

COVID-19 outbreak: Implications for public contracts

Europe overview

The COVID-19 pandemic is having a tremendous impact on the EU economy. It also affects contractual relations between governments and the private sector. In spite of the challenges raised by the crisis, public contracts are not automatically suspended. However, many government contractors are no longer able to continue their businesses at a normal level, due to quarantine measures, sickness, and reduced operations. Both public customers and their contractors will have to adapt to the impact of the pandemic. Fair and practical solutions will require reasonable and responsible approaches from both sides.

The following overview of individual EU member states and their public procurement and contract rules that are relevant to the crisis provides guidance to handle the current situation.

For public contractors, it is key not to be found in significant or persistent breach of contract, to avoid future exclusion from contracts under Art. 57 (4) (g) of Directive 2014/24. To that end, contractors that face difficulties to perform their contracts due to the crisis are well advised, generally speaking, to act reasonably in their dealings with the contracting authority. Although the pandemic is likely to be classified as force majeure, the precise consequences under national law depend on local case law and, typically, individual behaviour in the situation, in particular reasonable endeavours to mitigate the situation. At the same time, contractors should likewise expect reasonable and circumspect treatment from their public customers.

If you cannot perform a contract due to the COVID-19 pandemic, based on case-by-case analysis, you may consider taking the following steps:

- a. *Check what your contract provides for this case; if it contains specific obligations (e.g. notification to the other party of force majeure, extraordinary circumstances, etc.) and sets time limits, comply with its provisions*
- b. *Contact the contracting entity immediately, inform of the situation, propose alternative solutions*
- c. *Take all available and reasonable measures to reduce damage*
- d. *Collect and secure evidence of non-performance reasons*
- e. *Take all reasonable actions to avoid grounds for exclusion in future tenders, based on poor performance*
- f. *In new tenders – check the draft contract provisions and how they refer to the new circumstances, as well as evaluate the submission of requests for clarifications made to the awarding entity.*
- g. **Contact Dentons**

The following country overview provides more detailed information. Please note that this publication is not designed to provide legal advice and that each public contract must be analyzed on a case-by-case basis. We will be pleased to support you.

Please reach out to Dentons' key contact persons in your country.

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BELGIUM

1. Emergency provisions in relation to public procurement contracts

- a. During the Council of Ministers of March 6, 2020, the Belgian Federal Government adopted 10 measures to support businesses and the self-employed affected by the consequences of COVID-19.

- b. One of those measures is flexibility in the execution of federal public procurement contracts. Similar measures were introduced in circulars of the regional authorities in Belgium.

On 10 April 2020, the Flemish government published Circular KB2020/01 (“**Circular KB**”) setting out recommendations for Flemish contracting authorities, measures to support contractors to avoid liquidity problems, and points of attention for public procurement contracts in progress.

The Circular KB highlights the possibility for contracting authorities to consider i) the postponement of the announcement of tenders until the COVID-19 government measures have been eased or lifted, ii) the extension of the deadlines for submitting offers and iii) the postponement of the initiation order or the start of the contract.

Furthermore, and in accordance with the Circular KB, the contracting authorities can issue following measures to support contractors:

- i) faster payment of the contract, after the invoices have been fully approved by the authorities of the Flemish government;
 - ii) modification of the payment conditions (e.g. part of the contract that has been executed or accepted can already be invoiced);
 - iii) advance payments under certain conditions;
 - iv) exemption from bail (financial guarantee);
 - v) cancellation or deferral of penalties and fines.
- c. The Walloon government has published a similar circular setting out the following recommendations for Walloon contracting authorities. The recommendations are similar to these for the Flemish authorities (see above). The Walloon contracting authorities can consider to:
 - i) postpone the announcement of a tender;
 - ii) extend the deadlines for submitting offers;
 - iii) extend the validity period of offers by a minimum of one month;
 - iv) postpone the start of the public procurement contract;

- v) adjust deadlines for the execution of the public procurement contract and not enforce fines for delays, when the continuation of the contract is possible, with a delay;
- vi) suspend the execution of the public procurement contract if the continuation of the contract is impossible or that complicated that it cannot be executed without exorbitant costs for the contractor; or
- vii) terminate the public procurement contract if the continued execution of the contract is absolutely impossible.

Until today (4 May 2020), the government of the Brussels-Capital Region has issued no similar circular on public procurement contracts.

