitled to compensation for damage incurred**, in particular

- **as a result of its valid withdrawal** after the expiration of a reasonable extension period¹¹, or
- if the **construction contract is fulfilled late**, and the client suffers damage as a result of the delay.¹²

The damage calculation for the former is different from the latter.

3.3.2 However, a claim for damages presupposes that the contractor is at **fault** for the damage caused by the delay.¹³ If the current COVID 19 government measures, or the pandemic itself, cause a delay that leads to withdrawal, the client's claim for damages against the contractor will probably be denied. Since the suspension of construction work is not justified in every case (see point 3.1.5 above), contractors should exercise caution. If the construction work is stopped without justification, the contractor may be sued for damages.

3.4 The Austrian General Civil Code (ABGB)

3.4.1 **The ABGB regulations mentioned above are not mandatory** for construction contracts, which often contain several clauses to contract around and supersede the ABGB default provisions. Parties can agree on alternative ways to determine (i) who bears the economic risk of non-performance¹⁴, (ii) the consequences of default¹⁵, and (iii) any consequences of damages.

3.4.2 **In order to determine the legal consequences of possible pandemic-related non-performance or delayed performance of a construction contract, the specific contract language must be analyzed.**

⁹ *Welser/Zöchling-Jud*, Bürgerliches Recht II¹⁴ (2015) Rz 249, 252.

¹⁰ *Gruber in Kletecka-Schauer*, ABGB-ON^{1.06} § 918 Rz 35 (as of 01.08.2019, rdb.at).

¹¹ *Gruber in Kletecka-Schauer*, ABGB-ON^{1.06} § 921 Rz 1 ff (as of 01.08.2019, rdb.at).

¹² *Gruber in Kletecka-Schauer*, ABGB-ON^{1.06} § 918 Rz 53 (as of 01.08.2019, rdb.at).

¹³ *Gruber in Kletecka-Schauer*, ABGB-ON^{1.06} § 921 Rz 3 (as of 01.08.2019, rdb.at). *Gruber in Kletecka-Schauer*, ABGB-ON^{1.06} § 920 Rz 11 (as of 01.08.2019, rdb.at).

¹⁴ *Kletecka in Kletecka-Schauer*, ABGB-ON^{1.03} § 1168 Rz 2 (as of 01.01.2018, rdb.at).

¹⁵ *Gruber in Kletecka-Schauer*, ABGB-ON^{1.06} § 918 Rz 44 (as of 01.08.2019, rdb.at).

4. Contract Variations using ÖNORM B 2110

4.1 Delay in performance of a construction contract

4.1.1 ÖNORM B 2110 deals with delay in almost the same way as the ABGB. Pursuant to clause 6.5.1. of ÖNORM B 2110, delay occurs when the contractor fails to perform at the proper time, at the proper place, or in the proper manner (cf. § 918 ABGB).

4.2 Contractual penalties – impact on extensions

4.2.1 If the parties agree to follow ÖNORM B 2110, the contractual penalty for delay is limited to 5% of the original contract amount.¹⁶ Under the ABGB, however, contractual penalties have no limit unless they are unconscionable (against *bonos mores*).¹⁷

4.2.2 Under ÖNORM B 2110, damage exceeding the contractual penalty is only to be compensated in cases of intent or gross negligence on the part of the contractor.¹⁸ This contrasts with the ABGB approach.

4.2.3 If the parties mutually agree to extend a contractual deadline for performance, the contractual penalties they originally agreed upon continue to apply with respect to the new deadline. The newly penalized completion dates are to be expressly recorded as such.¹⁹ This contrasts with the ABGB approach.

4.3 Change of regime for the consequences of delay in performance

4.3.1 Contrary to § 1168 (1) sentence 2 ABGB and the relevant case law²⁰, clause 7.2.1 no. 2 of ÖNORM B 2110 assigns the risk of delays caused by "force majeure" to the principal, if the causal events were not foreseeable, and could not be reasonably foreseen at the time the contract was executed, and are therefore not attributable to either party.

4.3.2 Attributing delays caused by "force majeure" to the principal means that in the event of delays the contractor is entitled to an extension of the performance deadline²¹, and/or "compensation" and thus an additional claim for remuneration.²² This has been affirmed by the case law also for work stoppages, for additional storage and transport costs, and for extensions of the construction period.²³ Of course, such claims for additional costs must be reported immediately, and, pursuant to clause 7.3.3 of ÖNORM B 2110, must be submitted to the principal in a verifiable form with the amount of the claim as soon as possible.

4.3.3 The facts of any given case must be analyzed in detail to determine how much care the contractor must exercise, and the extent to which it should take preventative measures, to limit the adverse consequences of the force majeure event.

¹⁶ Clause 6.5.3.1. 2nd paragraph ÖNORM B 2110 in the version of 15.03.2016.

¹⁷ *Reischauer* in *Rummel* ABGB³ § 1336 Rz 3.

¹⁸ Clause 12.3.2 ÖNORM B 2110 in the version of 15.03.2013; this limitation of liability must be individually negotiated in consumer transactions.

¹⁹ The scheme departs from the opposite view of the Austrian Supreme Court (OGH 1 Ob 58/98f SZ 72/25 = *ecolex* 2000, 35 mwN).

²⁰ OGH 7.4.1976, 1 Ob 576/76; OGH 10.3.1982, 6 Ob 551/82.

²¹ OGH 21.10.2008, 1 Ob 200/08f *ecolex* 2009/76 (*Friedl*).

²² *Krejci* in *Rummel*, ABGB³ § 1168 Rz 23 ff quoting further authorities.

²³ OGH 17.10.2012, 3Ob180/12k.

5. **Recommendation**

- 5.1 This memo merely provides an initial, general assessment of the potential impact of the current situation. Because of the ability to contract around default law provisions, each contract must be individually reviewed in order to provide comprehensive advice on the consequences of non-performance or delay on a case-by-case basis.

Vienna, 19.03.2020

Eisenberger & Herzog
Rechtsanwalts GmbH