



COVID-19: The German Perspective

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For several weeks now, the corona virus has been presenting us with new challenges in all areas of life: "social distancing", travel restrictions, border controls and closure as well as quarantine are now part of our everyday life. For the economy, the COVID-19 pandemic means considerable restrictions, which in many cases can lead to disruptions or interruptions in business processes and financial difficulties, even threatening the existence of the businesses.

The reactions and resulting questions are manifold. We have summarised some of the central aspects herein. We appreciate that not all aspects have the same relevance for you and that your reading time may be limited. In order to provide access, a click on the hyperlinks in the table of contents leads directly to the respective chapter.

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Part One: Legislative Steps To Alleviate The Pandemic's Consequences

In order to mitigate the economic consequences of the spread of the corona virus and to support companies and citizens during and after the crisis, the German Federal Government has launched extensive packages of measures with far-reaching changes in legislation in recent days.

Here, we summarise the package of measures taken by the German legislator; combined with practical and legal advice on how the changes may affect your company and how they can be implemented.

I. Insolvency Law

In order to protect companies that get into a financial crisis as a result of the COVID-19 pandemic, the "Act on the Temporary Suspension of the Obligation to File for Insolvency and to Limit the Liability of Corporate Bodies in the Event of Insolvency Caused by the COVID-19 Pandemic" (COVInsAG) is part of the legislative package.

Background: In principle, managing directors of a GmbH (Limited Liability Company) and board members of an AG (Stock Corporation) are obliged to file for insolvency if their company is insolvent or over-indebted. Directors can wait up to three weeks before filing an insolvency application, as long as it can be expected that the reason for insolvency can still be eliminated within this period. In the event of a breach of the obligation to file for insolvency, directors may be exposed to personal liability risks and may even be liable to criminal prosecution.

Although the German government has announced state aid programs to support the liquidity of companies, there is no guarantee that such public aid will be paid out in time within the deadline for filing for insolvency. In order to avoid the need for insolvency applications during the processing of applications for assistance or financing or restructuring negotiations, the obligation to file for insolvency has been suspended until 30 September 2020. The aim of the regulations is to enable and facilitate the continuation of businesses.

However, the suspension of the obligation to file an application only takes effect if the insolvency situation results from the consequences of the spread of the COVID-19 pandemic and if there is a prospect of eliminating the insolvency. If necessary, these conditions must be proven by the management. This is of course difficult and therefore the legislator stepped in in form of a presumption of evidence: If the company was not insolvent on the

cut-off date 31 December 2019, it is assumed in its favour that the need for filing for insolvency is based on the effects of the COVID-19 pandemic and that there is a prospect of eliminating an existing insolvency.

Despite this presumption, it may be doubtful whether this special rule applies in the event of dispute. Proof to the contrary is permitted. For this reason, the directors of affected companies are recommended to document the financial situation of the company before and after the key date 31 December 2019, as well as the concrete effects of the COVID-19 pandemic on the business in detail. It is helpful, for example, to be able to document the order situation and promising contract negotiations - especially if the pandemic led to an order not being completed or triggering substantial extra cost. Talk to your tax advisor/auditor about the easiest and most accurate way to document the economic situation for your company. Of course, we are also at your side to help. For the same reasons, the application for public aid and the conduct of serious financing or restructuring negotiations should also be well documented. In this way, the continued existence of the company can be ensured without the need to file for insolvency.

The payment prohibitions imposed on management linked to the insolvency situation will also be suspended until 31 September 2020 insofar as management decisions in the ordinary course of business, including measures to maintain or convert business operations and models, are concerned. In addition, new (restructuring) loans will be privileged in terms of the law of avoidance and liability in order to provide an incentive for the granting of such loans. This means that banks or other lenders can participate in restructuring efforts without the risk of the loans or their collateral becoming ineffective under "normal" insolvency law, or the creditor becoming liable for damages for delaying insolvency. In addition, contracting parties already in a business relationship with the company concerned should be motivated to continue doing business with that company by limiting the contestability of certain payment transactions and their surrogates.

For a three-month transitional period, the right of creditors to request the opening of insolvency proceedings will also be restricted. Thus, for creditor insolvency applications filed within three months of the law coming into force, it will be required that the reason for insolvency already existed on 1 March 2020.

