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Handout on the legal implications of COVID-19

Luther Rechtsanwaltsgesellschaft mbH
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Despite all the quarantine and containment measures taken, COVID-19 has now reached Europe and Germany, as well. The associated risks are also affecting German and European companies.

In this handout you will find comprehensive and cross-industry information on the effects of the COVID-19. You will find further up-to-date information on our website under:

https://www.luther-lawfirm.com/en/competences/consulting-fields/detail/corona-virus-covid-19

Please contact your direct contact person for all legal questions concerning the effects of COVID-19 you may have.

You are also welcome to use our central e-mail address corona-support@luther-lawfirm.com.

We will then immediately forward your request internally and the responsible contact person will get in touch with you directly.

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Labour law - guidelines for employers

We take a look at the most important HR topics, such as mobile working, health checks, compensation or short-time working.

I. Mobile working

A. Implement mobile working for employees

- Regardless of the legal requirements - in principle, there is no entitlement to a home office - special situations require special measures. For this reason, employers should make every effort to enable mobile working, for the protection of the individual and the entire workforce.
- Unauthorised absence - without a certificate of incapacity, without an official order for quarantine or without consultation with the employer - is a violation of the main contractual duty to perform.
- An unauthorised stoppage of work is conceivable only in exceptional situations (e.g. if the current protective measures are unsuccessful and there are cases of infection in the department of the employee concerned, or the employer does not follow official directives).

B. Instructions issued by the employer

- The employer may order mobile working in individual cases with regard to the principle of consideration and loyalty duties (e.g. when employees return from risk areas), if the employer provides the technical means to do so.
- In the current situation, health protection regularly outweighs the personal interests of the employee.
- Even if the employee in this case does not comply with the instruction to work remotely and a labour court actually considers the instruction to be invalid, the employer's obligation to continue to pay wages will usually cease, since the employer offered an acceptable workplace in this case.

II. Health protection - what must the employer do?

The employer has the duty to take appropriate measures to protect health. Therefore, if there is a concrete possibility of infection, companies must take appropriate and reasonable measures. The following measures, among others, are conceivable:

- information about the risk of infection and minimisation of the risk;
- transfer of particularly vulnerable employees to other jobs/workplaces;
- organisation of the work in smaller working groups;
- transfer of employees from open-plan to individual offices;
- raising the standard of hygiene;
- and, under certain conditions, the carrying out of health checks.

Current practice: - Teams are split and work either separately from home and on site or on a rolling basis (i.e. one week from home and the other week on site).

- workplaces in the company that are available due to rotation are used to separate other teams within the company.

III. COVID-19 and the business trip

If the employer orders an employee to go on a business trip within the scope of its right to issue instructions, this order must correspond to "reasonable discretion":

- In view of the current worldwide travel warning issued by the German Federal Foreign Office regarding unnecessary tourist travel, employers should - except in absolutely exceptional cases - refrain from international business trips altogether. Especially in view of the increasing number of border closures, return cannot be guaranteed.
- If business trips within Germany are necessary (e.g. for companies with several locations), the car should currently be used as the exclusive means of transport. In addition, the risk of infection within these sites must be taken into account (in the worst case, several sites may have to be shut down due to one case of infection).

IV. Payment entitlements in times of COVID-19

A. Continued payment of wages

- If an employee is unable to work due to illness (regardless of the reason), the generally known rules on continued payment of wages apply.
- If an employee is not unfit for work but cannot resume work for other reasons, there is usually no entitlement to continued payment of wages (for instance in the case of quarantine). An exception can be made if the prevention is only for a 'relatively insignificant period of time', i.e. usually no longer than five days. However, this does not apply if the application of Section 616 of the German Civil Code is precluded by the employment contract, by company agreement or collective bargaining agreement.

  Current practice: Notwithstanding existing regulations on Section 616 BGB or the question of what is a 'relatively insignificant period of time', many employers currently continue to pay wages for 10 days in the event that an employee is prevented from working.
- In addition, the obligation to pay remuneration continues to apply in particular if the employer denies an employee access to the company due to existing health measures and the employee is therefore unable to work.

