BEITEN BURKHARDT

Special Newsletter
Disruption of Supply Chains due to the Corona Crisis

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The effects of the corona virus are now also clearly noticeable in Germany. Hardly any part of life has been spared by the pandemic. Every day there is talk in the media of plant closures, short-time work or other disruptions in the production or delivery cycle that have an impact on supply chains. Many companies are affected by delivery delays and shortages and, due to a lack of their own supply, have difficulties in meeting their own obligations to supply their customers on time.

The following considerations address the legal implications of this issue and serve as a guide for action to be taken.

1. CONTRACTUAL REGULATIONS IN DEALING WITH THE CORONA CRISIS

1.1 "Force majeure clauses" in (framework) agreements or general terms and conditions (GTC)

The keyword "force majeure" (usually referred to as "Act of God" in the English contractual language or internationally as "Force Majeure") often appears in connection with delivery delays and disruptions of supply chains. This non-statutory legal concept describes the regulations frequently made in contracts for the exchange of services and the effects of interferences with performance in the case of "*events which come from outside, have no operational connection and cannot be averted even by exercising the utmost reasonable diligence*" (according to the definition given by case law).

These clauses, often regarded as "annoying small print", are currently becoming more relevant than ever. Depending on the form they take, they are either general in nature or regulate specific individual cases or legal consequences - according to the General Rules on the Interpretation of Contracts, it will regularly have to be determined whether the failure to supply the goods or services by the company itself actually results in the company being released from its own performance obligations towards the customer. This will only be the case if there is a stockpiling system of the usual standard which absorbs normal supply shortages. Moreover, the business operator will have to prove that he has carried out such stockpiling and that the delivery difficulties are really due to "force majeure" - and not to his own carelessness.

At any rate, it is advisable to waive, if at all possible, the fixed promise of delivery dates at present and to agree on "force majeure clauses" if your own general terms and conditions do not already contain good and court-proof regulations. The mere "reservation of self-supply" might not be sufficient to suspend own performance obligations. If the regulations expressly cover epidemics or pandemics, you have a good chance of rightly invoking a "force majeure" event in the event of delivery delays due to the corona pandemic.

1.2 Contractual penalties

Frequently, business conditions of business operators provide for contractual penalties, even if the delay in delivery was not the fault of the supplier. Such "no-fault" contractual penalties are basically permissible. Whether a contractual penalty is due in the event of a delay in delivery due to the outbreak of the corona crisis must, however, be verified in each individual case. Even in the case of contractual penalty provisions, the reference to "force majeure" is not excluded from the very beginning.

2. Particularities of logistics contracts

2.1 General German Freight Forwarders' Standard Terms and Conditions (ADSp)

Every manufacturing or trading company makes use of logistical services, be it transport services or warehousing by a logistics company. Special features often deviate from general rules: This is the case, for example, because the *German Freight Forwarders' Standard Terms and Conditions (ADSp)* - these are "Special Terms and Conditions for Logistics Services" - preferred by the logistics industry are often applied to such services. The impact of these provisions on crisis-related disruptions in the supply chain must be examined on a case-by-case basis.

2.2 Quantity agreements in logistics contracts

Logistics contracts are often sophisticated special contracts in which the pricing depends decisively on the "quantity structure" of the storage or transport capacities called up. Many companies need considerably less of both in the crisis, and for them the question arises whether they can "cancel" partial services or capacities or at least leave them unused free of charge.

The analysis of your own warehousing and transport contracts can be a worthwhile tool for quick cost savings.

2.3 Crisis-related special termination rights for logistics contracts

Just as relevant is the question of what options are available if one's own logistics service provider gets into financial difficulties or even goes into insolvency - what are the legal and actual options for establishing an alternative service provider as quickly as possible?

2.4 Problems of proving the transfer of risk for transport service providers

Problems of proof may arise in the case of sale to destination, due to the fact that transport service providers, in the interest of avoiding physical contact, refrain from obtaining a signature from the receiver when the goods are handed over. The first cases have been reported in which delivery personnel have noted a "Q" for quarantine on the delivery note when the addressee is not present and have left the goods outside the door or on the company premises. There may be occasions when there is a reason for this but there is reason to fear that the second approach of the customer, which was still necessary before the crisis when a customer was not present, will be avoided "in practice"; the reference to the crisis apparently justifies everything.

This is in fact not true: The risk of accidental loss of the goods passes to the addressee when the carrier takes over the goods. Only when the goods are handed over is the carrier released from his duty of care and thus from his liability, including for accidental loss. In general, both procedures are verifiably recorded by signing the transport documents. Since, in the course of the worldwide Covid-19 pandemic, service providers are increasingly avoiding the potential for infection or minimising the risk of infection by not signing the documents, the transport industry is well advised to create other means of proof in order to avoid falling into a liability trap itself. In any case, if the receipt or the integrity of the goods is disputed at a later date, the burden of proof of the logistics provider shall be subject to further requirements than the quoted "Q" on the delivery note.

