

Impact of the corona virus on supply chains

The economic consequences of the corona virus (Covid-19) and its spread cannot be foreseen at present, but in view of the daily reports of supply bottlenecks, line stoppages, border closures, plant closures and short-time working, considerable unprecedented restrictions on economic life are to be expected. Numerous civil law issues arise for affected companies in this context, which we will briefly describe below.

Actual and legal effect on supply contracts

The corona virus can directly or indirectly affect companies, for example by

- infections in the company itself, which lead to the loss of important parts of the workforce;
- follow-up and protective measures in the event of an infection being detected (e.g. through precautionary plant closure; sealing off certain regions), or
- a shortage of supplied parts, because affected suppliers cannot meet their delivery obligations due to the corona virus.

If a company is affected by the corona virus in its activities, existing business relationships with suppliers and customers should be examined as soon as possible, particularly with regard to the following points:

- Impediments to performance/force majeure
- Delay
- Information requirements
- Insurance coverage
- Claims for damages

In this way, the affected company can clarify at an early stage whether and to what extent contractual obligations continue to exist (modified) or have been suspended by the corona virus and what rights, obligations and liability risks exist.

1. Impediments to performance/force majeure

The effects outlined above can be considered a legally relevant impediment to performance or even a case of force majeure, depending on the specific case. According to German law, "force majeure" is characterized by three elements:

unpredictability, unavailability and exceptional circumstances.

These could be fulfilled, for example, if a company is directly affected by an official closure order or if the employees mainly come from a quarantine area. Due to the existence of force majeure, the (counter-) performance obligation of the affected company may be temporarily suspended or even completely cancelled. If suppliers refer to force majeure due to missing/delayed deliveries, it should first be examined whether the prerequisites are actually met in the individual case. According to case law, companies are generally obliged to organize their supply chains in such a way that failures can be compensated. Therefore, it must be examined in each individual case and the affected party must also prove that no alternative sources of production existed.

Decisive in this regard is first of all whether and to what extent the parties have made contractual arrangements in this respect and whether these have been effectively agreed - especially in the area of general terms and conditions.

2. Delay

A prerequisite for the delay in delivery is that it is still possible to render the service. Depending on the individual case (e.g. in the case of just-in-time contracts), performance may already be considered impossible if there is a delay. In this case, the contractual partner may also be entitled to a right of withdrawal in addition to the claim for damages.

However, the supplier shall not be in delay if the performance has not been rendered due to a circumstance for which he is not responsible. This means that not every delivery bottleneck due to the Corona virus immediately leads to delay and thus to liability of the supplier. It must be examined in each individual case how far the supplier's obligations extend and whether the supplier has in particular also assumed the risk of procurement.

3. Information requirements

It is important that affected companies that are unable to deliver on time check whether they are obliged to inform their contractual partners as early and comprehensively as possible about the nature and extent of the delay. Such obligations may arise from the supply contracts or as a secondary contractual obligation in good faith. If an obligation exists, claims for damages may be asserted due to a breach of the duty to inform.

4. Insurance coverage

If companies have to close down temporarily or shut down their production, the question arises whether insurance coverage is provided by the company's own insurance policy (e.g. business interruption insurance). Depending on the form of the contract, insurance coverage includes lost profits, unearned fixed costs or even coverage for subsequent losses, provided that possible losses in connection with the supply relationships have been included in the insurance coverage when the contract was concluded. Decisive for the scope of insurance cover is the specifically agreed insurance policy of the company, which must be examined in each individual case. In order not to jeopardise the coverage, care should be taken to ensure that all obligations under the contractual insurance relationship are complied with (especially in the form of notification obligations).

5. Claims for damages

Claims for damages can be considered in a variety of constellations: as direct claims for damages by a company or an end customer against the supplier, or indirectly, as recourse claims via the supply chain. According to German law, claims for damages usually require fault on the part of the party being claimed against. Sometimes, however, such claims also exist regardless of fault, e.g. if a guarantee promise with corresponding content has been made. In order to avoid disadvantages, it is important that claimants fulfil their obligation to mitigate losses. In addition, in the event of short deliveries, it is important to ensure that a commercial complaint is made in a timely and effective manner, as otherwise claims for compensation are excluded.

Conclusion

Due to the large number of factual and legal implications of the corona virus, potentially affected companies should consider as early as possible which duties and obligations must be fulfilled to avoid disadvantages and which measures should be taken to secure rights.

We would be pleased to support you in reviewing the contractual basis of your supply relationships. Please do not hesitate to contact us if you have any questions or queries.

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