B. Loss of earnings according to the German Act for the Protection against Infection ("IfSG")

- In principle, if an employee is in quarantine owing to an official order, there is no entitlement to remuneration (see above), but a claim can be made for loss of earnings, in accordance with Section 56 IfSG. In such a case, the following compensation is granted:
  - up to week six: compensation amounting to the loss of earnings (net remuneration);
  - from week seven: compensation at the level of sickness benefit.
- If an employee does not turn up for work on the grounds that he or she is in quarantine, payment of salary must be suspended.
- The employer must then ask the employee to provide the order from the competent authority that prohibits the employee from carrying out his/her professional activity (cf. Section 31 IfSG).
- As soon as the official order is available, compensation for loss of earnings is to be paid for six weeks; loss of earnings = "the remuneration (Section 14 of Book 4 of the German Social Security Code) to which the employee is entitled for the regular working time applicable to him/her after deduction of taxes and social security and employment promotion contributions or corresponding social security expenses to an appropriate extent (net remuneration)" (Section 56 (3) IfSG).
- The employer has to file an application with the competent authority for an advance payment.

V. Short-time working

Section 95 et seqq. of the German Social Code - Book III (SGB III) sets out the requirements for the payment of short-time working allowance. The following should be noted:

- Short-time work requires a **considerable loss of working hours** (possibly after reduction of overtime and taking the remaining leave). The loss of working hours must be of **limited duration** and be due to economic causes or an unavoidable event. This applies to a (partial) standstill of operations due to the coronavirus (e.g. due to a decline in incoming orders, activity bans, quarantines).
- Finally, the loss of working hours must reach a **certain minimum level.** According to current legislation, 10% of the employees **of a company or a department of a company** must be affected by a loss of income amounting to more than 10% of their monthly gross income (the decree of the Federal Government specifying this in detail is still pending).
- If the employment relationship is terminated while short-term working allowance is paid or is terminated by way of a termination agreement, the entitlement to short-term working allowance lapses. Marginally employed persons (*geringfügig Beschäftigte*) do not meet the requirements for receiving any short-time working allowance. The same applies in principle to trainees. In the case of trainees, all means must be exhausted to ensure that the training continues. Based on the currently adopted legislative amendments, temporary workers will now also be able to receive short-time working allowance - this affects the **temporary employment agencies**.
- The introduction of short-time work requires a **legal basis**. This may result from a collective bargaining agreement, a company agreement or an agreement with the employee.
- The statutory subscription period for short-time working allowance is **currently twelve months**. The subscription period may be extended to up to 24 months.
- **In a first step**, the employer must notify the Federal Employment Agency of the introduction of short-time work in writing or electronically. There are forms available from the Federal Employment Agency for this notification. The competent authority is the employment agency **in whose district the company affected by the short-time work** is located. The existence of a considerable loss of working hours and the operational requirements for the short-time working allowance must be substantiated.
- **In a second step**, the employer must file the application for short-time working allowance within a **cut-off period of three months**. The application must be filed with the employment agency **in whose district the payroll accounting department responsible for the company** is located. The recipient of the short-time working allowance is the employer.
- The amount of the short-time working allowance is based on the flat-rate net remuneration difference. Employees with at least one dependent child receive 67% of the net pay difference, all other employees 60%.
- According to the current legal situation, the employer is in principle solely responsible for all **social security contributions** attributable to the short-time working allowance. The legislator has adopted various provisions to simplify access to short-time working allowance. These also provide for social security contributions attributable to the short-time working allowance to be reimbursed in full by the Federal Employment Agency.

VI. COVID-19 in school, kindergarten and the family

A. School or kindergarten is closed - what now?

- The employee may stay at home if this is necessary for the care of his/her child or in order to comply with the duty of supervision.
    - This is usually the case for children up to the age of 12.
    - There must be no other care facilities available.
    - The employee may be required to work from home in individual cases.
- However, the employer must be informed immediately/in time!
- In principle, the employee retains his or her entitlement to compensation for the period of care if the absence lasts for only a "relatively insignificant period of time" (see above).

B. The employee's child falls ill

- If an employee's child falls ill with COVID-19 (or other disease), the employee is not obliged to take up work in the company in this case if he/she has (unsuccessfully) tried to find another way of caring for the child. In this case, the employee generally retains his or her remuneration entitlement for a relatively insignificant period of time (see above).
- In addition, the employee is entitled to unpaid leave of absence/child's sickness benefit (e.g. in the case of a prolonged illness of the child), Section 45 of the German Social Code - Book V (SGB V).
    - **Rule of thumb:** For each child, 10 working days per parent for married employees or 20 working days for single parents per calendar year; in case of several children, the entitlement is limited to 25 working days or 50 working days per calendar year.
    - In order for this to apply, the child must have statutory health insurance and be younger than 12 years old.
    - Otherwise, the employee may stay at home only if it is unreasonable to expect him/her to carry out the work owing to the illness of the child.