2. Contract implications (actions to consider): exclusion of liability based on force majeure

The federal state will not impose fines or penalties on service providers, suppliers, companies or the self-employed for the non-execution of all federal public government contracts for which it has been proved that the delay or non-execution is due to COVID-19.

According to Belgian private law, a contractual party who has a certain duty to perform a contractual obligation will be liable in the event of non-performance of the existing contract. However, there are some legal grounds that can be considered to justify the non-performance of contractual obligations, e.g. force majeure and external cause or hardship if a clause to that effect has been inserted into the agreement.

Furthermore, article 38/9 of the Royal Decree of 4 January 2013 laying down the general implementing rules for public procurement contracts provides that the revision of the public contract can be requested when the contractual balance of the contract is disrupted in the disadvantage of the contractor, due to an unforeseeable circumstance (i.e. force majeure).

COVID-19 will therefore constitute a legitimate legal basis for requesting a revision of the public procurement contract, such as the extension of the term of the contract or a financial revision.

In case the contractor requests an extension of the term, the contractor has to prove that:

- i) the revision has become necessary due to circumstances which could not reasonably have been foreseen when the contractor submitted its offer (e.g. COVID-19 pandemic);
- ii) the circumstances could not have been avoided and;
- iii) the consequences of these circumstances could not have been remedied in spite of having taken all the necessary steps.

Other revisions of the contract, such as the financial revision of the public contract or its termination, requires that the disadvantage suffered by the contractor must be at least a certain percentage of the initial contract amount, and this in addition to the elements that have to be proved, as mentioned above. The burden of proof for claiming financial revision will therefore be heavier than in the case of claiming the extension of the term.

Please note that tender documents of public procurement contracts may contain specific review clauses.

3. Tender implications

Tenders may still be initiated during COVID-19 pandemic. However, as mentioned above, several measures are issued regarding the tenders, such as the postponement of the publications of new tenders or an extension of the deadline to submit offers.

In Belgium, tenders are published online and available on <https://enot.publicprocurement.be/enot-war/home.do> (available in English).

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FRANCE

1. Emergency provisions in relation to public procurement contracts

- a. On February 28, the French Minister of Economy and Finance announced the implementation of immediate support measures for businesses, including the recognition by the state of COVID-19 as a case of *force majeure* for public procurement contracts. Consequently, penalties for delay should not be applicable to public procurement contracts concluded by the state.
- b. An emergency draft law to handle the COVID-19 outbreak is under discussion:
 - i. An [impact assessment](#) of this draft law indicates that an “adjustment” to the freedom of contract might be made, notably to compel contracting public authorities to waive the application of contractual penalties when the failure of the economic operator is a direct consequence of COVID-19;
 - ii. The *Conseil d’Etat* delivered an [opinion](#) on the emergency draft law to handle the COVID-19 outbreak.
- c. The emergency draft law is under discussion in parliament (it was [adopted by the Sénat](#) on March 19, and was under discussion at the *Assemblée Nationale* on March 20).
- d. The emergency draft law authorises notably the government to take measures relating to public procurement in order to adapt rules on payment, performance and termination deadlines. Contractual penalties are specifically targeted.

2. Contract implications (actions to consider)

- a. *Force majeure* is defined by case law (by an administrative judge for public contracts) but it is usually agreed and defined in a contract (definition, procedure, notice deadline);
- b. Exclusion of liability based on *force majeure*:
 - i. *Force majeure* excludes the contractor’s liability fault-based;
 - ii. The burden of proof is on the contractor’s side;
- c. Modification of the contract (no automatic effect);
- d. Court action to terminate the contract.

3. Tender implications

- a. For now, with regard to tender procedures, the government has taken no measures. Consequently, tenders are not suspended and may still be initiated during the COVID-19 pandemic.
- b. But an extension of time limits should be considered by both parties;
- c. Most tenders are conducted electronically. If not (and physical submission is required), public authorities should adapt the tender documentation.

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GERMANY

1. Emergency provisions in relation to public procurement contracts

The German Federal Government and the German state governments have adopted emergency aid programs to mitigate the economic impact of the COVID-19 pandemic.