II. Company Law

As a result of the bans on meetings issued to combat the coronavirus, shareholders' or members' meetings designed as events to be attended in person cannot be held until further notice. The Stock Corporation Act (AktG) and the Limited Liability Companies Act (GmbHG) do not



provide for a virtual general meeting or shareholders' meeting, even if the AktG provides for the possibility of individual shareholders to participate in the general meeting electronically or if the articles of association of a GmbH allow for resolutions to be passed by electronic communication.

The "Act on Measures in Company, Cooperative, Association, Trust and Home Ownership Law to Combat the Effects of the COVID-19 Pandemic" has created the possibility of holding these meetings in 2020 by virtual means. This concerns the AG, KGaA (partnership limited by shares), GmbH (Private Limited), cooperative, association and trust. The SE (Societas Europaea), the mutual insurance association and the home owners' association (WEG) are also covered. For example, the law provides for the AG to be able to hold a fully virtual general meeting, provided image and sound transmission, the exercise of voting rights and the exercise of shareholders' right to ask questions are ensured. Shareholders of a GmbH are also given the opportunity to pass resolutions effectively in writing, even if not all shareholders agree with this method of passing resolutions. Associations can also allow their members to participate in the general meeting without being present on site or to vote in advance.

Regulations for the KG (limited partnership), oHG (general partnership) and GbR (civil law partnership) are missing because the applicable law for partnerships does not provide any requirements for the holding of shareholders' meetings, in particular not for attending in person. However, the partnership agreements regularly contain rules requiring personal attendance at shareholders' meetings. These can be waived by a unanimous resolution of the partners (written consent in lieu of a meeting). If, however, unanimity cannot be achieved, it must be examined in each individual case on the basis of the articles of association under which conditions it is possible to deviate from the provisions on the passing of resolutions in the meeting of shareholders in attendance. We will be pleased to assist you in this and, of course, in all other questions of corporate law. This also applies in particular to companies in the legal form of a GmbH & Co. KG. The simplifications in the passing of resolutions contained in the law only apply to the general partner GmbH, but not to the limited partnership itself.

In addition, the law stipulates that members of the management board or supervisory board of a cooperative, members of the management board of an association or foundation and managers of a home owners' association remain in office until a successor is appointed.

III. Lease Law

The package of measures also limits the lessor's right of termination. This applies to both residential and commercial leases.

Lessors may no longer terminate leases due to rental debts arising from the period between 1 April 2020 and 30 June 2020 if the non-payment of rent is due to the effects of the COVID-19 pandemic. The regulation applies also to usufructuary leases. However, the obligation to pay the rent on time remains in principle.

By restricting the right to terminate, the legislator has reacted to the problem that the closure of institutions and shops leads to considerable loss of income for many people. If these persons do not have sufficient financial reserves, there is a risk that they will no longer be able to pay rent. However, since even the delay in payment of, among other things, two months' rent can be sufficient to have the agreement terminated by the lessor without notice (Sect. 543 German Civil Code (BGB)), the legislator felt there was a need for action. The new regulation is intended to protect lessees from losing the rented premises/space and thus the basis of their gainful employment due to non-payment of rent, which is solely attributable to the COVID-19 pandemic.

In contracts (e.g. in general terms and conditions), the restriction on termination cannot be excluded. The limitation on termination is initially valid until 30 June 2020. After this date, the regulation may be extended under certain circumstances.

Since rental debts must be based on the effects of the COVID-19 pandemic, in the event of a dispute the lessee must provide credible evidence of the link between the pandemic and his failure to perform. The lessee has to present facts that show an overriding probability that his non-performance is due to the COVID-19 pandemic. In order to substantiate this, the lessee may use appropriate evidence (e.g. certificate of the granting of state benefits, employer's certificate, official operating ban order, etc.), an affidavit in lieu of oath or other suitable means.

Other termination rights remain unaffected. Terminations without notice due to breaches of contract of any other kind are therefore still possible.