Current practice: Regardless of the statements above, the obligation to pay remuneration always continues to apply if the employer denies an employee access to the company due to existing health measures and the employee is therefore unable to work already for this reason.

C. Holiday entitlements

- Only if an employee falls ill and becomes incapable of working during his or her holiday, the holiday is not counted and must be granted again.
- However, the holiday entitlements are also "used up" if the employee's recovery does not turn out as hoped for because of care duties or quarantine.
- In reverse, there is no obligation on the part of the employee to take leave to care for the child or to accept leave directed unilaterally by the employer. However, the employee may lose his or her entitlement to remuneration for the period of absence (see above).

The lawyers in our Employment Law Practice Group will be happy to answer any questions you may have on these topics.

Commercial - effects on supply relationships

What are the legal consequences if a company is no longer supplied with the materials necessary for its production due to the current crisis? Or the supplier can no longer produce because "production relevant" employees are in quarantine or sick?

Under what conditions can suppliers be exempted from their performance obligations? And what happens to the claim for the respective consideration? May one of the contracting parties claim damages? Or do contracts have to be amended?

The following remarks should help to make an assessment of the situation. Please note that our explanations apply to contractual relationships that are subject to German law. If a contract is governed by the law of another country - for example, because the parties have expressly chosen a different law or because clauses regarding the choice of law in the respective general terms and conditions contradict each other - the legal situation may differ from the following explanations. These are situations in which we will clarify the applicable legal situation in cooperation with our foreign offices or with our worldwide partner law firms.

I. Your own contract as a starting point

A. Force majeure clauses

In many contracts the parties have agreed a so-called 'force majeure' or 'act of God' clause. These clauses are usually divided into two parts and regulate on the one hand the conditions of their application and on the other hand the legal consequences thereof.

If the requirements of a 'force majeure' clause are met, it usually provides for all or at least some of the following points:

- that the parties are (temporarily) released from their performance obligations;
- that the parties must try to minimise the adverse effects for the other respective other party;
- that there is a right of termination or withdrawal after a certain period of time; and/or
- that damages in the event of 'force majeure' shall be excluded.

Epidemics are rarely explicitly mentioned in these clauses as a case of 'force majeure'. If the clause therefore exhaustively enumerates those cases that are to be considered 'force majeure' according to the contract, this can lead to epidemics not being covered by it. If, on the other hand, the contract does not contain a precise definition or if a list is not - as is usually the case - defined as exhaustive, general principles must be applied.

The outbreak of the COVID-19 virus is classified as an epidemic. Epidemics are mentioned as cases of 'force majeure', for example, in the explanatory memorandum to the Federal Government's bill on the tour operator contract.

However, the decisive factor for the application of a 'force majeure' agreement is that the 'force majeure' event does not just affect the contract in question in some way. Rather, the 'force majeure' must make it temporarily impossible or unreasonable for the party who wishes to withdraw from its contractual obligations to fulfil these. Whether this is the case can only be assessed in relation to each individual case.

The mere fact that that people throughout talk about an epidemic or in the meantime even a pandemic does not lead to the impairment of any supply relationships. The decisive factor may be where the supplier - or the customer - is located. If, for example, a supplier produces in one of the sealed-off cities in Hubei province in China or in Northern Italy and is currently unable to deliver special castings manufactured based on individual drawings for its customer in Germany, it is highly probable that a case of 'force majeure' has occurred. Whether or how long this applies, if the supplier of an inner-German contractual relationship cannot deliver a marketable product, which he himself sources from China, to his customer because a container is located in the port of Qingdao and is not shipped, will again be determined by the circumstances of the specific case. Depending on whether a delivery from Germany for a customer in China is to be made according to Incoterms® 2020 ex works or, for example, DAP Shanghai, results

will differ. It may also be relevant whether the provisions of the contract in question provide for a reservation of self-supply or not. The legal consequences provided for in the respective contracts remain to be examined.

Please note: As a rule, the affected party is obliged to inform the other party immediately about the occurrence of the event of 'force majeure' and its expected duration - and this regardless of whether the contract contains any provisions related to such an event or not. If it does not make a 'force majeure' report as soon as possible after it becomes aware of this, it shall be liable for any damage resulting from such late reporting.

B. Impossibility

But what applies if the contractual arrangements do not address the problem (no 'force majeure' clause, no effective reservation of self-supply)? Then the legal consequences are basically governed by the statutory provisions. In the event that performance is **impossible** for the supplier or anyone else, the law stipulates that the claim for performance is excluded. However, the principle must be observed here that a case of impossibility only exists if the supplier is also not in a position to procure the goods - even taking into account the assistance of third parties.

