

Pandemic

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Coronavirus and the Supply Chain

Supply contracts within the supply chain deserve special attention.

The World Health Organization (WHO) has now classified the outbreak of coronavirus as a "public health emergency of international concern". This pandemic has now had a considerable impact on the global economy – and the situation will definitely continue to deteriorate: Production stoppages in China are leading to supply bottlenecks, as well as losses of capacity in the transport sector. This means that many goods produced in China will no longer be available in Europe – which could have some rather serious consequences: in Germany, for example, there are apprehensions of extreme delays in the supply of medicines.

In such situations, the reduction in inventory holding periods ("just-in-time" deliveries!) takes its toll, as does dependence on only a single supplier. Companies would therefore be well advised to take the crisis as an opportunity to consider a dual sourcing strategy, which in most cases however, is unlikely to be feasible in the short term. The extent to which this will lead to plant shut-downs and bankruptcies cannot be predicted at present. Anyone relying on business interruption insurance will in most cases find that this will not be effective in cases of property damage and loss of earnings. The situation is likely to be different only if the occurrence of an infection leads to the closure of the business concerned. Normal industrial plants however, rarely have such insurance.

Supply contracts within the supply chain deserve special attention. Contractual parties which are unable to meet their delivery obligations, or can only do so with delays, frequently invoke force majeure clauses in order to cause their contractual obligations to lapse without adverse consequences and to avoid liability for damages. The prime consideration in such cases is which regulations the contract includes for claiming a case of force majeure. If necessary, it is advisable to renegotiate existing contracts accordingly, taking care to describe as precisely as possible the situations in which force majeure may be invoked, e.g. entry and exit restrictions, barriers imposed by governments, authorities or people, epidemics and associated quarantine measures, transport disruptions of certain types...

In the absence of a framework of rules it is essential to determine which national law applies to the contract. The applicable law could then possibly be adapted to the contract or to its dissolution, in which case the spectrum of ways and means for withdrawing from the contract would range from the difficult to the practically impossible. A clear and independent framework of regulations in the contract itself is therefore vastly preferable.

The party that requests amendment or termination of the contract for good reason must prove that the relevant prerequisites are met. In this context, a Force Majeure Certificate of the China Council for Promotion of International Trade (CCPIT) can be of assistance. This can be applied for via the online platform of the CCPIT (unfortunately only in Chinese): <https://www.rzccpit.com/>.

However, the Council only certifies the existence of the circumstances (e.g. that certain means of transports are not operational). Whether the respective facts are sufficient to affirm termination or adjustment of the contract for good reason is to be determined on a case-to-case basis depending upon the contractual provisions or the law applicable to the contract. The certificate is therefore only an aid to evidence, but does not itself directly influence the legal situation!

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Depending on the applicable law, if force majeure cannot be affirmed, one of the other arguments which may be put forward is that the "basis of the transaction no longer exists". This, too, is a question dependent upon the individual case.

In any case, discussions with the business partner concerned should be initiated as early as possible. This can help in finding alternative solutions and thus to reach satisfactory solutions without involving the "awful majesty of the law". In any case, this is invariably preferable by far to destroying an otherwise good business relationship. Moreover, the obligation to restrict the damage to the minimum possible extent, in itself requires keeping the business partner concerned informed at the earliest, (see Art. 79 Para. 4 CISG) and making attempts to overcome the obstacle. Those who fail to comply with these obligations may lose the right to invoke force majeure. For this reason, precise and proper documentation must be maintained, showing when the customer was informed and which possible solutions were discussed.

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