IV. Labour law - Short-Time Work Compensation

Short-time work (Kurzarbeit) can be a short-term aid for both the employer and the employee to survive a crisis such as the current de facto "shut-down" due to COVID19. By having employees work (temporarily) less and consequently receiving less pay, the employer can reduce his costs. The financial disadvantages that arise for the employee are partly compensated by the state



through the granting of the short-time working allowance. In return, a dismissal for operational reasons is generally not possible during the period in which short-time working compensation is received and for a certain time thereafter if the dismissal is based on the same reasons that led to short-time working.

In order to simplify the granting of short-time working compensation, the legislator implemented a corresponding legal regulation on 23 March 2020 with effect from 1 March 2020. The following regulations were adopted:

- The prerequisite for entitlement to short-time working compensation is now that only at least 10 % of employees are affected by a loss of earnings of more than 10 %;
- Any social security contributions on the short-time working allowance for lost working hours are fully reimbursed by the Federal Employment Agency;
- temporary agency workers are also entitled to short-time compensation;
- Short-time work compensation can be drawn for a period of up to 12 months; and
- Working time balances no longer have to be used with priority before the short-time working allowance is claimed (this does not, however, apply to paid leave).

In addition, the other conditions for the use of short-time work compensation remain applicable. Among other things, there must be a significant loss of working hours with loss of remuneration, the operational and personal requirements must be fulfilled and the loss of working hours must be reported to the Federal Employment Agency.

- The work stoppage must be temporary and unavoidable due to an unavoidable event (e.g. due to official measures due to the coronavirus) or for economic reasons (e.g. lack of orders). In order to make the loss of working hours unavoidable, the employee's remaining vacation from previous vacation years must be used up.
- The employer-related prerequisites are met if at least one employee is employed in the company or operational department of a company.
- The personal prerequisites include, among other things, that there is a continuation of employment subject to compulsory social insurance. Temporary employees can also receive short-time work benefits.
- The notification for economic reasons must be received by the Employment Agency in the calendar month in which the short-time work be-

gins. In the event of an unavoidable event, the notification must be made immediately. The notification must be made in writing or electronically to the Federal Employment Agency office at the place of business. The substantial stoppage of work must be outlined.

The amount of the short-time allowance is based on the net pay difference and is calculated individually for each employee on the basis of a lumpsum net pay. Employees with at least one child receive 67 % of the lost net pay. In all other cases, the reduced hours compensation is 60 % of the net salary. Similar to unemployment benefits, the entitlement to short-time work compensation is limited to the income thresholds (for 2020, EUR 6,900 (West) or EUR 6,450 (East) gross per month) and the resulting lumpsum net remuneration.

It is important to note that the employer cannot unilaterally order short-time work within the framework of his right to direct. Rather, this requires a special legal basis and thus an agreement with the employees concerned or the worker's council. The required consent of the employee can either already be included in the employment contract or be individually agreed upon later. In both cases, the agreement is subject to control in the light of the rules on general terms and conditions. We therefore recommend that such an agreement is drafted carefully. If it turns out in retrospect that the clause is invalid, the employee retains his full salary entitlement despite reduced working hours.

In companies with a workers' council, the workers' council must be involved in the introduction of short-time work and a workforce agreement between employer and the worker's council must be concluded. This should clearly specify that and how the working time (and thus also the remuneration) for the employees can be reduced and the amount of work is distributed. The advantage is that if such workforce agreement is concluded, its effects extend to the individual agreements with the employees so that individual negotiations are not necessary.

Due to the numerous detailed questions that arise, it is recommended that specialist legal advice be sought both when introducing short-time working under individual contracts and through a workforce agreement. Our experts are at your disposal for this purpose.



Part Two: Legal Consequences For Different Industries

I. Construction Contracts Subject To VOB/B

The rapid spread of the COVID-19 pandemic also confronts the construction industry with a multitude of previously unknown legal problems and questions. One of these questions will be what legal implications the COVID-19 pandemic will have for compliance with contractually agreed completion deadlines. In addition, questions will arise regarding the contractor's claim for compensation for work, the contracting parties' options for termination and the effects on new contracts to be concluded in times of the COVID-19 pandemic.

This JusLetter classifies disturbances in the construction process under work contracts as well as delivery disturbances in supply contracts legally. At the same time we list conceivable options and recommendations for action.