So, what is relevant here is,

- whether the supplier is obliged to procure the products concerned on the market; or
- whether the performance obligation of the supplies is limited to the products concerned, which, for example, cannot be finished in his factory in Wuhan.

Thus, not every form of impediment of performance directly leads to the impossibility of performance.

It should also be noted that the obligation to perform does not cease to apply simply because a possible replacement purchase on the market is expensive and was not planned. There is some disagreement as to whether the supplier could refuse performance in cases of mere economic impossibility.

If a case of impossibility exists, the debtor is released from his obligation to perform and the respective creditor is entitled to withdraw from the contract. Whether this is the case is, like so much else, a question of individual assessment.

C. Frustration of contract (*Störung der Geschäftsgrundlage*)

If there is no case of impossibility, an amendment or cancellation of the contract by means of the legal instrument of frustration of contract (*Störung der Geschäftsgrundlage*) may be considered. Whether a contract can be amended or even cancelled on the grounds of the principles of frustration of contract depends on various factors.

- First of all, the contract would need to be based on a certain circumstance that changed significantly after the conclusion of the contract.
- The next step would be to examine what risk allocation applies between the parties - whether by contract or otherwise according to general principles by which the typical risk of a contract is to be determined. In other words: Is the actual risk materialising here allocated to one of the two parties alone?
- Only when the party affected by the interference can no longer be reasonably expected to fulfil the contract unchanged on the basis of a comprehensive weighing of interests, can a contract adjustment or even termination be considered.

An adjustment of the contract can therefore only be considered as an exception if circumstances beyond the supplier's control and sphere of risk result in such a blatant disproportion between performance and consideration that it is no longer possible to adhere to the unchanged contract. However, the hurdles set by case law are quite high.

It should also be noted that contractual 'force majeure' clauses will generally be part of the General Terms and Conditions of one of the contracting parties. Therefore, with regard to the legal consequences determined in the clause, it may be questionable whether the respective legal consequences are actually effective from the point of view of GTC law in the individual case, for example with regard to regulations that determine which party ultimately bears the economic loss.

In accordance with the principles of frustration of contract (*Störung der Geschäftsgrundlage*) a party may not claim that performance has become more difficult, if the supplier has assumed the procurement risk, as is usually the case with so-called market-related debts defined by class (*Gattungsschulden*). On the other hand, the supplier would not have assumed the procurement risk, for example, if he was supposed to deliver from his stock. However, the limits of the risk assumed will be exceeded if, as a result of unforeseeable circumstances, such considerable obstacles to performance have arisen that the supplier can no longer be reasonably expected to procure the goods or services.

D. Damages

Whether, in one of these constellations, the party who does not fulfil the agreed obligation is obliged to pay damages depends first of all

- on whether it is entitled to one of the rights described above; and
- whether the supplier (debtor) is responsible for the respective impediment to performance.

In principle, the debtor is **only liable when he is at fault**. This means that in case of actual or legal impediments to performance for which he is **not at fault**, e.g. in the event of operational disruptions due to 'force majeure' or an official entry ban, he will not be held liable. This applies according to the law and therefore does not require the agreement of a 'force majeure' clause. Even without such an agreement, it therefore applies that as a rule the supplier does not owe any damages if he cannot deliver on time due to an event of 'force majeure'. However, the debtor will be liable if he has assumed a warranty or the procurement risk.

If the supplier has assumed the procurement risk, he is generally liable even if he is not at fault for the impediment to performance. Such cases, however, in which, as a result of unforeseeable circumstances, such significant impediments to performance have arisen that the supplier can no longer be reasonably expected to procure, are usually not attributed to the assumed procurement risk.

II. Looking ahead: New business opportunity - and now?

The outbreak of the epidemic and the fact that is does have consequences are no longer unforeseeable, although the actual extent of the consequences is uncertain. It is therefore essential that you make use of the possibilities available when negotiating individual contracts. It would be difficult to invoke 'force majeure' for newly concluded supply contracts now - after the outbreak of the COVID-19 epidemic.

To this end, arrangements should be agreed to allow the parties to react flexibly to changing and still uncertain circumstances, for example by specifying concrete assumptions under which performance is deemed feasible by the agreed date and concrete mechanisms that will apply if the assumptions change.

