

**COVID-19  
Cancellation or postponement of  
events**

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# Cancellation or postponement of events in times of COVID-19



## Legal effects on the relationship between organisers and their contractual partners

The COVID-19 pandemic leads to numerous restrictions that affect both the economy and private individuals. Social distancing, which is used worldwide as a method to prevent the transmission of the virus, obviously cannot be implemented on a voluntary basis alone. In Germany, ordinances and general decrees have been issued at the federal state level which, among other things, prohibit gatherings of people or events. These are initially only valid for a certain period, mainly until mid/end of April. However, an end to the pandemic is not in sight at present and a relaxation of the measures will, at best, take place gradually. It is to be expected that events (e.g. trade fairs, conferences, training courses, company celebrations, concerts) will remain unfeasible for the next few months, or at best will be able to take place under heavy restrictions. In view of the uncertainty about the feasibility of events that are usually planned well in advance, many organisers have therefore decided to cancel or postpone their events already. In the relationship between the organiser and his contractual partners (e.g. event agencies, hotels, event room rental companies, catering service providers, lecturers, artists), a number of legal questions arise in this context: Can the contractual partners fulfil their performance obligations? Will the payment obligations of the organiser towards the

contractual partners remain in force despite the cancellation of the event? Can the organiser demand the return of payments already made? Can the contractual partners claim cancellation fees or demand an adjustment of the contract (e.g. the postponement of the event)?

The answers to these questions are primarily determined by the contractual agreements. However, the question of statutory exemptions from the obligation to perform and rights of termination or rescission also arises. In this respect, the legal assessment depends on each respective contract and a final legal assessment can only be made on the basis of the individual circumstances of the case. In the following, we will try to outline the main features of the legal regulations and provide a general overview.

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## I. Official prohibition of the event on the planned date

### 1. Exemption of the organiser's contractual partners from their obligation to perform

If the event is prohibited on the planned date due to official orders, a temporary legal impossibility is to be assumed (Section 275 para. 1 German Civil Code - BGB). It is not possible for the organiser to carry out the event on the planned date and it is not possible for his contractual partners to provide their services for the purpose of holding events. As soon as it becomes legally permissible again to carry out the event, the contractual partners would in principle be obliged to provide their services on an alternative date.

However, the law also recognises constellations in which it is assumed that the performance is not only temporarily but permanently impossible and the contractually owed performance can therefore be permanently refused. This is to be assumed if the time of performance is so crucial for the creditor (i.e. for the organiser) in accordance with the purpose of the contract and the interests involved that a delayed performance no longer constitutes 'performance' because the contractual partner's performance can only be provided at a certain time or within a narrowly defined period of time (so-called absolute fixed date transaction). This must be examined on the basis of the circumstances of the individual case. Ultimately, it depends on whether an event is extraordinarily time-sensitive and "stands and falls" with the date. In many cases, an event will be able to take place at a later date and can therefore be postponed. The organiser's contractual partners would then have to provide their services on an alternative date (so-called relative fixed date transaction).

### 2. Release of the organiser from his obligation to pay and cancellation options

If the contractual partners of the organiser are permanently released from their performance obligations, neither the obligation of the organiser to provide consideration, i.e. to pay the corresponding remuneration, applies (Section 326 para. 1 BGB). A payment already made can be reclaimed (Section 326 para. 4 BGB).

In case of a temporary legal impossibility, the organiser is also only temporarily released from the obligation to

provide consideration. However, it may withdraw from the contract and declare its withdrawal, because the contractual partner as debtor is not in a position to provide the contractually agreed due service (Section 323 BGB). Fault on the part of the debtor is not required for this. Even a prior setting of a deadline is usually not required, because timely performance is usually essential in the contracts in question (cf. Section 323 para. 2 no. 2 BGB). In any case, the setting of a deadline is obsolete if it is foreseeable on the basis of a prognosis that the service cannot be rendered even within a reasonable grace period. This could be assumed, for example, if an end to the restrictions and measures to contain the COVID-19 pandemic were most likely not to be expected even beyond the period of a reasonable grace period.

The organiser may assert his rights even before the planned date of the event if it is within the period of validity of an event ban already issued (Section 323 para. 4 BGB or Section 326 para. 5 BGB). Otherwise, a prognosis must be used to assess whether the event is unlikely to be able to take place on the planned date because it must be assumed that new official orders will be issued that prohibit events of the type covered by the contract (see the information in Section II below).

