



Special information Commercial law consequences of coronavirus

On 30 January 2020, WHO declared an international health emergency. In order to stem the further spread of the coronavirus (also known as "2019-nCoV") Federal Health Minister Jens Spahn (CDU) recommended that major events with more than 1,000 participants be cancelled until further notice. In response, the Free State of Bavaria - like many other federal states - prohibited events with more than 1,000 participants, initially until 19 April 2020.

The economy is also increasingly feeling the effects of the coronavirus. Supplies from China have been suspended in many cases. European companies producing in China or purchasing goods from China are confronted with supply failures. This threatens to result in a not inconsiderable loss of sales.

For the companies concerned, numerous civil law issues therefore arise in this context, which will be briefly discussed below.

1. 2019-nCoV as force majeure in German law

If there is an event that is referred to in German case law and legal literature as "force majeure", the performance of services under a contract affected by it is usually impossible (§ 275 BGB (German Civil Code)) or the business basis of the contract affected by it is disturbed (§ 313 BGB).

However, German law does not define when an event that is to be understood as force majeure exists. German case law defines force majeure as

- an external event, which is not related to the company and is caused from the outside and
- is unpredictable and unusual and that
- cannot be avoided or remedied by economically viable means.

The assessment of whether such an event actually occurs is always strongly dependent on the individual case. In German travel law, for example, it is recognized that epidemics can in principle be regarded as force majeure. This was decided, for example, by the local court of Augsburg in 1992 in relation to the outbreak of the SARS-virus. Declarations of the German Foreign Office and recommendations of the WHO have particular indicative effect here. An official measure is also regarded as a typical example that can lead to force majeure.

Irrespective of whether the outbreak of the 2019-nCoV in Germany can be classified as an epidemic or not, this classification does not yet lead in individual cases to the conclusion that the conditions of force majeure are actually fulfilled from a legal point of view. For a final legal assessment, the necessary comprehensive medical and empirical knowledge of the novel virus is currently lacking. As



a result, the courts will probably also have to deal with this legal question in the future.

The situation must be assessed differently in connection with official measures. Depending on the nature of the official measures, the existence of an event of force majeure can be affirmed in such a case.

2. Cancellation of trade fairs and events

According to the German Protection against Infections Act (Infektionsschutzgesetz respectively IfSG), the local health authority is entitled to decide whether an event has to be cancelled. According to § 28 IfSG "the competent authority may restrict or prohibit events or other gatherings of a larger number of people".

If such an official decree exists, it is currently also to be assumed that a case of force majeure has occurred and that it is therefore impossible to hold the event. Contracts, e.g. with **exhibitors, stand constructors** or **catering companies**, can no longer be fulfilled. In this case, the (counter-) performance does not normally have to be provided either. At the same time, however, the respective contractual partner also loses his claim to remuneration. If advance payments have been made, these are to be repaid.

The situation is different for contracts concluded by participants in the relevant event. An example is the booking of **hotel rooms** for the trade fair on site. A distinction must be made here between whether the hotel was booked in combination with the business event and whether the business event became the basis of the accommodation contract (for example, due to special trade fair offers made by the hotel). Cancellation of the event alone does not constitute a case of impossibility of performance. The room could also be used without visiting the trade fair. For the hotel booking, only the reason for the booking has been omitted. However, this alone does not entitle the cancellation of the contract. However, if the hotel has been booked with reference to the relevant event (e.g. as part of a special trade fair offer), in this case the cancellation of the contract can usually also be declared to the hotel. However, many hotels also grant their customers contractual cancellation options in their General Terms and Conditions of Business, which should be examined immediately in each case.

If events are prohibited by the authorities, the organizer cannot be accused of any culpable action with regard to its cancellation. In addition to the reimbursement of the "exhibitor costs", he is therefore generally not required to pay any further **compensation**. If, on the other hand, the trade fair organizer takes the decision to cancel a trade fair without an official order to do so, the situation must be assessed differently. In this case, companies should examine whether they can claim the investments made for the trade fair as compensation for damages from the trade fair organizer. Whether such a claim has a chance of success depends in particular on whether the organizer himself is responsible for the cancellation of the fair or not.