III. What applies to services?

Whether the service provider can invoke 'force majeure' or impossibility and thus be (temporarily) released from his obligation to perform without being liable for damages, or whether he can demand an adjustment of the contract with reference to the principles of frustration of contract (*Störung der Geschäftsgrundlage*), depends, as already described above, on the circumstances of the individual case. In the case described here, it will depend in particular on **whether the trip to the customer is practically excluded, or even prohibited by official order or would be associated with unreasonable health risks for the service provider.**

If, on the other hand, an employee refuses to travel without justification, the fault is probably attributable to the service provider.

Commercial - effects on events

Following the outbreak of the COVID-19 epidemic in Europe, almost all events in Germany have now been cancelled at short notice - from large public trade shows to specialised congresses, concerts, sporting events and celebrations of all kinds. Initially, these cancellations were the result of an independent decision of responsible organisers, but over the course of time the authorities have increasingly banned or at least restricted events of basically all kinds at the level of the federal states and the cities and municipalities. The operation of cinemas, museums, bars, clubs, etc. was also prohibited.

What are the mutual rights and claims arising from the cancellation of these events? Please note that our explanations apply to contractual relationships that are subject to German law. If a contract is governed by the law of another country - for example, because the parties have expressly chosen a different law or because the choice of law clauses in the respective general terms and conditions contradict each other - the legal situation may differ from the following explanations. These are situations in which we have to clarify the applicable legal situation in cooperation with our foreign offices or with our worldwide partner law firms.

I. The reason for the cancellation of the event

Of central importance is of course the reason for the cancellation. While this still seemed quite surreal for many observers at the beginning of March, it is currently foreseeable that an event - even regardless of the expected number of participants - will actually no longer be able to take place due to a **general ban on events**. It is to be expected that in the coming weeks - if at all - events with a very small group of participants will at best be allowed. It is not possible to predict what will happen with events that that are only scheduled to take place in the next few months. The following is decisive to start with: Is the organiser obliged to cancel the event because the competent authority has **prohibited** this specific event or of events in general? Or is there only a specific **recommendation** for the period concerned that events with more than 'X' participants should not be held in the region 'Y' in the period 'Z'? Have **official conditions been imposed** that make it actually impossible to hold a specific event? Or does the authority responsible for the venue not express an opinion or does not impose specific conditions, but the organiser considers the holding of the event to be too dangerous for **his own reasons**, in particular because of an increased risk of infection, especially since other comparable events have already been cancelled? Is the place of the venue "**sealed off**"?

II. Legal basis

A. Force majeure clauses

In many contracts the parties have agreed a so-called 'force majeure' or 'act of God' clause. These clauses are usually divided into two parts and regulate on the one hand the conditions of their application and on the other hand the legal consequences thereof.

If the requirements of a 'force majeure' clause are met, it usually provides for all or at least some of the following points:

- that the parties are (temporarily) released from their performance obligations;
- that the parties must try to minimise the adverse effects for the other respective other party;
- that there is a right of termination or withdrawal after a certain period of time; and/or
- that damages in the event of 'force majeure' shall be excluded.

Epidemics are rarely explicitly mentioned in these clauses as a case of 'force majeure'. If the clause therefore exhaustively enumerates those cases that are to be considered 'force majeure' according to the contract, this can lead to epidemics not being covered by it. If, on the other hand, the contract does not contain a precise definition or if a list is not - as is usually the case - defined as exhaustive, general principles must be applied.

The outbreak of the COVID-19 virus is classified as an epidemic. Epidemics are mentioned as cases of 'force majeure', for example, in the explanatory memorandum to the Federal Government's bill on the tour operator contract.

However, the decisive factor for the application of a 'force majeure' agreement is that the 'force majeure' event does not just affect the contract in question in some way. Rather, the 'force majeure' must make it temporarily impossible or unreasonable for the party who wishes to withdraw from its contractual obligations to fulfil these. Whether this is the case can only be assessed in relation to each individual case.

Therefore, a precise examination of each individual case is required to determine whether the contract in question contains a 'force majeure' clause at all, whether the conditions defined therein are fulfilled and what legal consequences the contractual provision then provides for.

It should also be noted that contractual 'force majeure' clauses will generally be part of the General Terms and Conditions of one of the contracting parties. Therefore, with regard to the legal consequences determined in the clause, it may be questionable whether the respective legal consequences are actually effective from the point of view of GTC law in the individual case, for example with regard to regulations that determine which party ultimately bears the economic loss.

However, it is of utmost importance that the party who wishes to invoke the occurrence of the event of 'force majeure' must inform its contractual partner of this immediately (in writing). If it does not make a 'force majeure' report as soon as possible after it becomes aware of this, it shall be liable for any damage resulting from such late reporting.

