

UPDATE: BRIEF STATEMENT ON CONSTRUCTION CONTRACTS  
IN THE COVID 19 PANDEMIC

AS OF 30.03.2020

1. RECENT DEVELOPMENTS

- 1.1 The construction social partners - the Federal Guild of Construction, the Construction Industry Association and the Trade Union Bau-Holz - reached an agreement on Thursday regarding the "construction site problem" and, in cooperation with the Central Labour Inspectorate, drew up **protective measures for safe working on construction sites**<sup>1</sup>. The protective measures cover industrial hygiene, organisational measures, work equipment, risk groups, transport of people, dormitories and construction site coordination.<sup>2</sup>
- 1.2 The Minister of Health has promised to use this catalogue of measures as a basis for an order to subordinate departments to carry out **checks on construction sites**.<sup>3</sup>

2. RESTRICTIONS ON ENTERING PUBLIC PLACES / PLACE OF PROFESSIONAL ACTIVITY

- 2.1 For about two weeks already, there have been **entry restrictions for public places**.
- 2.2 COVID-VO II (BGBl 98/2020) does not contain a definition of the term "*public place*". However, the VwGH has already stated in an earlier ruling that the term "**public place**" is characterised by the **essential feature of general accessibility**.<sup>4</sup> This corresponds to the definition contained in § 27 para. 2 SPG, according to which public places "*are those which can be entered by a circle of persons not determined from the outset*". In contrast, places that are only accessible to certain (individually designated) persons are not "*public places*".
- 2.3 Since 20.03.2020, **entering public places** is permitted, among others, if
- it is necessary for professional purposes, **and**
  - it is ensured that a safety distance of at least one metre can be maintained between persons at the place of work, **or**

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<sup>1</sup> See in particular [https://www.ots.at/presseaussendung/OTS\\_20200327\\_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen](https://www.ots.at/presseaussendung/OTS_20200327_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen)[https://www.ots.at/presseaussendung/OTS\\_20200327\\_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen](https://www.ots.at/presseaussendung/OTS_20200327_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen).

<sup>2</sup> <https://www.wko.at/branchen/gewerbe-handwerk/bau/bauarbeiten-und-covid-19.pdf>; Cf. in particular also [https://www.ots.at/presseaussendung/OTS\\_20200327\\_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen](https://www.ots.at/presseaussendung/OTS_20200327_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen)[https://www.ots.at/presseaussendung/OTS\\_20200327\\_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen](https://www.ots.at/presseaussendung/OTS_20200327_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen).

<sup>3</sup> See in particular [https://www.ots.at/presseaussendung/OTS\\_20200327\\_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen](https://www.ots.at/presseaussendung/OTS_20200327_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen)[https://www.ots.at/presseaussendung/OTS\\_20200327\\_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen](https://www.ots.at/presseaussendung/OTS_20200327_OTSS0056/corona-virus-handlungsanleitung-fuer-sicheres-arbeiten-auf-baustellen).

<sup>4</sup> VwGH ruling on the Tobacco Act, of 20.03.2012 (VwGH 2011/11/0215).

- if the risk of infection at the place of work is minimized by appropriate protective measures.<sup>5</sup>

Thus, Section 2(4) of the COVID-VO II links the necessity of protective measures at the place of professional activity to the fact that public places are entered in connection with the professional activity.

In a nutshell, it is practically always necessary to enter public places (cf. point 2.2) in order to get to the construction site - the place of professional activity. **Therefore, even on construction sites, even if they themselves cannot be qualified as public places, it must always be ensured that either (i) a safety distance of one meter is maintained to other persons, or (ii) the risk of infection is minimized by appropriate protective measures** (such as mouthguards, disinfectants, documented safety instructions). This also applies if the workers travel to the construction site alone.<sup>6</sup>

### 3. NEW PROBLEMS

#### 3.1 Compensation for damage caused by delay?

3.1.1 According to the dispositive provisions of §§ 918 ff ABGB (Austrian Civil Code),<sup>7</sup> under certain **conditions** the building owner is **entitled to compensation for the damage that it** has suffered as **a result of delayed fulfilment of the building contract**<sup>8</sup> (see point 3.3 of our brief statement on building contracts in the COVID 19 crisis, as of 18.03.2020).

3.1.2 However, a claim for damages presupposes that the building contractor is at **fault** for the damage caused by the delay (see already point 3.3.2 of our brief statement on building contracts in the COVID 19 crisis, as of 18 March 2020).<sup>9</sup>

3.1.3 The amendment (Federal Law Gazette 107/2020) to COVID-VO II (Federal Law Gazette 98/2020), which came into force on 20.03.2020, clarified that the safety measures to be taken at the place of employment do not necessarily have to consist of maintaining a safety distance of one meter between persons<sup>10</sup>. Rather, other safety measures appropriate to the situation, such as protective clothing (see point 2.3), are sufficient.