In the case of event contracts that also include, for example, the booking of hotel rooms or other parts that would still be partially feasible/permissible and are not covered by the impossibility (example: conference becomes impossible, a room contingent was booked in the conference hotel at the same time), the organiser may, under certain circumstances, withdraw from the entire contract or at least demand an adjustment of the contract due to a loss of the basis of the contract (cf. Section 313 BGB).

## II. Planned date of the event after expiry of the currently valid official prohibition

### 1. Exemption of the organiser's contractual partners from their obligation to perform

If the currently issued official orders expire before the planned date of the event, neither a permanent nor a temporary legal impossibility exists from today's perspective. At best, an exemption from the obligation to perform by the organiser's contractual partners for reasons of infection prevention (in analogous application

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of Section 275 para. 3 BGB) may be considered. Obligations of consideration towards event participants and the general public constitute legitimate reasons for the refusal to perform: In these cases, a weighing of interests shows that a debtor can temporarily defer his obligations to perform behind conflicting obligations and legal interests of the general public.

## 2. Release of the organiser from his obligation to pay and cancellation options

For the organiser himself, too, withdrawal is possible even before the due date (in this case: the planned date of the event) if an obstacle to performance is obvious and it is almost certain that the preconditions for withdrawal will be met (cf. Section 323 para. 4 BGB): This would be the case if an event date is still outside the temporal scope of application of an event ban due to an official order or decree, but the issue of new official orders or the extension of the currently valid measures are most likely to be expected due to the unchanged situation.

If one of the organiser's contractual partners invokes an exemption from performance for reasons of precautionary infection prevention (Section 275 para. 3 BGB analogously), the organiser is also exempted from the consideration in the form of his payment obligations (cf. Section 326 BGB) or, if applicable, can exercise rights of withdrawal - as described above.

## III. Elimination of the basis of the transaction (frustration of contract)

If an exemption from performance or the exercise of rights of rescission cannot be considered (as explained above), in particular for disruptions of equivalence in the execution of the contract, the contracting parties may demand an adjustment of the contract (e.g. postponement of the event or execution in another form) or even rescind the contract due to the loss of the basis of the contract (see Section 313 BGB). A discontinuation of the basis of the contract is to be assumed if the circumstances on which the parties based the contract have changed significantly or have proven to be incorrect.

The COVID-19 pandemic and the associated changes in the legal situation have altered the general economic and social fabric to such an extent that in many cases an adjustment of the contract can be demanded due to the loss of the so-called "major business basis". With regard to the risk allocation, it must be taken into account,

according to the previous case law on Section 313 BGB, that in cases of the loss of the major business basis (as in the present case) the risk may not be allocated to one party solely, but that a burden must be shared in line with the interests of the parties if the fundamental confidence in economic and social framework conditions has been shaken. In view of the existing exceptional situation, it can be assumed that the courts will endeavour to bring about an appropriate division of the damage between the parties.

Only as ultima ratio a right of withdrawal/termination exists if an adjustment of the contract is not possible or is unreasonable for the contractual partner.

## IV. Damages and cancellation fees

Since claims for damages require a culpable conduct (fault), both contracting parties are usually not entitled to assert damage claims against the other party in the situation described. Moreover, if an organiser makes use of statutory rights of rescission/termination, the contractual partner may also not charge any cancellation fees (irrespective of whether they are legally qualified as liquidated damages, liquidated reimbursement of expenses or contractual penalty) in connection with contractually agreed termination/rescission rights, as is often the case in practice.

## V. Right of refusal to pay under the law to mitigate the consequences of the COVID-19 pandemic

On 27 March 2020, the Federal Council passed a law to mitigate the consequences of the COVID-19 pandemic. Among other things, it provides for a right of refusal to carry out performance for consumers and micro-businesses if, in the case of continuous obligations as a result of the COVID-19 pandemic, it would not be possible to provide the service without jeopardising a reasonable livelihood or the economic basis of the business. As a rule, however, event contracts will neither be continuous obligations nor contracts that are necessary for the provision of a reasonable livelihood or the appropriate continuation of the business.

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