B. Impossibility

But what applies if the contract does not contain a 'force majeure' clause? Then the legal consequences are basically governed by the statutory provisions. In the event that performance is **impossible** for the debtor or anyone else, the law stipulates that the claim for performance is excluded. If the staging of an event is prohibited, the provision of a wide range of related services will be impaired or practically excluded. However, it must be examined in detail what is the actual good or service owed and whether a case of impossibility actually exists precisely with regard to this good or service. This applies accordingly, if the performance would require such an effort that this would be disproportionate to the creditor's interest in performance, taking into account the nature of the obligation and the requirements of good faith - this may be the case, for example, if authorities impose particularly far-reaching conditions for the holding of an event. The same applies if the debtor has to perform the service personally, as in the case of a concert, for example, and it simply cannot be expected of him.

Particularly in the case of major events, which are firmly scheduled in the calendar of events, it may be a matter of fixed transactions in terms of time (*Fixgeschäft*). In this case, a temporary obstacle to performance typically already results in (permanent) impossibility.

If a case of impossibility exists,

- the debtor is released from his obligation to perform, and
- the respective creditor is entitled to withdraw from the contract with the consequence that the entitlement to counterperformance lapses as well.

Here, too, however, it depends on the circumstances of the individual case and the individual contract design. In particular, it must be examined whether the contractual terms and conditions of the organiser provide for the possibility of postponing the event in a permissible form and the contracting partner can be reasonably expected to postpone it.

C. Adjustment of contract due to frustration of contract (*Störung der Geschäftsgrundlage*)

In cases in which an event cannot be held due to a prohibition, the assessment shall focus on the statutory provisions on the right of impossibility. Whether a contract can be amended or even cancelled on the grounds of the principles of frustration of contract, provided that a prohibition does not exist (yet), depends on various factors.

- First of all, the contract would need to be based on a certain circumstance that changed significantly after the conclusion of the contract. In the present context, the contracting parties involved probably shared the idea that the general economic, social and, in particular, health situation in Germany basically allows the holding of corresponding (large-scale) events. Whether the actual effects of the epidemic in a specific case have led to interference with such expectations for the place and time concerned must be examined in detail and cannot be answered in general terms here either.

- The next step would be to examine what **risk allocation** applies between the parties - whether by contract or otherwise - according to general principles by which the typical risk of a contract is to be determined. In other words: Is the actual risk that has materialised here allocated to one of the two parties alone? Only when the party affected by the interference can no longer be reasonably expected to fulfil the contract unchanged on the basis of a **comprehensive weighing of interests**, can a contract adjustment or even termination be considered.

An amendment of the contract therefore only may be applicable in exceptional cases. This seems conceivable, among other things, currently for events that are not yet imminent and for which the question of a ban is therefore still open, but whose feasibility at the originally scheduled date must be considered acutely at risk. The hurdles set by case law for a contract amendment based on the principles of frustration of contract (*Störung der Geschäftsgrundlage*) are generally quite high.

D. Damages

Whether in one of these scenarios the party who does not fulfil the agreed obligation is obliged to pay damages depends first of all on whether it is entitled to one of the rights described above and whether the party is responsible for the respective impediment to performance. In principle, the debtor is liable only when he is at fault. This means that in case of actual or legal impediments to performance for which he is not at fault, e.g. in the event of operational disruptions due to 'force majeure' or an official entry ban, he will not be held liable. However, the debtor will be liable if he has assumed a warranty or the procurement risk, which in turn must be examined for each contract on a case by case basis.

E. Contracts between organiser and service providers

The same legal instruments - impossibility of performance, 'force majeure' clauses, frustration of contract (*Störung der Geschäftsgrundlage*) - must also be used to examine the legal relationship between the organiser and service providers, booth builders, etc. If necessary, special requirements must be taken into account here which result from the nature of the contractual relationship depending on whether the party owes a specific work (*Werkvertrag*) or has to provide a specific service (*Dienstvertrag*), since for example the customer of a contract for work (i.e. in this case the organiser) can terminate this contract at any time, but the contractor retains the claim to the consideration, reduced by saved expenses.

F. Contracts between organiser and visitors

If it is impossible for the organiser to hold the event, the visitor will be able to withdraw from the event contract and demand a refund of any tickets already paid. If the organiser cancels the event, although it would still be possible to hold it, he is generally liable for damages to the visitors - but with regard to the extensive official prohibitions, this is unlikely to happen in case of currently upcoming events. In the case of an obligation to pay damages, the claim for damages may well include the reimbursement of so-called "frustrated expenses", such as the costs of travel bookings that can no longer be cancelled or accommodation costs.

