Munich, April 08, 2020

FAQs regarding the possible effects of the "Corona Virus" on contracts under German Law

I have a so called "Force Majeure Clause" in my contract. Can I terminate or suspend this contract (e.g. delivery contracts) due to the negative effects of the Corona Virus to my business?

The main question is the contractual definition of Force Majeure and the agreed effects and the procedure within the contract. Such clauses generally set forth limited circumstances under which a party may terminate or fail to perform without liability due to the occurrence of an unforeseen event. Assessing applicability and enforceability of such clauses requires a highly fact-specific analysis.

In general we have no clear definition of Force Majeure under German Law (see question 2).

But German courts have already ruled that e.g. the SARS epidemic or even cholera can be considered a so-called "*Höhere Gewalt*". According to the Federal Court of Justice (BGH), force majeure is "*an external event which has no operational connection and cannot be averted even by exercising the utmost diligence that can reasonably be expected*" (BGH, judgement of 16 May 2017, ref. X ZR 142/15). It can therefore be assumed that the effects of the corona pandemic will also be considered as "*Höhere Gewalt*" and thus also as force majeure.

However, it is essential to examine and assess whether the contractual default is actually due to the Corona Pandemic or whether, for example, a pre-existing supply bottleneck or financial problems are the real cause of the default. Usually, the above mentioned force majeure clauses only regulate facts/adjustments due to (i.e. causally) based on the force majeure event.

Thus the details and options contractual partners have need to be evaluated very carefully as well as the formalities that need to be respected. We are happy to assist.

I have <u>no</u> so called "Force Majeure Clause" in my contract. Can I terminate or suspend this contract (e.g. delivery contracts) due to the negative effects of the Corona Virus to my business?

If the contract does not contain a force majeure clause, the question of force majeure will depend on which law is applicable.

(1)

If the contracting parties have agreed on "German law" in an international sales contract, then the UN Convention on Contracts for the International Sale of Goods (CISG) and, in

addition, German law shall apply - unless the applicability of UN sales law has been expressly excluded.

If the parties have not made a choice of law, UN sales law shall apply under the conditions of Art. 1 para. 1 CISG.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) stipulates in Art. 79 CISG that a party need not be held liable for non-performance of its obligations if it proves that such non-performance is due to an impediment beyond its control and that it could not reasonably be expected to avoid or overcome such impediment [...] or its consequences. This rather broad provision is to the supplier's advantage.

Thus, if UN sales law is applicable, the affected party may potentially successfully invoke force majeure. To do so, the affected party has to be able to prove that the delivery was not made or was delayed as a result (causal) of the coronavirus.

Art. 79 CISG, however, only regulates the lack of fault of the contracting party and not the question whether and how the delivery was delayed.

(2)

If the CISG does not apply German Law may be applicable. According to German law, it must be examined whether (a) a case of impossibility according to § 275 of the German Civil Code (BGB) or (b) the discontinuation of the basis of the transaction according to § 313 BGB exists.

(a)

Conceivable are the - temporary - subjective impossibility, i.e. impossibility in the person of the party obliged to deliver according to § 275 para. 1 BGB, as well as a right to refuse performance in case of unreasonable efforts according to § 275 para. 2 BGB.

The legal consequence is that the supplier is (temporarily) released from his obligation to perform. In this case, the buyer does not have to pay the purchase price (§ 326 para. 1 BGB). Any liability for damages, however, remains unaffected. Thus, the buyer can demand compensation if the non-delivery or the delay in delivery is due to negligence or intent of the supplier.

(b)

The coronavirus can also constitute a disruption of the basis of the business in accordance with § 313 Para. 1 BGB and justify a claim to adjust or terminate the (supply) contract. A party may demand that the contract be adapted if adherence to it is unreasonable because the circumstances which became the basis of the contract have changed seriously after the contract was concluded and the parties - if they had foreseen the change - would not have concluded the contract or would have concluded it with a different content.

The disruption of the basis of the transaction interferes with the content or existence of the delivery contract, but - just as in the case of impossibility - has no direct effect on the liability for the economic consequences of the delayed or omitted delivery. An adjustment of the supply contract presupposes that the disruptive event does not fall within the risk sphere of one of the parties. As a rule, the manufacture and delivery of products is assigned to the supplier's sphere of risk, which is why he usually has no right to demand an adjustment of the contract.

In fact, each individual case must be examined and assessed separately. We are happy to support you.

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