KNOW-HOW

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CORPORATE

CANCELLATION OF GENERAL MEETINGS – MUST THE RENT FOR VENUES, THE CATERERS AND ANY SERVICE PROVIDERS BE PAID?

Because of the ban on public meetings necessitated by the corona pandemic, many general meetings cannot take place as usual as attendance-based events on the planned dates.

From today's perspective, there is often uncertainty about whether a ban on public meetings will still be in force on the planned date; the question arises as to whether these meetings should also be cancelled or postponed. It is true that stock corporations are obliged under the German Stock Corporation Act (AktG) to hold a general meeting requiring physical attendance in the first eight months at which the annual financial statements must be presented and a vote must be taken on the appropriation of profits and the formal approval of the actions of the management board and supervisory board members. The German Act on the mitigation of the consequences of the COVID-19 pandemic (**Mitigation Act**) extended the period by four months to cover the entire financial year; it was also made possible to hold a virtual general meeting without the need for shareholders to be physically present (please see our client update Virtual general meetings – changes to the Stock Corporation Act (AktG) due to COVID-19). If a company postpones the general meeting or replaces the general meeting requiring physical attendance with a virtual general meeting because of the pandemic, the question arises as to whether the company can terminate its contracts with the lessors of the venue, the GM service providers, the caterers and other contracting partners or demand that they amend the respective contracts; correspondingly, the question also arises as to whether the company remains obliged to pay the agreed fees in the event of termination.

In view of the corona pandemic, which could not be anticipated at all by either the company or its contracting partners and which forces the cancellation of general meetings or – if it is uncertain whether the ban on public meetings will still be in place on the planned date – makes cancellation appear to be a possibility, it is necessary to consider the rules governing frustration of contract (section 313 German Civil Code (BGB)). However, the rules governing frustration of contract are only to be applied as a subsidiary measure, that is only if the provisions in the BGB governing contracts and the agreements made by the parties to the contract would not lead to an appropriate solution, i.e. would be unreasonable for at least one of the parties. It must therefore first be checked whether the contracts concluded with the lessors, caterers, GM service providers and other contracting partners provide for cases of force majeure such as natural disasters and pandemics. If they do not, as is usually the case, it is necessary to check whether the regulations forming the special law of obligations in the BGB contain provisions which serve the interests of both parties. This would be the law governing leases for the leasing of the venue, the law on contracts for work and services for the GM service providers and caterers and possibly also service contract law for other service providers.

Under the **law governing leases**, a reduction in rent for material defects (section 536(1), sentence 1 BGB) or for legal defects (section 536(3) BGB) would come into consideration. A general ban on public meetings does not however pertain to the specific condition of the leased object and therefore does not entitle the company to a reduction in rent; a legal defect can also be ruled out. However, section 543(1), sentences 1 and 2 BGB grants the lessee the right to terminate the lease for cause without notice if, after weighing its own interests against those of the lessor, it cannot be reasonably expected to continue the lease. If a ban on public meetings is in place at the time of the planned general meeting, the meeting cannot be held. However, this does not necessarily mean that the lease agreement may be terminated, for this would lead to the financial consequences of the pandemic being unilaterally imposed on the lessor. The lessor of course remains in a position to make the venue available on the

agreed day; the company is simply not in a position to use it for the intended purpose, namely the general meeting. A solution that serves the interests of both parties therefore does in fact lead to the rules on frustration of contract, which remain applicable in addition to section 543(1) BGB.

In the case of **contracts for work and services** concluded with the GM service providers, caterers and other suppliers, the company has the general right of termination of a client pursuant to section 648, sentence 1 BGB. However, if the company exercises this right, it remains obliged to pay the agreed fee; its contractual partner only has to offset what it saves in expenses as a result of the cancellation of the contract or what it acquires or maliciously fails to acquire by using its working capacity elsewhere (section 648, sentence 2 BGB). If the general meeting must be cancelled because a ban on public meetings is in place on the day of the general meeting, the caterer will save the cost of buying the food and possibly also the cost of hiring temporary staff. The savings made by the GM service providers, however, are likely to be small. If the company terminates the contract pursuant to section 648, sentence 1 BGB, it must therefore essentially bear the financial consequences. In addition, the law on contracts for work and services makes it possible – like the law governing leases – for both parties to terminate the contract for good cause, provided that they cannot reasonably be expected to perform the contract (section 648a(1) BGB). This, too, would lead to a binary "all or nothing solution", which does not seem appropriate in the case of termination on account of a pandemic. For this reason, it is possible to additionally fall back on the principles of frustration of contract in this regard, too.