The Federal Ministry of Economics and Technology clarified in a current circular dated March 19, 2020 (Ref. 20601/000#003) that the current crisis situation constitutes a situation of extreme urgency within the meaning of section 14 (4) No. 3 VgV. The circular permits the use of a negotiated procedure without prior publication for tenders above the normal value thresholds for the procurement of goods and services to combat the pandemic (especially in the health sector). The same applies for goods to maintain the functionality of public administration (e.g. equipment for home offices). Depending on the circumstances of the individual case, a procedure with only one provider is also permissible; in addition, contracting authorities may set the shortest possible deadline (up to 0 days).

In the sub-threshold area, a negotiated procedure without prior publication can be carried out for the same reason in accordance with section 8 paragraph 4 No. 9 UVgO. Here too, if the circumstances of the case so require, only one company may be approached in accordance with section 12 para. 3 UVgO.

In addition, extensions and expansions of existing contracts are possible in accordance with section 132 para 2 sentence 1 No. 3 VgV (in the sub-threshold area in connection with section 47 para 1 UVgO), if the overall character of the contract is not changed and the value limit of 50% of the original contract volume is not exceeded.

Some state governments are currently also evaluating how they can also use public procurement law instruments to avoid minimize the economic impact of the pandemic. The focus is on appealing to contracting authorities to examine the existing legal and contractual legal bases for provisions on unforeseeable events and not to make use of all available legal means to enforce contracts.

2. Contract implications (actions to consider): exclusion of liability based on force majeure

- a. The contracting parties must check whether they have made arrangements to deal with such cases.
- b. German public procurement law provides that the execution periods for contracts must be extended by a sufficient period if force majeure prevents the execution of the contract. The economic impact is likely to be classified as force majeure where companies must close due to quarantine measures or can only operate in emergency mode. As the public authorities have issued explicit warnings in this respect and the scale is global, the conditions for force majeure are likely to be met.
- c. According to German civil law, the obligation to perform a contract does not apply if a contractual performance becomes permanently "impossible". Conversely, the obligation for the contracting authority to pay remuneration then also ceases to apply. According to the supplementary provisions of public procurement law, the contractual party affected by the "impossibility" must notify the other party of its omission.
- d. Since the pandemic is very likely to be classified as force majeure, all claims of the contracting authority that are linked to the culpability of the contractor are therefore not applicable. This excludes in particular contractual penalties and claims for damages arising from the effects of the COVID-19 pandemic.
- e. The provisions of public procurement law establish a right of termination for the contracting authority if there is a delay of more than three months.
- f. Since contractual penalties and claims for damages are not applicable in the case of performance impediments due to COVID-19, the German transposition of the provision in Art. 57 (4) Directive 2014/24 is also unlikely to apply. An exclusion from future award procedures is therefore unlikely to apply.

3. Tender implications

- a. With regard to tender procedures, the government has not adopted any particular measures so far. Consequently, tenders are not suspended and may also be initiated during the COVID-19 pandemic. Calls for tenders can be found on the electronic procurement platforms of the federal and state governments.
- b. It is to be assumed that contracts of hospitals for protective clothing and medical devices can be awarded in the procedure pursuant to Art. 32 (2) lit. c of Directive 2014/24. The COVID-19 pandemic is likely to be a situation that meets the conditions mentioned there. This is the case if an award procedure cannot be carried out for urgent reasons. Due to the unpredictability of the pandemic, it should also be possible to extend existing contracts without a call for tenders by no more than 50% of the original contract value, subject to the requirements of public procurement law. Such an extension must be published in the Official Journal of the EU.
- c. Due to quarantine measures, the German authorities have partially adapted or temporarily (strongly) restricted their activities. At the level of the Federal Government, the competent Public Procurement Review Chamber at the Federal Cartel Authority operates without restrictions. An exception is access to the authority. Oral hearings take place at the discretion of the Chamber. The Federal Cartel Authority has set up e-mail addresses that allow direct contact with the individual review chambers. All responsible staff members have access to these email accounts.
- d. On state level, the activity of the administrative authorities is limited. Accordingly, some of the public procurement chambers of the federal states are not fully accessible. However, particular effects on review procedures and deadlines of this limited accessibility are not known at present.

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HUNGARY

1. Emergency provisions in relation to public procurement contracts

On March 11 a state of emergency was declared by the Hungarian government in connection with the COVID-19 pandemic. Subsequently, on March 20 Government Decree No. 48/2020 was introduced concerning actions that have to be taken during the major emergency in public procurement procedures. Nevertheless, it is very likely that the number of the negotiated procedures without prior publication of a contract notice have increased. One of the legal grounds of application of that type of procedure is extreme urgency brought about by events unforeseen by the contracting authority, especially in the field of healthcare and the military. In light of the case law, COVID-19 can be invoked as a valid ground to be exempted from liability for delayed or non-performance of public contracts.

