

## What are the possibilities to change or terminate an agreement with a supplier if the execution becomes worthless due to (the measures related to) COVID-19?

Many organisations are struggling with declining demand for their products or services because of (the measures against) the Corona virus. As a result, services and products from suppliers may become worthless. For example, because many organisations are closed down, projects are temporarily halted. Recruitment agreements for the recruitment of personnel, for example, becomes worthless as a result. Restaurants and bars want to (temporarily) stop buying food and drinks because of the compulsory closure.

Can agreements be terminated (temporarily or partially) in such cases? The main rule is that agreements are binding upon the parties. Contracts therefore cannot be amended or terminated unilaterally. Nevertheless, the agreement, the associated general terms and conditions or the law may provide openings that do make it possible to terminate or amend the agreement.

We will list these possibilities below, indicating if it specifically concerns the current situation with (the measures against) the Corona virus. We have placed the options to be investigated in an order that will be workable for many contracts. In the end, the tailor-made work will remain, in which not only the exact agreements will be decisive, but also the specific circumstances.

1. **Minimum purchase obligation?** Check in the agreement whether a minimum purchase obligation has been agreed upon. If this is not the case, the customer can in principle (completely) reduce the purchase. This is a simple way to adapt the performance of the agreements to the current situation.
2. **Intermediate termination option?** Assess whether the agreement offers an interim termination option. If so, check which termination acts are mandatory. For example, it is often required that notice of termination is given in writing and subject to a fixed notice period. If there is no possibility of interim termination in the agreement, this does not necessarily mean that it cannot be terminated. Contracts for an indefinite period of time can in principle be terminated, but a reasonable notice period must be observed (even if there is no notice period in the contract).
3. **Duration agreement?** Maybe you don't need to terminate because the agreement is about to expire. In that case, please check whether any termination acts are mandatory. Agreements are regularly tacitly renewed if the agreement is not explicitly terminated in time prior to the end of the term.
4. **Shortcomings contract party?** If the contracting party fails to meet its obligations, the customer may dissolve the contract. In many cases, this requires that the contracting party is given one last chance to fulfil its obligations by issuing a formal notice of default. It is important that this is done with the correct wording and formalities. A notice of default will not always be necessary, for example, because performance is permanently impossible. Moreover, it is irrelevant whether the contracting party can be blamed for not being able to comply.
5. **Change clause?** A change clause can also offer a solution. This gives the right to amend the agreement unilaterally. The consent of the other contracting party will then not be necessary. The agreement can, for example, be amended in such a way that there is no longer a minimum purchase obligation or that the agreement can, for example, be terminated prematurely.
6. **Cancel under the law?** If the agreement to be terminated concerns an assignment agreement (like a services agreement), it can be terminated by the customer on the grounds of Dutch law. This is not possible if the agreement explicitly stipulates that it cannot be terminated (prematurely) or if the

agreement explicitly provides in a premature termination regime. Moreover, a notice period often has to be observed and sometimes reasonable compensation may still be due. An assignment agreement is characterized by the fact that it (i) does not concern employment (ii) the contract relates to the provision of services and (iii) the contract does not concern making a physical work (e.g. a house), storage of goods, publishing of works or a transport contract. For example, an assignment agreement may cover the services of IT suppliers, marketeers, recruiters, financial services, notaries, etc.

7. **Unforeseen circumstances?** Do the options outlined above not offer a solution? Sometimes the court can amend or (partially) dissolve the agreement if it is of the opinion that unforeseen circumstances exist. These are future circumstances that were not foreseen by the parties when the agreement was drawn up. An appeal to unforeseen circumstances does not succeed quickly. It is often assumed that the parties have indeed taken into account the occurrence of the circumstances in question, but did not wish to make a provision for them. For instance, let's assume there is a very extensive force majeure clause in an agreement, but without mentioning a pandemic. In the context of the Corona outbreak, a court will probably rule that the parties did not wish to include a settlement for the occurrence of such a pandemic in the agreement. Even though the situation regarding the Corona outbreak is extremely rare, these would then not qualify as unforeseen circumstances. In addition, the circumstances must be so drastic that the other party may not demand unaltered maintenance according to standards of reasonableness and fairness.
8. **Force majeure?** A force majeure appeal will succeed if a shortcoming in the agreement cannot be attributed to the party failing to fulfil its obligations. If this is the case, the other party cannot claim fulfilment or compensation from the party that fails to fulfil its obligations. Force majeure shall be deemed to exist when the failure is not attributable to the fault of the party invoking it, nor should it remain at its risk. When the failure is caused by the outbreak of a pandemic, it seems defensible to us that there is force majeure when the failing party has no other possibilities than (temporary) non-compliance, especially since the government has imposed strict measures under forfeiture of substantial fines. Parties can agree in the agreement when there is force majeure. These agreements then take precedence over the statutory regulation on force majeure. Please note that force majeure does not stand in the way of dissolution. The agreement can therefore be terminated in spite of force majeure.
9. **Communication with the contracting party?** Perhaps your contract partner is willing to adjust the agreement in this extreme situation or to strike a balance by mutual agreement, taking into account the interests of both parties. Your contract partner may be in the same situation with regard to fulfilling its own obligations.
10. **Future** To prevent your organisation from ending up in the same situation in the future, it makes sense to include a good interim termination clause in an agreement. In addition, it is wise to include a well-considered clause about force majeure, so that the parties themselves can assess when this is the case.

Want to know more or need assistance? Contact your permanent contact person at our office or with [Huub de Jong](#), [Annemarie Bolscher](#), [Esmée Fonville](#) or [Tom de Wit](#).