1. Effects on execution deadlines

One of these questions will be what legal implications the COVID 19 pandemic will have for compliance with contractually agreed execution deadlines. In addition, questions will arise regarding the contractor's claim for compensation for work, the contract parties' options for termination and the effects on new contracts to be concluded in times of the COVID-19 pandemic.

In the case of contracts based on the VOB/B (German Standard Terms for Building Projects), the principle remains that contractors must adhere to contractually agreed execution deadlines in accordance with Sect. 5 Para. 1 VOB/B. However, Sect. 6 para. 2 No. 1 lit. c) VOB/B stipulates that execution deadlines are extended if the hindrance is caused by "force majeure" or other circumstances which are unavoidable for the contractor.

According to case law, "force majeure" ("höhere Gewalt") is defined as an extraordinary event affecting the business from outside, which is unforeseeable, cannot be averted without endangering the economic success of the business, even if the utmost care is taken, and should not have been taken into consideration by the company because of its frequency. Even the slightest fault excludes "force majeure". Natural events such as earthquakes, lightning strikes, hurricane-like storms as well as exceptional floods and inundations are examples of force majeure.

As far as can be seen, there is so far no case law on the question of whether pandemics or epidemics fall under the concept of "force majeure" within the meaning of Sect. 6 Para. 2 No. 1 lit. c) VOB/B. However, case law on

travel issues provides some guidance: According to this, diseases and epidemics should also be covered by the concept of "force majeure" (see German Federal Supreme Court (BGH), decision dated 16 May 2017 - X ZR 142/15). Since COVID-19 is a disease classified by the WHO as a pandemic, which affects public life worldwide and in particular also in Germany to an extent unknown so far, the present situation is likely to constitute "force majeure" in the sense of Sect. 6.2 No. 1 lit. c) VOB/B. This is also the view taken by the Federal Ministry of the Interior, for Construction and the Homeland. The Ministry gave guidance on dealing with the COVID-19 pandemic for government building sites. The guidance note can be found [here](#) (in German language).

However, contractors should note that an extension of the execution deadlines will only be considered if there are exceptional circumstances in the individual case. A mere reference to the overall situation in the country will not suffice. Contractors should therefore continue to describe very carefully in their written obstruction notifications the obstacles caused by the COVID-19 pandemic.

2. Claims for damages

If the contractor exceeds contractually agreed execution deadlines, there is a risk that claims for damages may be asserted against him. However, both the BGB contract to produce a work and the VOB/B contract presuppose a culpable breach of duty. In the case of "force majeure", however, culpability is generally not to be assumed.

3. Effects on the payment of the contract price

The spread of the COVID-19 pandemic is having an increasingly negative impact on the economic situation of companies. It is to be expected that individual clients will get into serious payment difficulties and will no longer pay the contract price. Nevertheless, clients cannot invoke "force majeure" or a disruption of the business basis with regard to their payment obligations. In this respect, the legal principle of "one must have money", according to which the cause of the lack of liquidity is irrelevant, remains valid. Contractors can therefore, as before, assert their claims in full.

Presumably, the legal possibilities for securing claims for compensation for work, in particular the collateral for building companies according to Sect. 650f BGB, will be of particular importance in the future.

4. Termination options

Both, according to the provisions of the BGB and the provisions of the VOB/B (German Construction Contract Procedures), the parties can terminate a contract for cause. Whether the COVID-19 pandemic is a sufficient reason for extraordinary termination can only be assessed on the basis of the individual case and the respective concrete effects. Here, too, the reference to the COVID-19 pandemic alone will not suffice.



However, the contracting parties should exercise caution when discussing the extraordinary termination, as an invalid extraordinary termination is to be reinterpreted as a free termination, with the consequence that the contractor can demand his full remuneration - minus saved expenses - or the customer for his part can declare the termination for good cause if he has been subjected to a wrongful extraordinary termination by his contractor.

A further right of termination for both the customer and the contractor is provided by Sect. 6 Para. 7 S. 1 VOB/B. According to this, either party can terminate the contract if an interruption of the construction work lasts longer than 3 months.