2. Contract implications (actions to consider): exclusion of liability based on force majeure

- a. Check whether there is an alternative way to perform the contract.
- b. Examine whether force majeure events are agreed and explicitly defined in the contract and what are the legal consequences.
- c. In the absence of explicit provisions in the contract, it has to be considered under the applicable case law (there is no definition of a force majeure event in substantive law in Hungary).
- d. An impediment that exempts the contracting party from liability for breaching the contract requires the following conditions to be met:
 - i. the failure was due to an impediment beyond their control;
 - ii. they could not reasonably be expected to have taken the impediment into account at the time when the contract was concluded;
 - iii. they could not reasonably be expected to have avoided or overcome it or its consequences, and the contracting party has to verify that the force majeure event has a direct link with their non-performance. The force majeure event does not have to be the direct cause of the non-performance of the contracting party, however, if there are too many steps between the force majeure event and the non-performance and this makes it difficult for the contracting party to satisfy causation.
- e. An impediment can imply exemption from liability for damages.
- f. An impediment can cause termination of the contract (in the form of nullification).
- g. Or it can cause modification under the rules of the public procurement act on the basis that the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee.
- h. In rare cases court action takes place to change the commitment or terminate the contract.

3. Tender implications

- a. Tenders are not suspended by law, a tender can be initiated during the epidemic via the Electronic Procurement System (EKR), since all tenders are conducted electronically.
- b. Purchases related to COVID-19 control measures can be initiated in a different manner as stated in the procurement provisions based on individual derogations. In addition, in cases of extreme urgency, only one economic operator can be invited directly to submit an offer instead of at least three bidders.
- c. The courts have suspended their activities in the form of an extraordinary court vacation; therefore in cases of infringement the parties cannot initiate a legal procedure against the decision of the Public Procurement Authority, which has not suspended its activity.
- d. Some contracting entities have extended the validity period of tenders and request tenderers to maintain their bids.

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ITALY

1. Emergency provisions in relation to public procurement contracts

Due to the extraordinary emergency situation linked to the spread of COVID-19 in Italy, on January 31, 2020, the Council of Ministers formally announced a state of emergency. Following this declaration (which automatically entailed a significant increase of the powers of the Civil Protection Department), several decrees and orders were enacted by the Italian government and by the Civil Protection Department in order, *inter alia*, to speed up the purchase of medical devices. A new decree was enacted on March 17, 2020 (Law-Decree no. 18/2020), and further decrees or orders are on the brink of being published.

In this respect, several derogations from the public procurement rules are set out by the mentioned acts.

2. Contract implications (action to consider)

Possible exclusion of liability based on force majeure:

- a. The occurrence of a “force majeure” event entails that the contractor (who is not in a position to fulfil the obligations provided by the contract due to the “force majeure”) cannot be considered liable for the infringement of the contract and the validity of the latter shall be automatically terminated.
- b. The concept of “force majeure” is often considered by the Italian courts in their decisions, where they seek to determine whether there has been a specific impediment (not caused by the contractor’s conduct) to the performance of the contract that cannot be overcome by the party’s willingness to perform the contract. However, no specific definition of “force majeure” is provided by the law. Consequently, the relevant definition is agreed by the parties within the contract.
- c. Indeed, it is important to check if the contract provides a specific and clear definition of “force majeure” and if the spread of COVID-19 may be included.
- d. Based on article 91 of Law-Decree no. 18/2020, the Italian government expressly considers that the contractor’s compliance with the emergency measures adopted at national level¹ may entail an exclusion of the contractor’s liability – also in terms of penalties – in the event that compliance with the emergency measures leads to an infringement of the contract (e.g. a significant delay in the performance). However, the lack of contractor’s liability should be assessed by the court in the specific case.
- e. The court’s decision on a contractor’s liability can also determine whether the contractor can participate in public tenders launched in the future, considering that the termination of a contract due to the contractor’s liability entails ground for their exclusion pursuant to article

¹ E.g. bans on moving outside geographical limits except for extraordinary needs, including those attaining to the work, closing of certain activities, hygienic and sanitary measures, etc.

