



Covid-19 Disputes: Try to avoid, but be ready

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Covid-19 has shaken the world as we know it from the ground up. Many industries have already been hit hard, but its full (negative) impact on the economy is yet to be seen.

It is expected that, in response to the Covid-19 crisis, a waive of disputes will arise worldwide, as well as a number of insolvency proceedings and restructurings.

For this reason, we prepared some practical tips on what a company can do to avoid potential disputes, but also to be ready if litigation or arbitration becomes inevitable.

Litigation can be expensive. Arbitration even more so. However, there is an option to run almost cost- and risk-free disputes. It is called third-party funding. We summarized the main points below and will be happy to provide further information.

<p>Identify your weak(est) links</p>	<ul style="list-style-type: none">• How did the Covid-19 crisis affect your and your counterparties' ability to fulfil contractual obligations?• Did your company suffer damage? Did your company cause damage?• How did particular government measures affect your business? States can be held liable for damages their measures caused to companies.• How did you manage your workforce during the pandemic?• Anticipate. What is not a problem now may become one in a few months' time.
<p>Check your agreements</p>	<ul style="list-style-type: none">• Carefully analyse what you agreed to.• Covid-19 does not (necessarily) exempt you, or your counterparty, from meeting your contractual obligations.• Do not make rash moves, such as termination or breach of contract.• Analyse provisions on force majeure, hardship, material adverse change, insurance, limitation of liability, representations and warranties. Their content (or lack thereof) can be a game changer.• Check for notice requirements and what triggers them.• Assess available legal remedies.• Adjust your strategy and future steps accordingly.

<p>Everything you say (and write) can and will be used against you</p>	<ul style="list-style-type: none"> • Letters, emails, meeting minutes, internal and official notes are regularly used as evidence in litigation and arbitration. • Be careful in communication with the counterparty. Especially when discussing issues caused by Covid-19 and potential solutions. • Avoid statements that could qualify as a waiver, acknowledgement of liability, concession, or the like. • Our statements do not always sound (or read) the way we intended. This is the case more often than we expect. They can be vague and ambiguous, or purposefully misinterpreted, taken out of context or misrepresented. Be mindful of this. • Coordinate communication to avoid contradicting statements by your company. • Inform relevant employees about potential risks. Instruct them on how to communicate and act, and whom to consult internally, if necessary.
<p>Keep records</p>	<ul style="list-style-type: none"> • Existence and credibility of documentary evidence can define the outcome of a dispute. It is also crucial for assessing and proving damage. • Create a central database and keep all documents relating to the issue. One never knows what may become relevant and why. • As noted above, letters, emails, meeting minutes, internal and official notes are evidence. Keep them. • Keep track of who is involved, their roles and responsibilities, as they could be potential witnesses.
<p>Consider third-party funding</p>	<ul style="list-style-type: none"> • Third-party funders are financial institutions that provide funding for legal disputes. • Different funding models are available, but, in essence, the funders provide upfront capital in exchange for a portion of the damages in case of a successful outcome. In case of a negative outcome, capital is almost always non-recourse (as this is an investment and not a loan). A funder funds single claim, but also a portfolio of matters. • This industry has seen a tremendous rise in the last decade, especially since the 2008 economic crisis. The crisis runs some companies out of business and causes cash-flow constraints to others. Without third-party funding, pursuing claims against this background may be extremely difficult or even impossible. • But third-party funding is not only for insolvent or companies facing liquidity issues. It is also for companies who have sufficient funds to pursue their claims, but prefer to invest those funds in other projects, or are simply not willing to take on the negative accounting impact. • Schoenherr cooperates with a number of funders. We can provide assistance throughout the entire process, from contacting the funders, preparing a dispute status overview, negotiating the financing terms, all the way to signing the financing agreement and representation in a dispute.

For more information, please contact our dispute resolution partner **Nataša Lalatović Đorđević**.

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