5. Impact on new contracts

Even if it can be assumed that the effects of the COVID-19 pandemic are a case of "force majeure" with regard to existing construction contracts, it is still unclear whether this also applies to construction contracts to be concluded in the future.

For new contracts it is advisable to include a special "corona clause" in the contract. Since the corona virus and its devastating economic consequences have been known for some time now, it is likely to become more difficult to invoke force majeure in the event of disruptions in the construction process under new contracts.

Such a clause may include provisions on how to deal with delays caused by a pandemic, such as the contractor's obligation to observe hygiene measures, waiver of compensation in the event of an extension of the construction period, waiver of compensation in the event of a stop of construction being ordered, and of course the contractor's obligation to take appropriate hygiene measures of its own to prevent the introduction of infections.

In any case, the current situation should be taken as an opportunity to include such provisions in the contract which place the (scheduled) implementation of the construction project under a reservation with the possibility of adjusting the contract. In this context, it would be conceivable to include provisions that extend the execution periods as soon as employees of the contractor/subcontractor are infected with COVID-19 or have to be quarantined as a precautionary measure, building materials can no longer be procured or a ban on work is issued. The same would apply to delays caused by COVID-19 issues on the side of the party ordering the works.

In the case of contracts with public authorities, the management of the effects of the COVID-19 pandemic should be discussed before the offer/proposal is submitted.

6. Recommendations for action

Due to the progressive spread of the COVID-19 virus, it is to be expected that the construction industry will be

significantly affected in the near future. It is advisable for each of the contracting parties to notify the other contracting party of any possible adverse effects in good time. Contractors should use the usual formats for notice of impaired workflow and describe the relevant circumstances in detail. A general reference to the current COVID-19 pandemic will probably not be sufficient.

In the case of contracts yet to be concluded, the current situation should be taken as an opportunity to include in the contract also those provisions which have as their object that the construction process is subject to pandemic-related difficulties, see above item Part Two, I. 5.

II. Contracts for Works

1. Customer's Point of View

For the customer of a contract for works (unless the VOB/B have been agreed, for which see above), a number of problems can arise from the current crisis. If the customer also is the final purchaser of the work, he may be affected by delays in the production process, with the consequence that, for example, the completion of a plant or ship (and thus its possible use) may be delayed. If, on the other hand, the customer is obliged to deliver the work to be completed to a third party, the customer may find himself in an even more difficult situation: he not only has to deal with disrupted construction processes and possible additional cost demands from his subcontractors. He also has to secure his position vis-à-vis his end customer; in this case, late delivery may result in compensation obligations, contractual penalties or even termination of the purchase contract or contract for works, which forms the legal basis of the relationship with his end customer.

However, many contracts already contain provisions on how to deal with a case of so-called "force majeure", which in all probability includes the COVID-19 pandemic. It is therefore always advisable to first check the clause in the contract, which often even defines what constitutes "force majeure" and which would prevail over the statutory law.

In the absence of a contractual regulation, the statutory law must be relied upon. This means:

a) Financial losses of the customer due to delay

The delay in performance caused by the disrupted construction process and the resulting delay in the ability to use the works can cause damages to the customer, e.g. in the form of lost revenue. Claims of the contractors involved in the works, e.g. according to Sect. 642 BGB, may cause further loss. Depending on the contractual situation, the customer may also be threatened by the claims of the end user outlined above.



For losses caused by delay, the customer or end customer is in principle entitled to claim for damages against the contractor according to German law on contracts for works (and also under a VOB/B contract) (Sect. 631, 280, 286 BGB; Sect. 5 para. 4, Sect. 6 para. 6 VOB/B). Furthermore, often contractual penalties for late delivery of the works are agreed between the parties.

Such claims presuppose fault on the part of the contractor, i.e. conduct for which he can be blamed and which caused the delay. "Force majeure" can exclude fault; see above, Part Two, I.1. for details on force majeure. However, (as already outlined above under [Part Two, I.6](#)) simply referring to the "corona pandemic", as is now frequently the case, is usually not enough on its own. Rather, the assessment depends on the circumstances of the individual case, in particular on how the contractor deals with the crisis: If the contractor would have been able to prevent the delays by taking appropriate measures, he will not be able to invoke force majeure, but must compensate the customer for the damage caused by the delay or pay the contractual penalty.