80, paragraph 5, let. c-ter² of legislative decree no. 50/2016 (hereinafter “**Italian Public Procurement Code**”)³ (in line with article 57, paragraph 4 of Directive 2014/24).

Possible suspension of works, services and supplies

- a. Article 107 of the Italian Public Procurement Code provides the possibility to temporarily suspend the performance of public contracts of works, services and supplies “*in case of occurrence of special circumstances, not foreseen at the date of the conclusion of the contract, which temporarily obstructs the correct performance*” of the contract itself. The works’ supervisor is entitled to suspend the performance of the contract, filling a specific report explaining *inter alia* the reasons underlying the suspension. In case of particular needs or public interest, the measure aimed at suspending the performance of the contract can also be adopted by the project manager of the contracting authority (the so-called “RUP”).
- b. Indeed, where the performance of the public contracts becomes complicated due to the necessity to comply with the emergency measure adopted at national level, it would be advisable to investigate with the contracting authorities the possibility to suspend the performance of the contract⁴.
- c. Obtaining a public clearance formally authorizing the suspension of the performance of the public contract is mandatory, taking into account that the interruption of public services or services having a public utility (as the performance of some public contracts may be theoretically qualified) without public consent can be subject to criminal sanctions.

Modification of contracts during their term

- a. Pursuant to article 106, paragraph 1, let. c) of the Italian Public Procurement Code, the project manager of the contracting authority (the so-called “RUP”) is entitled to authorize, in accordance with the internal regulation of the contracting authority, modifications of contracts during their term where, *inter alia*: (i) the need for modification has been brought about by circumstances that the contracting authority could not foresee, and (ii) the modification does not alter the overall nature of the contract. In these circumstances, the modifications of the contract do not require the launch of a new public procurement procedure.
- b. Although in case law such a provision has mainly been applied where supervening legal amendments (including new legal provisions enacted after the conclusion of public contracts) affected the original framework set out in the public contract, we consider that it may apply also to the modification of contracts that are strictly linked to the spread of the COVID-19 emergency. For instance, in cases of quantitative (i.e. in relation to the amount of goods or services) or qualitative (e.g. concerning the type of goods or services) modifications, as well as in cases where it may be necessary to review the original design in order to comply with the term for the conclusion of the works originally planned by the parties.

² Where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions.

³ In any case, after the decision of the European Court of Justice of June 19, 2019, the economic operator is required to declare, in the context of the participation to the public tender, the existence of a judicial proceeding involving the early termination of the contract (also when the final decision has not been handed down yet). Such declaration allows the tendering authority to assess, regardless of the publication of a final decision handed down by the court, the existence of professional misconduct that may be considered as relevant in the specific case.

⁴ Please consider that, in the event that the performance of the contract is suspended for a period of time exceeding one quarter of the entire contract duration or, in any case, exceeding six months, the contractor is entitled (i) to ask for the termination of the contract and, (ii) if the contracting authority rejects such a request, to be granted reimbursement of the charges due to the suspension.

3. Tender implications

- a. Use (without prejudice for some derogations) of direct awards pursuant to article 163 of the Italian Public Procurement Code⁵ or tender procedures without a previous public notice pursuant to article 63 of the Code itself⁶ in relation to the acquisition of devices linked to the COVID-19 emergency.
- b. In relation to the acquisition of devices linked to the COVID-19 emergency, specific exceptional provisions are currently in force in relation to the assessment of the grounds for exclusion, whose verification will be done in a manner compatible with the management of the emergency situation (first of all, by means of the centralized database or easily acquired evidence).
- c. Payment in advance is permitted in relation to the acquisition of devices linked to the COVID-19 emergency (and a general provision authorizing the payment in advance of 20% of the price in urgent circumstances was introduced by means of Law-Decree no.18/2020 in the Italian Public Procurement Code). However, as pointed out in the note issued by the Ministry of Justice 0075904.U of March 4, 2020, "*the particular risks deriving from such a derogation suggest proceeding with proper caution and due attention, in any case using adequate justification*".
- d. Further tenders (i.e. not required for tackling the COVID-19 emergency) are not officially suspended by law, but all public offices are closed and they have switched to remote work. In any case, some tendering authorities are postponing the deadline for the submission of bids. Such tenders are required to comply with the ordinary public procurement rules.