If the organiser is not responsible for the cancellation of the event, claims for damages by the visitors are excluded. The extent to which the event contract limits the organiser's liability in a permissible manner must be examined. However, before a hasty affirmation of a liability for damages is made, it must also be examined here according to the principles presented above to what extent an adjustment or even cancellation of the contract is possible.

III. Looking ahead: joint solutions and event planning - and now?

In many cases, it will be advisable to reach amicable solutions in the sense of a future-oriented and partnership-based cooperation in the event of cancelled events or threatened event cancellations, especially where events can be postponed - even if this causes additional costs. In all other cases, the parties will have to deal with the set of instruments described above.

When dealing with contracts concluded before the outbreak of the epidemic, the importance of careful contractual arrangements for events that are currently being negotiated becomes evident. This is all the more true since, with agreements yet to be concluded, the outbreak of the COVID-19 epidemic can certainly no longer be considered an unforeseeable event. At present, it seems to be uncertain *how long* the virus will continue to affect everyday life; unfortunately, it seems certain *that* it will continue to do so for some time. It is therefore essential that you make use of the possibilities offered by individual contractual arrangements, such as agreeing on risk allocations. Against the background of current events, it also seems to make sense in principle to examine the possibilities and economic viability of insurance cover.

Corporate - securing the entrepreneurial ability to act

The absence of senior employees or a shareholder/partner can delay or even prevent decisions in day-to-day business and strategic measures. Is your company prepared for the quarantine case?

In day-to-day business, it must be possible to release payments, sign contracts and make legally effective declarations on behalf of the company even in the event of quarantine. At shareholder/partner level, it must be ensured that strategic decisions can be implemented quickly and efficiently. Formalities, such as the invitation to a shareholders' meeting with longer notice periods, can turn out to be fatal restrictions.

Recommendations:

- Expand the circle of persons with power of representation for the company. Appoint additional managing directors or, as a precaution, appoint authorised signatories (*Prokuristen*) at different locations of the company, if possible. Even if the aforementioned persons have not yet been entered in the Commercial Register, the appointment / nomination is effective. If the entry in the Commercial Register has not yet been made, the corresponding resolution of the shareholders' meeting (regarding managing director/s) or of the granting of power of attorney by the management should be presented to the business partner on request.

- Provide senior staff with specific powers of attorney (e.g. bank mandate) or general powers of attorney. The powers of attorney should - if possible - each be notarised.

- Avoid the loss of knowledge and ensure access to knowledge in the company (access to databases, accounts of any kind, etc.).

- Ensure that a so-called general meeting at shareholder level is possible, i.e. that all shareholders will be present or represented. This is the only way to ensure that the shareholders can effectively pass resolutions waiving any requirements as to form and deadlines for convening a shareholders' meeting.

- Provide persons with enduring and comprehensive powers of attorney (*Vorsorgevollmachten*), so that a shareholder who is no longer able to act due to illness can be represented. These powers of attorney must be notarised / recorded in a notarial act. It must be ensured that the power of attorney covers the right to vote waiving any requirements as to form and deadlines (see above).

- Enable shareholder decisions outside of meetings attended in person. Take advantage of the opportunity to pass resolutions by way of circulation (e.g. by e-mail) or within the framework of telephone or video conferences.

- Adopt amendments to the Articles in order to implement the measures stated above. The same applies to other by-laws of the company (rules of procedure, advisory board regulations, etc.).

- Take measures under company law that require the involvement of notaries, registry courts or public authorities at an early stage, as long as it is still ensured that these measures will be implemented by the public bodies in a timely manner.

- Authorise employees of the notary to file the necessary documents with the Commercial Register.

Financing

Various measures are offered to avoid liquidity shortages and to ensure the financing of companies currently affected by the corona crisis or on which the corona crisis has an impact. These range from comprehensive guarantee programmes by the KfW to take out loans in order to further ensure the liquidity of a company, measures to maintain liquidity such as the payment of short-time working allowance and the deferral of tax claims, to the suspension of the obligation to file for insolvency due to lack of funds. The measures for financing and securing the liquidity of companies include:

- ***KfW Special Programme*** - As announced by the German Federal Government, the KfW Special Programme will improve and considerably simplify the access to and terms for the existing support programmes KfW Entrepreneur Loan, KfW Loan for Growth and ERP Start-up Loan. For companies that have been on the market for more than five years, the KfW Entrepreneur Loan is particularly relevant here. Under this programme KfW assumes the risk (liability waiver) of up to 80% for the on-lending financing partners for working capital loans with a volume of lending of up to EUR 200 million. In addition, a liability waiver is also granted to large companies with an annual turnover of up to EUR 2,000,000,000 (previously a turnover limit of EUR 500 million applied). In addition, measures for young enterprises (ERP Start-Up Loan programme) and the launch of a special programme for small and medium-sized enterprises are also planned. The launch of these programmes is subject to approval by the European Commission which is still pending.