If the exhibitor cancels his participation in a trade fair without a respective official order, it must currently be assumed that he will have to bear all costs incurred by him for the trade fair himself.

3. Effects on supply contracts



In the context of supply relationships, special attention must first be paid to the so-called contractually agreed **force majeure clauses**. In general, such clauses aim to regulate the consequences of disruptions to the contractually agreed services caused by circumstances or events beyond the control of the contracting parties. Generally, the contractual legal consequence is the at least temporary suspension of the obligation to perform while at the same time excluding any liability for damages to the contracting party. In most cases, force majeure clauses also contain special termination rights in favor of one or both contracting parties. Whether the spread of the coronavirus is to be classified as a contractual force majeure event must be clarified in each individual case by means of a precise analysis of the specific contractual clause. In this case, it is particularly important to consider which law the respective contract is subject to.

The CCPIT (China Council for The Promotion of International Trade) issues Force Majeure Certificates to companies upon request. These facilitate the corresponding proof of force majeure and lack of fault vis-à-vis customers or courts if claims for damages are asserted due to non-delivery, and are therefore particularly interesting for companies that produce in the affected regions of China. Such certificates, however, only have an indicative effect.

If such force majeure clauses have not been (effectively) agreed in the contract, the supplier is also obliged to invoke the **impossibility of performance** (§ 275 BGB) or the **disruption of the basis of the business** (§ 313 BGB). Which options with regard to an adjustment or termination of the respective contractual relationship are above all economically reasonable is subject to a precise examination of the particularities of the concrete case.

If companies in Europe are not supplied by their suppliers from China, and if they are therefore in default of delivery to their customers, companies may well be exposed to claims for damages or contractual penalties. In such a case, the extent to which the company bears the procurement risk is decisive. It must be examined whether a company based in Europe can be reasonably expected to procure the parts to be supplied from another country. It must also be examined whether there are alternative means of transport. Just because the upstream supplier can invoke force majeure due to the coronavirus, this objection cannot simply be passed on in the supply chain.

4. Recommendations for action

- Companies that are directly affected by the coronavirus at contractual level should **check the relevant contracts as soon as possible for possible force majeure clauses and their consequences or other exit clauses**.
- Companies affected by a delay in delivery should also **carefully document in writing** all measures taken to ensure their own efficiency (e.g. search for alternative sources of supply, transport routes, production capacities or subcontractors).
- Overall, **early contact** should be **made with the contractual partners** so that they too can take measures to minimize any damage that may arise.
- In parallel, it should be examined whether, irrespective of any contractual provision, an undertaking concerned may invoke the legal institutions provided for by law to prevent or disrupt the basis of its business on grounds of force majeure. It is recommended, however,



that appropriate care be taken when examining the facts of the case. It cannot be ruled out that an unjustified distancing from the contract may trigger further claims for damages.

- Depending on the results of the audit, **corresponding declarations** (withdrawal from the contract / termination of the contract / adjustment of the contract) should be declared immediately to the contractual partner verifiably by the legal representatives of the company. Here it is recommended to send the corresponding letter in advance by email and afterwards as a registered mail.



The above statements are only a non-binding compilation according to the current status. No liability is assumed for the correctness and completeness. We would be pleased to support you in checking and, if necessary, implementing the above measures in your company.

The contact persons of our law firm who are known to you are also available here. In addition, you will find the contact persons who have been particularly involved in the above-mentioned topics.

Your contact persons:



Verena Bäßler

Lawyer

verena.baessler@sonntag-partner.de

Phone: +49 821 57058 - 0

Fax: + 49 821 57058 - 153



Alessandra Schnell

Lawyer

alessandra.schnell@sonntag-partner.de

Phone: +49 821 57058 - 0

Fax: + 49 821 57058 - 153

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