For the sake of completeness, it should be underlined that article 103 of Law-Decree no. 18/2020 provides a general suspension of the terms relating to the ongoing administrative procedure (or those started from February 23, 2020) until April 15, 2020; however, it is not crystal clear whether such a suspension applies also to public procurement procedures.
- e. Most tenders are conducted electronically.
- f. In the following months, it is highly likely that the Italian government, in order to face the financial impact of COVID-19, will enact specific laws aimed at simplifying the public procurement rules and at derogating the ordinary provisions.
 - a. The relevant courts in Italy remain available, but the hearings (except for extraordinary circumstances) are postponed until the end of the COVID-19 emergency.

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⁵ Article 163 of the Public Procurement Code defines specific procedures for cases of extreme urgency and civil protection, allowing, in summary, direct awards "*in circumstances of extreme urgency that do not allow any delay*" and in relation to works not exceeding €200,000.

⁶ Article 63, paragraph 2, lett. c) of the Public Procurement Code provides for the possibility of proceeding without prior publication of a contract notice "*to the extent strictly necessary when, for reasons of extreme urgency resulting from events unforeseeable by the contracting authority, the time limits for open or restricted procedures or competitive procedures with negotiation cannot be complied with*". Please consider that paragraph 6 of article 63 generally requires the previous consultation of at least five economic operators; however, such a rule may be derogated in relation to the acquisition of personal protective equipment and medical devices where the value of the contract is under European thresholds.

NETHERLANDS

1. Emergency provisions in relation to public procurement contracts

- a. On March 17, 2020, the Dutch government decided to take exceptional economic measures because of COVID-19. All these measures are in place until (at least) April 6, 2020. The government did not adopt specific measures regarding tenders. The government and the Centre of Procurement Expertise of the Ministry of Economic Affairs and Climate Change did call for a lenient approach towards time limits set by tendering authorities ([Pianoo](#) website, available in Dutch).
- b. On March 19, 2020, the Ministry of Defense took measures for current tenders and existing contracts, to prevent adverse economic effects, such as possible shortage or problems in the supply chain for the goods and services the ministry purchases. The ministry extends deadlines for current tenders, practices leniency towards suppliers invoking contractual provisions of *force majeure* and calls for the same leniency of tenderers when the ministry itself is unable to perform its obligations under the existing contracts.
- c. For reasons of extreme urgency, brought about by events unforeseeable by and not attributable to the contracting authority, the contracting authority may for certain contracts use the negotiated procedure without a prior publication. It is very likely that for certain contracts, because of the urgency and because it could not be foreseen, COVID-19 provides a valid ground to use the negotiation procedure without prior publication. An example could be the purchase of ventilators for the hospitals by the Ministry of Health.

2. Contract implications (actions to consider)

- a. Apart from the Ministry of Defense, we are unaware of any other specific measures introduced by the government with respect to the non-execution or delay of existing or future public government contracts due to COVID-19.
- b. According to Dutch civil law, a contracting party who has a certain duty to perform a contractual obligation can in principle be held liable in the event of non-performance of the existing contract. A claim for compliance will be rejected under certain circumstances, for example, when the *force majeure* requirements are met (either in a contractual hardship clause, or by law) or in the application of a material adverse change clause. Force majeure requires that the debtor is not at fault for the non-performance. This means that the non-performance should not be result of something the debtor could or should have prevented or of which the debtor could or should have prevented the consequences. Contracting parties should first assess whether the contract and/or the accompanied general terms and conditions contain a *force majeure* clause (hardship clause). If the wording of such a clause provides for events such as COVID-19 (e.g. language such as “virus outbreak” or “pandemic” or even more broadly defined, e.g. “government measures”), the clause may be relied upon by the contracting party who is unable to perform due to COVID-19.

The next step is to consider the extent of the protection that is offered by the contractual clause. In the absence of a contractual *force majeure* clause, the debtor could try to invoke the *force majeure* provision in the law, i.e. Art 6:75 of the Dutch Civil Code (DCC).

However, this would most likely only succeed if the government measures in conjunction with COVID-19 obstruct the debtor’s performance as such. Hence, this would not capture the scenario that the debtor could perform, but not without a serious disturbance of the contractual balance between parties. For that scenario, unforeseeable circumstances (i.e. a ‘material adverse changes clause’ in the contract, or in the absence of such a clause, by law in Art 6:258 DCC) may offer an escape.

If a contracting party successfully invokes *force majeure*, either contractual or by law, he would not be liable for damages for non-compliance with his contractual obligations. A successful appeal to unforeseeable circumstances (Art 6:258 DCC) requires court involvement to amend or (partially) dissolve the contract in order to restore the contractual balance in the context of the new circumstances of the case.