3. THE SUPPLY CONTRACT DOES NOT CONTAIN A PROVISION ON "FORCE MAJEURE" - LEGAL REGULATIONS FOR DEALING WITH THE CORONA CRISIS

If the supply contract does not contain a "force majeure clause" and no relevant provisions of the General Terms and Conditions are applicable, the law must be applied. Civil and commercial law contain a variety of regulations in this respect. They are based on the principle that contracts must be respected. There is only room for invoking the debt-discharging effect of "force majeure" or a "changed business basis" if the external circumstances leading to the default are not attributable to the risk sphere of one party.

3.1 Exclusion of performance obligations due to impossibility

Particularly in connection with national or cross-border supply chains, companies should not prematurely refuse benefits temporarily or permanently on the grounds of the current worldwide tense situation. It always remains to be carefully assessed whether one's own obligation to pay benefits is actually impossible - and possibly only temporarily - due to the currently rampant pandemic and its economic effects, and whether and how long benefits can be refused. So-called fixed-date transactions or just-in-time contracts in which delivery is "up and down" when the delivery date expires (the much-cited chocolate Easter bunny which is not delivered to the trade before Easter, is no longer of interest to the customer), can be of particular significance in this context. What is to be qualified as a " fixed transaction " or as a " delivery made later",

where an exemption from the obligation to perform does not occur, must be determined on the basis of the interpretation of the contract and the relevant case law.

3.2 Default due to delay in delivery

If there is a delay in delivery (e.g. because the truck has to wait at the closed border) " default" can occur, with the consequence that the supplier in default must pay compensation for the damage caused by the delay in delivery. This can prove to be expensive if, for instance, the consignee of the delivery is itself only an intermediary and contractual penalties are due as a result of delays in delivery to its customers - which it now wants to pass on to its supplier.

In this context, how are delays that occur as a result of official orders or recommendations on health care, for example because fewer staff are available for the contractually agreed provision of services? Here, too, only contract analysis and interpretation can help.

3.3 Rescission of the contract / termination

Performance disruptions in supply chains can give rise to the right to rescind the contract or to terminate continuing obligations (such as framework agreements). This applies in particular if the performance disruption is not only short-term but is likely to last for a long time. If it is foreseeable that a supplier will hardly be able to deliver again even after the end of the crisis, for example because he "will not survive" the crisis economically, the contractual partner cannot be expected to adhere to the contract. But in this case, too, caution is called for: Anyone who gives notice "too quickly" or even takes the opportunity of the crisis to "get rid" of a contractual partner who has been unpopular for a long time in an extraordinary way can be liable for damages.

Whether the termination of contractual relationships is advisable must be decided on a case-by-case basis; not every right (to terminate etc.) must also be exercised. An operational analysis of the advisability of exercising the right to terminate the contract will be crucial.

3.4 Interference with the basis of the transaction

As ultima ratio, the legislator provides for the possibility of adapting the contract in the event of an interference with the basis of the transaction if, taking into account all circumstances of the individual case, in particular the distribution of risk, it cannot reasonably be expected to adhere to the unchanged contract. Here, circumstances which have become the basis of the contract must have changed seriously after conclusion of the contract. Furthermore, it must be assumed that the parties would not have concluded the contract or would not have concluded it in this way if they had foreseen the new circumstances.

As this instrument of the law of obligations is intended to be used only as a last resort, consideration can in fact only be given to serious and sensitive disturbances in the performance relationship between the contracting parties, and only those which do not fall within the sphere of risk of a contracting party. However, mere increases in the cost of raw materials, for instance, are not sufficient to justify an interference with the basis of business, as they are part of the general corporate risk. In contrast, shortages caused by state border closures or embargoes could lead to an interference with the basis of business transactions.

3.5 Implications of the proposed legislation to mitigate the corona crisis

On 27 March 2020, the legislator passed the law to mitigate the consequences of the Covid-19 pandemic and announced it in the Federal Law Gazette. Among other things, it has provided for civil law that certain debtors (initially) have a statutory right to refuse performance from 1 April 2020 to 30 June 2020, which may not be made subject to negative legal consequences by the creditor.

3.6 UN Sales Convention

Even in the case of contracts subject to the UN Convention on Contracts for the International Sale of Goods, the international agreement provides for legal possibilities of refusing performance if the circumstance of the impediment does not originate from the sphere of influence of the refusing party. Thus, if the contract does not contain the well-known, usually considered irrelevant clause on the "Exclusion of the provisions of the UN Convention on Contracts for the International Sale of Goods", it is indeed advisable to take a look at these special provisions.

4. BRIDGING FINANCE FOR COMMERCIAL AGENTS

Business operators whose sales are based on the use of commercial agents and their integration into their sales networks are currently confronted with requests from commercial agents for interim financing as an advance payment on future commissions, as

sales agents also lose sales. This applies as well for subscription, membership or contract advertisers.

There will generally be no legal claim to such commission advances, not even due to a change in the basis of business transactions as a result of the crisis. Whether such requests are complied with is a business decision that should be carefully considered. It is not foreseeable whether and to what extent there will be commission claims that can be offset against the "advance" again in future. Anyhow, in the event that such benefits are granted, a clear contractual situation must be created which ensures that any advance or subsidy is not lost but is made repayable and offsettable.

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