Therefore, since the amendment to COVID Regulation II became effective (at the latest), it has been clear that

- the COVID 19 pandemic does not justify the blanket suspension of construction sites for reasons of prevention, and
- the security measures adopted by regulation to contain the COVID 19 pandemic **do not make it impossible to provide the service.**

<sup>5</sup> § Section 2(4) of COVID-VO II (Federal Law Gazette 98/2020 / Federal Law Gazette 107/2020).

<sup>6</sup> § Section 2(5) of COVID-VO II (Federal Law Gazette 98/2020).

<sup>7</sup> Cf. *Kletecka in Kletecka-Schauer*, ABGB-ON1<sup>03</sup> § 1168 Rz 47, 49 (status 01.01.2018, rdb.at).

<sup>8</sup> *Gruber in Kletecka-Schauer*, ABGB-ON1<sup>06</sup> § 918 Rz 53 (as of 01.08.2019, rdb.at).

<sup>9</sup> *Gruber in Kletecka-Schauer*, ABGB-ON1<sup>06</sup> § 921 Rz 3 (as of 01.08.2019, rdb.at). *Gruber in Kletecka-Schauer*, ABGB-ON1<sup>06</sup> § 920 Rz 11 (as of 01.08.2019, rdb.at).

<sup>10</sup> § Section 2(4) of COVID-VO II (Federal Law Gazette 98/2020 / Federal Law Gazette 107/2020).

3.1.4 In order to assess any claims for damages by the client against the contractor, one must therefore distinguish between the site setting

- **before the** amendment (Federal Law Gazette 107/2020) to the COVID Measures Ordinance (Federal Law Gazette 98/2020) took effect on 20 March 2020 (see point 3.1.3) and
- **after** they took effect

to distinguish between the two.

3.1.5 **Before** COVID-VO II was amended, public places - as already explained in point 3.1.3 - could only be entered for professional purposes if it was ensured that a **safety distance of one meter was** maintained between persons at the place of professional activity.

If a building contractor has temporarily suspended construction because of a pandemic, and they can actually substantiate that it was not possible to maintain a safety distance of one meter between the workers on the specific construction site, it is unlikely that the building contractor can be accused of negligence during the temporary suspension of the construction site. In this case, the client will not be able to claim compensation from the contractor for any damage caused by delay.

3.1.6 **With the amendment of the COVID Measures Ordinance**, the **previously prescribed security measures** to contain the COVID 19 pandemic were **expanded** (cf. point 3.1.3). Furthermore, the agreement reached by the construction social partners (cf. point 1.1) shows that protective measures appropriate to the situation can be suitable for construction sites.

If a building contractor nevertheless does not continue construction, they will be accused of breaching due diligence, because there is no (further) proper justification for not fulfilling the contractual obligations. In this case, the contractor may be exposed to possible claims for damages by the client.

## 3.2 **Supply problems with regard to protective equipment**

3.2.1 A contractor who is unable to provide their employees with the necessary protective equipment may be forced to keep their site(s) (still) closed, due to the restrictions on entering public places outlined in point 2.3. If the contractor can demonstrate that they are making every effort (i) to provide the protective equipment necessary to continue the work and (ii) can demonstrate that it is not possible to maintain a safety distance of one meter between workers on the specific site, it will be difficult to accuse them of a breach of due diligence.

## 3.3 **Cost of protective equipment**

3.3.1 The documents drawn up by the construction social partners together with the Central Labour Inspectorate (see point 1.1) do not contain any recommendations as to who should bear the costs of the protective equipment now required.

3.3.2 In view of the fact that construction contracts are very differently structured in practice due to the dispositivity of the relevant legal provisions (in particular Sections 1168, 914 et seq. of the Austrian Civil Code; see point 4 below), such recommendations would interfere considerably with existing contractual agreements and could not take into account the individual structure of construction contracts.

3.3.3 According to the optional legal provisions, the cost of the now required protective equipment remains with the contractor, unless individual contractual provisions indicate otherwise.

#### 4. DISPOSITIVE REGULATIONS OF THE ABGB, RECOMMENDATION

4.1.1 **The above statements are based on the dispositive provisions of the ABGB.** A construction contract may therefore contain deviating provisions (i) on bearing the economic risk of non-performance of the construction contract<sup>11</sup>, (ii) on the consequences of default<sup>12</sup> and (iii) on any consequences under compensation law. Construction contracts often contain a large number of clauses by which the parties deviate from the optional legal provisions discussed above.

4.1.2 **A final assessment of the legal consequences of a possibly pandemic-related delay in the performance of a construction contract can therefore only be made on the basis of the specific contract text.**

4.2 The above comments are therefore only intended to provide an initial, general assessment of the potential impact of the current situation. Due to the dispositive relevant legal provisions, it is essential to analyze the consequences of a delayed performance of a construction contract in detail on the basis of the specific contract text.

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<sup>11</sup> *Kletecka in Kletecka-Shower, ABGB-ON1<sup>.03</sup> § 1168 Rz 2 (as of 01.01.2018, rdb.at).*

<sup>12</sup> *Gruber in Kletecka-Schauer, ABGB-ON1<sup>.06</sup> § 918 Rz 44 (as of 01.08.2019, rdb.at).*