- c. According to the Dutch Public Procurement Act (Aw), a public contract may be amended without a new procurement procedure if the need for change is due to circumstances that a diligent contracting authority could not foresee (art. 2.163e Aw). The value of the changes may not exceed 50% of the value of the original contract and successive changes must be added together (article 2.163d Aw). Such an amendment must be announced on the website Tendered.

3. Tender Implications

- a. With regard to public procurement tenders or new tender processes, the government has taken no official (legal) measures. Consequently, tenders have not been suspended and may also continue to be initiated during the COVID-19 pandemic. It is, therefore, up to the contracting authorities to determine whether it prolongs any periods set in the tendering procedure or sets aside the tendering procedure.
- b. Most tenders are conducted electronically and therefore the submission of an application is in principle not affected by the measures of the government. However, many companies have switched to remote working/ working from home. Particularly for large tenders where submission of an application generally is a joint effort, it can be a challenge for interested parties to submit an application or registration on time. The government and the Centre of Procurement Expertise of the Ministry of Economic Affairs and Climate Change have therefore asked contracting authorities to deal with tender deadlines generously, i.e. by extending the relevant time limits and by informing the interested parties of further amendments in the process of assessment of the tenders. In that case, all interested parties should be informed simultaneously. Terms in the Dutch Procurement Act are minimum terms and tendering authorities can provide longer deadlines.
- c. For reasons of 'extreme urgency', brought about by events unforeseeable by and not attributable to the contracting authority, the contracting authority may for certain contracts use the negotiated procedure without a prior publication. The contracting authority should then also justify that in these circumstances, even the accelerated procedure of Art 2.74 Aw is not an option.
- d. The Dutch courts will close until at least until April 6, 2020. Only urgent cases will continue to be handled, such as those concerning the detention of suspects, bankruptcy filings, and certain family law matters. New cases can be filed and registered in accordance with the ordinary course of business. However, no oral hearings will take place until at least April 6, 2020.
- e. The vast majority of all public procurement cases are dealt with in summary proceedings. For this type of proceedings, the court decides whether the hearing will take place (i.e. in case of extreme urgent matters) or whether it should be adjourned (i.e. the court hearing as well as the court verdict will be postponed). If a hearing follows, it will preferably be held digitally.

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POLAND

1. Emergency provisions in relation to public procurement contracts

On March 8, the Act on Special Arrangements with the view to Counteracting, Preventing and Combating COVID-19, Other Contagious Diseases and the Resulting Crisis Emergencies and to Amend Certain Other Acts, entered into force. Some purchases necessary to counter COVID-19 were excluded from public procurement rules.

From March 20, an epidemic state was announced in the Republic of Poland in connection with SARS-CoV-2, which replaced an epidemic emergency which began on March 14, 2020.

In addition, the provisions introducing the so-called Anti-Crisis Shield are being urgently put into practice. These include, among others, changes to the Public Procurement Law regarding the obligation of the parties of the contract to inform each other of the extent to which COVID-19-related circumstances affect the due performance of the contract, the possibility of amending the contract, the right to resign from collecting receivables, including liquidated damages and exemption from penalties under the public finance discipline act and the penal law.

2. Contract implications (actions to consider)

- a. Exclusion of liability based on force majeure
 - i. No definition of force majeure in law
 - ii. Often agreed and defined in a contract (definition, procedure, notice deadline)
 - iii. Burden of proof on the contractor's side
- b. Exclusion of contractual liability based on general rules– if force majeure not regulated in the contract
- c. Modification of the contract subject to fulfillment of statutory or contractual premises (no automatic effect)
- d. Court action to change the commitment or terminate the contract

3. Tender implications

- a. Tenders not suspended by law
- b. A tender may also be initiated during the epidemic - in this case requesting, e.g. an extension of time limits to be considered
- c. Most tenders conducted electronically (exceptions apply e.g. to military tenders)
- d. The National Appeal Chamber suspended its activities
- e. The deadlines for lodging appeals were not suspended yet. The Ministry of Justice is currently working on temporary suspension of various material and procedural deadlines

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SLOVAKIA

1. Emergency provisions in relation to public procurement contracts

- a. As of March 16, 2020, there is a state of emergency in Slovakia. The emergency was limited to public hospitals.
- b. On March 18, 2020, the state of emergency has been extended to private facilities as of March 19.
- c. In other sectors and areas of Slovakia, an extraordinary situation persists in connection with the COVID-19 pandemic. Several closures and limitations were made by the public health care authorities and by private corporations.
- d. The contracting authority may purchase goods and public works in negotiated procedures without prior notification.