- ***Short-time working allowance*** - see page 6, V. - Short-time work;

- ***Deferral of tax claims*** - It will be made easier to defer tax payments and to reduce advance tax payments. Enforcement and late payment surcharges should be waived in connection with the effects of the coronavirus. Companies should contact their local tax office to obtain tax deferrals. In the case of taxes administered by the customs administration (e.g. energy tax), the Central Customs Authority has been instructed to make concessions to taxpayers. The same applies to the Federal Central Tax Office, which is responsible for insurance tax and value added tax and will proceed accordingly.

- ***Guarantee programmes of the federal states*** - In addition to the guarantee and funding programmes of KfW, the corresponding guarantee programmes of the federal states may also be an option and it is planned to open them up to a broader range of eligible parties. The intention is in particular, to secure the loans of the relationship banks of a company. A federal state guarantee comes into question in particular if a loan requirement of at least EUR 2,500,000 (or less in the case of restructuring) is to be secured (in practice up to a maximum of EUR 50,000,000 to EUR 100,000,000), whereby default guarantees may usually serve as collateral for 80 percent of the loan volume. The programmes can vary in the individual federal states, as can the responsible contact persons; as a rule, these are the responsible ministries or the development banks or guarantee banks of the federal states as mandataries. A combination of guarantees at national and regional level is also possible.

In addition, the European Investment Bank ("**EIB**") announced in the evening of 17 March 2020 that, comparable to 2009, guarantee or support programmes for companies and programmes for banks to back up loans will be launched again. To this end, the EIB has proposed a package to mobilise EU-wide support measures amounting to some EUR 40,000,000,000. It is planned to provide bridge financing, payment deferrals and other measures to counteract liquidity and working capital restrictions in small and medium-sized enterprises and mid-caps. It was also proposed to introduce a substantial and scalable guarantee to ensure that the EIB and national development banks can provide small and medium-sized enterprises with access to capital for as long as necessary. On the basis of existing programmes, the EIB plans to set up special guarantee schemes to support companies in need. The EIB also announced that it will purchase asset-backed securities from banks with a value of up to EUR 2,000,0000,000. In this way, banks can transfer the risk on existing portfolios of corporate loans to the EIB, freeing up capital for new lending.

In addition to the above-mentioned government support programmes and measures, it should also be mentioned at this point that companies should now increasingly examine and use various options for improving liquidity and internal financing to strengthen their own liquidity situation. These measures include the use of cash pooling and other internal financing instruments, but also measures to improve working capital management such as factoring and forfaiting and the utilisation of existing debt financing elements, e.g. existing credit lines (provided that these (still) allow for such utilisation). In the broadest sense, this area thus covers all measures that a company itself can take to strengthen its own liquidity situation. These include, above all, all measures of effective working capital and supply chain management (including the adjustment of payment dates) and the examination of long-term measures such as sale and leaseback transactions.

On the other hand, the current situation may quickly make it necessary to review existing financing instruments (especially loan agreements) to determine whether changed circumstances or measures to be taken could trigger information obligations or grounds for termination or whether assurances could become incorrect, thus preventing the drawdown of new loans under existing financing instruments. In the worst case, a material adverse change (MAC) could also occur in extreme situations. On the other hand, banks now have to pay more attention again to whether loans can still be granted without further ado in the given situation or whether the loans are to be qualified as restructuring loans with all necessary preconditions and possible liability consequences (Section 826 of the German Civil Code (BGB) because the borrower in question is in crisis.

State regulation, state liability - corona lockdown and compensation for plant closure

For companies, the official measures mean massive economic losses, some of which are already threatening the existence of companies. The question therefore quickly arises whether and, if so, who will pay for the damage caused and what further steps must be taken by those affected.

You can find current information on this topic on our website at

https://www.luther-lawfirm.com/en/newsroom/blog/detail/der-corona-lockdown-und-entschaedigungen-fuer-betriebsschliessungen

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