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## COMMERCIAL

### EFFECTS OF THE CORONAVIRUS ON SUPPLY CONTRACTS

Since the beginning of the year, the spread of the coronavirus has given rise to increasing uncertainty worldwide. A large number of new infections have occurred in numerous countries in the last few months. And even within Europe, specialists are of the opinion that a risk of a genuine pandemic now exists. The economy is also feeling the impact of this more and more intensely. For example, there are now daily reports in the media on supply bottlenecks, assembly line stoppages, plant closures and short-time work. And these effects can be expected to intensify further. Numerous civil law questions arise in this connection for affected undertakings, which will be briefly touched on in the following.

#### Actual and legal impact on supply agreements

The coronavirus can have direct or indirect effects on undertakings, e.g. by

- › infections in the undertaking itself which lead to a loss of important parts of the workforce;
- › protective and follow-up measures where infections are determined (e.g. by closing the operation as a precaution, isolation of certain regions), or
- › a lack of supply parts because affected suppliers cannot meet their delivery duties due to the coronavirus.

If the activity of an undertaking is impaired due to the coronavirus, the existing business relationships with suppliers and purchasers should be analysed as soon as possible, particularly with regard to the following points:

- › impediments to performance/force majeure
- › default and obligations to provide information
- › insurance coverage
- › damages claims

In this way, affected undertakings can obtain clarity early on as to whether, and to what extent, contractual duties continue to exist (in a modified form) or have been suspended due to the coronavirus and what rights, obligations and liability risks exist.

#### Impediments to performance/force majeure

Depending on the individual case involved, the effects described above can fall under the category of a legally relevant impediment to performance or even a case of force majeure. This could cause the (counter)performance duty of the affected undertaking to be temporarily suspended or even completely eliminated. This is first of all dependent on whether, and to what extent, the parties have made contractual arrangements in this regard and whether they were also validly agreed upon – particularly in light of the laws governing general terms and conditions. Additionally, from the standpoint of German law, above all the legal provisions of the German Civil Code (BGB), the German Commercial Code (HGB) and – often for international supply relationships – the UN Convention on Contracts for the International Sale of Goods (CISG) must be taken as a basis.

#### Default and obligations to provide information

A prerequisite for default in delivery is that it must still be possible to render the performance. Depending on the individual case (e.g. in the case of an absolute fixed-date transaction), in the event of a delay, the performance can already be deemed to be impossible. In that case, more far-reaching consequences will apply as a rule. For example, in that case the contracting partner may be entitled not only to damages claims, but also to a right of rescission.

Conversely, the supplier will not be in default if it fails to render the performance due to circumstances beyond its control. Accordingly, not every supply bottleneck due to the coronavirus will automatically lead to a default, and thus to liability on the supplier's part. It is therefore necessary to examine in each individual case how far the supplier's duties reach and to what extent it has also assumed the procurement risk.

It is important that the affected undertaking which cannot deliver on time ascertain whether it is obliged to inform its contracting partners of the nature and extent of the delay as soon and as comprehensively as possible. Otherwise, it may be subject to damages claims due to a violation of the obligation to provide information. Such obligations can derive above all from explicit contractual arrangements or as a contractual ancillary duty from the principle of good faith.

### **Insurance coverage**

Should businesses have to close temporarily or slow down their production, the question arises whether insurance protection exists under their own insurance policies (e.g. business interruption insurance, all risk insurance). Depending on the structure of the contract, the insurance protection covers lost profits, the fixed costs which are not earned, or even CBI protection, insofar as possible damage in connection with the direct suppliers and purchasers was included in the insurance protection when the contract is drawn up. Since the structuring of insurance contracts can be very diverse and the insurance market is very large, the question of when insurance protection applies and to what extent such protection exists must be examined in terms of the specific insurance policy. In order not to endanger the coverage, it should be ensured that all of the obligations under the insurance agreement (above all in the form of notification duties) are complied with.

### **Damages claims**

Damages claims also come into consideration in various situations, either as direct damages claims of an undertaking or an end-customer against the supplier or indirectly, as a recourse claim in the supply chain. Under German law, damages claims generally require that the party against whom the claim is asserted be at fault. Occasionally, however, such claims also exist regardless of fault, e.g. if a guarantee to that effect had been agreed upon. In order to avoid disadvantages, it is important that claimants meet their duty to minimise damage. Moreover, in the case of short deliveries, a timely and formally valid commercial complaint must be rendered, as otherwise claims for compensation are excluded.

### **Conclusion**

The above explanatory remarks show that potentially affected undertakings should ascertain as early as possible what duties and obligations must be met in order to avoid disadvantages and what measures need to be taken to secure their rights.

Should you have any specific questions, please do not hesitate to contact us.

*As of 04.03.2020*

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