2. Contract implications for existing contracts

- a. If you cannot perform your contract, check your contract for *vis maior* / *force majeure* clauses or similar and follow the agreed procedure;
- b. If no *vis maior* / *force majeure* clause exists in your contract, statutory provisions will apply:
 - i. Your liability for damage will be limited based on circumstances, which are not under your control, could not be expected when executing the contract, and cannot be prevented;
 - ii. Notify the other contracting party without undue delay;
 - iii. Take all reasonable measures to reduce the damage;
 - iv. Collect your evidence – burden of proof lies with the obliged party, which calls for application of *vis maior*;
 - v. The extraordinary situation will not have any effect on the payment obligations or duty to pay contractual penalty for delays;
- c. Termination of the undertaking / contract due to the COVID-19 pandemic is only on an exceptional basis, if its performance is not possible, even by using other suppliers or later, after the COVID-19 pandemic is over.

3. Implications for tender procedures

- a. The state of emergency declared in Slovakia does not have any automatic implications on tender procedures.
- b. It is up to the contracting authority whether it prolongs any periods set in the tendering procedure or sets aside the tendering procedure.
- c. Please see information published on the information system used by the contracting authority for such tendering procedures.

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UNITED KINGDOM

1. Contract implications (actions to consider)

Force majeure

- a. The first consideration is whether the contract contains a force majeure clause. This is a clause which relieves parties from the consequences of non-performance in the event of circumstances beyond their control, typically by allowing parties to suspend performance or terminate the contract.
- b. Force majeure is entirely a creature of contract. It is only applicable if the contract makes provision for it. Therefore, whether an affected party can rely on a force majeure clause will depend on the wording of the clause.
- c. The clause will set out the circumstances in which an affected party may be relieved of the consequences of failure to perform. The drafting will often include a list of force majeure events which result in the parties being unable to perform the contract. Of relevance may be references to epidemics or pandemics, or to quarantines or other forms of government intervention. Alternatively, general or sweeper language may be used, such as to references to causes beyond a party's control or to an "Act of God". The language needs to be carefully considered to determine whether the clause can be relied upon in the context of particular forms of disruption as a result of COVID-19.
- d. The next step is to consider the extent of the protection offered by the clause. The clause will usually set out whether an affected party is entitled to cancel the contract, suspend performance, claim an extension of time, or is otherwise excused from performance.
- e. Importantly, the protection offered by a force majeure clause only kicks in when a party is genuinely unable to perform (rather than it simply being more difficult or expensive to do so). The force majeure event must usually be the sole cause of the failure to perform an obligation.

Frustration

- a. Where there is no force majeure clause, contracting parties may be able to argue that the impact of COVID-19 has "frustrated" the contract.
- b. The doctrine of frustration applies where an event occurs after the formation of the contract which renders the contract physically or commercially impossible to fulfil, or makes the obligation to perform a radically different obligation from that undertaken upon entry into the contract. The courts treat this as a high threshold to be met. This is because the effect of frustration of a contract is radical. The contract is terminated and the parties are discharged from their obligations.

Getting it right

- a. Asserting force majeure or that a contract has been frustrated is a tricky business at any time, and even more so in the uncharted territory of COVID-19. It is important to take legal advice. Incorrectly asserting force majeure or that a contract has been frustrated may itself amount to a breach of contract, entitling the other contracting party to claim damages or potentially terminate the contract.

2. Tender implications

- a. Ongoing public procurement tenders have not been suspended by operation of law. New tender processes continue to be initiated.
- b. Many offices have already switched to remote working and this will increase following a UK government announcement recommending this on March 16, 2020.

- c. If economic operators are experiencing COVID-19 related difficulties in responding to a tender, they may wish to request an extension early in the process. Such requests from multiple tenderers may persuade a contracting authority to extend.
- d. Most tenders are now conducted electronically through portals.
- e. The relevant courts in both England & Wales and Scotland remain open, albeit with adjustments to their working arrangements.
- f. Applicable deadlines / limitation periods for economic operators to take action have not been suspended.

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