In the case of "corona-related" disruptions in the construction process, the customer should therefore obtain a precise explanation and documentation from his contractor as to what caused the delay and what measures the latter has taken to protect his operations from the virus and restrictions. Similarly, the contractor must also explain what compensatory measures he has taken. Since any (contributory) causation for which the contractor is responsible excludes force majeure, any stoppage must not be due to inadequate protective steps or organisation. It will also be decisive that the critical path of the construction process is affected.

Whether a company has taken sufficient protective measures is naturally difficult for the layperson to assess. However, there are good guidelines: For example, the German Federal Office for Civil Protection and Disaster Management ("BBK") has published a 9-point checklist for crisis management ([here – in German](#)).

Especially for the construction industry, it should be noted on the other hand that, according to the guidance of the Federal Ministry of the Interior, for Construction and the Homeland ("BMI") on construction contract issues during the COVID-19 pandemic of 23 March 2020 ([here – in German](#)), all construction measures on federal construction sites should continue to be carried out with due regard for health protection, unless official measures force a stop to the work. Both publications show that health protection measures have to be put in relation to the services owed under the contract. In our opinion, the guidelines drawn up by the BMI can also be used as a guide, for example for plant construction or shipbuilding.

Conversely, a contractor can use the aforementioned evidence to defend himself against possible claims against

the customer (be it as a general contractor or end customer).

What is decisive is a careful and level-headed approach to your own company organisation and proper documentation of the effects on production and construction processes!

b) Violation of obligations to cooperate, Sect. 642 BGB

It is also conceivable, of course, that the customer (as general contractor or end customer) is himself affected by corona-related restrictions which cause the disruptions in the construction process. Examples are: Loss of own employees due to quarantine, tightened hygiene measures which reduce the production speed, or the official shutdown of the business, but also preparatory work not being completed in time. In such cases, the customer can be faced with a claim for compensation from his contractor (Sect. 642 BGB) because he has failed to perform an act of cooperation incumbent upon him.

Unlike the claims for damages and the contractual penalties discussed above, this claim for compensation does not depend on any fault on the part of the customer. In other words, the lack of fault does not exclude the claim for compensation. Accordingly, the customer is obliged to pay compensation even if he is unable to perform his cooperation for reasons that are not within his sphere of responsibility, such as the coronavirus.

However, this prospect, which is gloomy from the customer's point of view, is subject to the concept of force majeure, too. A decision of the BGH of 20 April 2017 points the way: In this decision, the BGH ruled that the customer is not obliged to ward off very unusual weather conditions from the building site because such events cannot be influenced. Applied to the current COVID-19 pandemic, this would mean that if a duty to cooperate could not be fulfilled due to the COVID-19 pandemic, the customer is not obliged to pay compensation. Here again, the final decision is likely to depend on the specific circumstances, which are to be assessed according to the criteria described above. Whether the decision of the BGH will actually be applied to the corona-related construction process disturbances has not yet been clarified in court. However, in our view this is likely to be the case.

c) Adaptation Of The Contract

In the event of disruptions to the construction process, it goes without saying that an adjustment of the provisions of the contract to produce a work must also be considered. The safest way would be to find a solution for the disruptions together and - if possible - to adapt the contract by mutual agreement. If this is not possible, the provision of Sect. 313 BGB could offer a way out. It provides for an adjustment of the contract in case of changed circumstances up to the termination of the contract. How-



ever, very strict conditions are attached to such an adjustment of the contract, which may only be fulfilled in extremely exceptional cases (e.g. official prohibition of the construction measures). All in all, Sect. 313 BGB is more likely to be the last stopgap for affected parties.

d) Other Practical Information

Since the legal consequences of corona-related disruptions to the construction process always depend on the specific circumstances and the legal situation cannot always be clearly assessed, clients should seek to enter into discussions with their contractual partners at an early stage - if possible even before a disruption occurs. The aim must be to reach a joint agreement on how to deal with possible disruptions and delays.

However, special care is required if the construction process has already been disrupted several times due to delays. In this case, the temptation will be great for each contracting party to "iron out" these delays "free of charge" by referring to delays caused by corona. It is therefore evident that it is good advice to document the construction process correctly even outside of crisis periods and to be able to pinpoint performance delays or construction obstructions precisely.