On balance, the same applies to **service contracts**. If the company does not accept the services on the agreed date, that is on the day of the general meeting, it will essentially be in default of acceptance pursuant to section 615 BGB and will therefore remain liable to pay the agreed fee. However, if acceptance of the service is – by way of exception – unreasonable for the party entitled to the service, such party will not be deemed to be in default of acceptance. Here, too, only the rules governing frustration of contract can help to achieve a solution that serves the interests of both parties.

The cases discussed here cannot on balance be solved by the provisions in the BGB covering the **impossibility of performance** (section 275 BGB), either. This implies that the purpose of the service has fallen away, rendering performance impossible. However this is not the case here. The contracting partners do not unilaterally bear the risk of it not being possible to hold the general meeting on the agreed date. Moreover, the provisions covering the impossibility of performance would also only provide an unreasonable "all or nothing solution", because if it is impossible to carry out the principal performance, the consideration will, pursuant to section 326(1) BGB, fall away without substitution.

Frustration of contract first of all gives rise to a right to amend the contract (section 313(1) BGB). If it is not possible to **amend the contract** or one party cannot reasonably be expected to accept this, the disadvantaged party may – only as an **alternative** – **revoke** or **terminate** the contract (section 313(3) BGB). Whether the contract has been frustrated and whether or in what way an amendment of the contract can be demanded must be clarified **in each individual case, weighing up the interests of both parties**.

If it is already clear today that a ban on public meetings will still be in place on the planned day of the general meeting, the meeting must either be cancelled or postponed or be held as an online general meeting. The company's decision in favour of one of these options will affect the amendment of the contract on account of frustration of contract. The company must check whether an alternative date to which the meeting can be postponed is available; here it is not the 8-month period stipulated in the AktG that is taken as a basis, but rather the one-year period made possible by the Mitigation Act. The contracting partner must endeavour to offer alternative dates that would be reasonable from its point of view. Should, for example, the lessor reject a postponement even though the venue would be free, this argues in favour of the lessor losing its claim to the payment of rent. For its part, the company must check whether these alternative dates would be suitable for it. If the company rejects the lessor's offer to postpone the general meeting to an alternative date that would be reasonable from the company's point of view and instead switches to an online GM, this would appear to support the view that the company remains obliged to pay the agreed rent. However, any reasons that the company may have for not postponing the general meeting and for holding a virtual general meeting instead must be taken into account. One argument against postponement could be that resolutions must be passed without delay or that resources would be tied up for the general meeting towards the end of the financial year which would be needed elsewhere, also because of a possible expected increase in business. The weighing up of these factors could result in the amount to be paid by the company being reduced. If, despite goodwill on both sides, it is not possible to find an alternative date for a general meeting requiring physical attendance that works for both parties, the contract is to be amended pursuant to section 313(1) BGB. This should, in case of doubt, lead to the risk being split equally, i.e. the company remains obliged to pay 50 % of the rent. As far as the caterers are concerned, this means that they can demand half of the agreed fee remaining after deducting the expenses saved. The same applies to GM service providers.

But what happens if it is currently uncertain whether a ban on public meetings will still apply on the planned date of the general meeting? Given this objective uncertainty, the company must decide whether or not to adhere to the original date of the general meeting. Cancelling the meeting at an early stage will generally not be justified if it would be possible to postpone it to later in the financial year and this option has also been offered by the contracting partners. Cancelling the meeting prematurely or switching to an online general meeting without considering possible alternative dates may mean that the company remains obliged vis-à-vis its contracting partners to pay the agreed fees, with a possible setoff pursuant to section 648, sentence 2 BGB remaining an option in the case of contracts for work and services.

It is in any event advisable to contact the contracting partners about the general meeting and any postponement at an early stage. It is always preferable to find an amicable solution, also with a view to working together in the future.

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