Due to the dependence of the legal consequences on the individual case, the contractor should therefore not simply accept construction obstruction notifications from his contractor/subcontractor, but should have the exact circumstances and the target/actual process explained to him. At the same time, however, building obstruction notices are not a declaration of war, and should be taken as a reason to look for amicable solutions.

In the event that an agreement cannot be reached and losses are imminent, the customer should - as has been emphasised several times already - in any case meticulously document which measures were taken when and why and what caused any delays in their operations. This makes it easier to prove a lack of responsibility for the disruption in the construction process and thus to claim or defend against any claims.

e) New Contracts For new contracts being negotiated now we suggest considering a "corona clause"; see above at [Part Two, I.5](#). As a customer without obligation to provide any advance performance (e.g. providing necessary planning or creating certain construction stages), the pandemic-related risks in agreeing contractual deadlines lie with the contractor, as the conclusion of a construction contract is currently being made in full knowledge of the pandemic situation. A special agreement on the extension of the contract periods is then not absolutely necessary.

f) Protection Against Infection Act

In the case of officially ordered quarantine, the additional expenses incurred during the period of loss of earnings

can also be reclaimed from the competent authority in accordance with Sect. 56 para. 4 of the Infection Protection Act (IfSG) if the existence of the company is endangered. Self-employed persons will be reimbursed for any further uncovered operating expenses to a reasonable extent. Advances may be granted in the anticipated amount of the compensation. However, an application deadline of three months after cessation of activities was ordered by the authorities must be observed (Sect. 56, para. 11 IfSG).

2. Contractor's Point of View

As has become clear from what has just been said, the contractor and the customer are initially in the same boat in the event of pandemic-related disruptions to the construction process. If no amicable arrangements can be found, however, they face each other as opponents of the claims. A contractor would be a claimant according to Sect. 642 BGB for compensation by the customer. But he could be a debtor of claims for default or contractual penalty. In any case also for the contractor, "Corona" is not a simple reason for exoneration or basis for a claim. Thus, the effects of the disrupted construction process must be documented in an understandable and verifiable manner.

As outlined above, the COVID-19 pandemic is likely to be classified as a "force majeure" in itself. This enables the contractor to defend itself against any claims for damages in the absence of fault. In this context, it is also relevant for contractors that a case of force majeure can also lead to the assumption that it is impossible to provide the work, e.g. if an official ban on work is issued and it is subsequently (objectively) impossible for the contractor to perform the contractually agreed work. While the impossibility cancels the obligations to perform and counter-perform, under certain circumstances claims for damages by the customer are still possible (e.g. because he has relied on the performance of the work), the prerequisites of an impossibility should be examined in detail in each concrete case and here too, first of all, a discussion should be sought with the contractual partner for an alternative solution.

III. Supply Contracts

Supply relationships are also increasingly subject to corona-related contractual disruptions - delivery bottlenecks, the loss of sick employees and restrictions in passenger and freight traffic are just some of the possible disruptions.

For the assessment of disruptions in supply relationships caused by the COVID-19 pandemic, the contract concluded between the parties is primarily relevant. The contract must first be examined in detail to determine which party would have had to provide which performance and which of the parties is now unable to perform the obliga-



tions (in the form originally promised) incumbent upon it. Does the contract itself offer a solution or regulations for the current situation? Are there any possibilities to achieve the contractually agreed result - even if it is much more costly and/or a little later?

If the performance cannot actually be provided as owed and the contract does not provide a solution for the current situation, the contractual arrangements must be used to examine in detail which of the parties assumed the risk that the act cannot be performed as promised under the contract. In this context, Incoterms clauses (EXW, FCA, FOB, etc.) agreed in the contract may also be relevant. Otherwise, a large number of circumstances may be relevant for risk allocation. In particular, the law applicable to the contract will also be decisive.

After it has been assessed to which party the contractual risk of the current default falls, it must be examined which consequences result from this, in particular whether the party is obliged to pay damages to their contractual partner or whether a general obligation to pay damages is no longer applicable due to force majeure. Again, it depends on which law applies to the contract:

1. German Law

According to German law, the party not performing in accordance with the contract remains fundamentally obliged to perform despite corona-related disturbances. Only in rare exceptional cases will that party be released from its obligation to perform, for example if performance is impossible (e.g. the delivery item is permanently unavailable on the market) or if the basis of the contract is so fundamentally disturbed that an adjustment of the contract is unavoidable. However, this is not likely to be the case with normal commercial goods.

The party still obliged to perform is in principle obliged to pay damages to its contractual partner in the event of delivery disruptions. However, the obligation to pay damages requires fault (intent or negligence). This fault does not exist if the disruption is caused by force majeure, which in all probability includes the coronavirus. Here, too, however, the existence of force majeure is often excluded by a causal contribution of the party not performing according to the contract. In supply contracts, too, proof of adequate risk provisioning as protection against pandemic influences is therefore essential.

2. UN Sales Law

For international sales contracts, the UN Convention on Contracts for the International Sale of Goods (CISG) is usually applicable. Even if an attempt is made to exclude it in the general terms and conditions, the CISG applies if the exclusion clauses are invalid.

If the CISG applies, Art. 79 contains a clause on force majeure, but its application is subject to strict conditions. According to this, the contract remains unchanged in

principle. In particular, the party not performing in accordance with the contract remains bound by the contract and cannot unilaterally terminate it. However, as long as the conditions of Art. 79 CISG are fulfilled, damages may not be claimed from the party not performing in accordance with the contract if it informs the other party immediately after the possible obstacle becomes apparent. Whether this condition was met should be examined in each individual case.

In view of these imminent obligations to pay damages, it is recommended in principle not to wait for disturbances to occur, but to inform the other party as soon as possible and attempt to seek an amicable solution. As a precaution, the relevant insurance companies should also be informed.

Part Three: New Model Clauses On Force Majeure And Hardship

On 25.03.2020 the International Chamber of Commerce (ICC) published the new model clauses on force majeure and hardship cases (ICC Force Majeure and Hardship Clauses 2020). These update the previous version from 2003 and offer a simpler presentation and extended options to meet the needs of companies.

The conditions for the occurrence of a force majeure event are maintained, but the wording is partly changed. A force majeure event is therefore present if:

1. the obstacle is beyond the reasonable control of the party concerned
2. the occurrence of which could not reasonably have been foreseen at the time the contract was concluded; and
3. the effects of the impediment could not reasonably have been avoided or overcome by the party concerned.

For an event to be considered force majeure for the purposes of this ICC Model Clause, all three of the above conditions must be met, with evidence of this to be provided by the party concerned. Finally, the third paragraph of the ICC Model Clause contains a list of events where a case of force majeure is suspected. This includes, for example, epidemics, so that this should apply all the more to the corona crisis, which the WHO has declared a pandemic. If an event mentioned in this third paragraph occurs, the affected party is released from the obligation to prove the existence of the above-mentioned conditions 1. and 2. The affected party must still prove that it was unable to control or prevent the effects of the event.



Finally, the hardship clause was largely revised. The ICC first of all fundamentally states in the instructions for application that national legal systems should deal differently with situations in which one party had to perform the contract under different or more difficult circumstances than those anticipated at the time of conclusion of the contract. Thus, some legal systems provide for a right of extraordinary termination, others for the adaptation of the contract and only in very limited scenarios as ultima ratio for a right to termination (e.g. the German law in Sect. 313 BGB, see above). Accordingly, especially in arbitration proceedings, it is often disputed whether an adjustment of the contract or termination can be demanded if the parties cannot find a solution by negotiation.

In the interest of legal certainty and predictability, the ICC has now included three alternatives in the Hardship Model Clause 2020. Provided that the parties cannot agree on alternative terms of the contract, (a) the party invoking the hardship clause is entitled to terminate the contract and may only submit a request for adaptation of the contract with the consent of the other party; (b) each party is entitled to request the judge or arbitrator to adapt or terminate the contract; and (c) each party is entitled to request the judge or arbitrator to declare the termination of the contract.

The new ICC sample clauses can be used immediately. It should also be noted that the clauses can also be modified and thus be "tailor-made" for the respective concrete individual case.

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