DS AVOCATS

FLASH INFO – CORONAVIRUS #GERMANY

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Impact of the pandemic Covid-19 on the German Economy

For Germany, which had an extremely solid economy until now, the coronavirus is a serious challenge for the whole society. Not only citizens but also companies are concerned. Due to the globalization of trade, German companies are affected a lot by the impact of the pandemic in other parts of the world.
All sectors of the German economy are affected by this crisis and no one is currently able to accurately assess the damage that may occur.

The German government has announced last week important economic and fiscal policy measures. It wants to make liquidity available to secure the business activities and the employment. The main message was that there is enough money available to tackle the crisis and it is going to use this money now.

Given the exceptional nature of the moment and for information purposes, we proceed to point out a summary of the main issues that we believe may have a greater impact on a business level, in relation to each specific area:

1. Package of economic measures by the German Federal Government to stabilize and support the economy (employees and companies)

a) In labor law / Short-time allowance (see also Section 2) :

- During the financial crisis 2008/2009 the enlargement of payment of short time compensation was one of the most important measures to avoid insolvency of small and big companies. This measure has now been reinstated: Compensation is paid when at least 10% of staff is partially employed (before: 33%).

- Partial or complete waiver of building up negative working time balances (before: building up negative working time balances was requires before applying for short-time allowance)
- full reimbursement of social security contributions by the Federal Employment Agency
- Short-time allowance also for temporary employees possible

b) Tax liquidity support:

- Facilitating the granting of deferrals where recovery would constitute a significant hardship
- Easier adjustment of advance payments
- No enforcement measures until 31.12.2020 if the tax debtor is directly affected by the effects of the corona virus

c) Financial aid:

- Expansion of existing credit programs
- Facilitating access to credit programs
- Higher risk assumption by the state owned bank by KfW ("Kreditanstalt für Wiederaufbau")
- Doubling of the maximum guarantee amount given by guarantor banks to EUR 2,5 million
- Additional special programs for all kind of companies
- Facilitating of export credit guarantees

d) Insolvency law / Suspension of the obligation to file for insolvency :

- Suspension of the obligation to file for insolvency for companies due to insolvency or overindebtedness caused by Coronavirus until 30.09.2020
- Reduction of liability and rescission risks for lenders/creditors

Regarding the above announcements, the government wants to finish drafting the implementing legislation before June 27th, 2020.

Of course any measure is likely to evolve or to be adapted at any time depending on the development of the crisis and its magnitude which cannot be really predicted at this stage.

Germany being a Federal State, there will be additional financial support given by every single state of the Federation. E.g. to support the companies of North-Rhine-Westphalia (18 million inhabitants) the local government in Düsseldorf has opened a rescue umbrella amounting to EUR 25 billion.

The European Commission and the European Central Bank will also grant a large financial support to European companies.

2. Labor law

a) Employee in Quarantine

If the employee is incapacitated by the infection with the corona virus, he will receive continued remuneration in accordance with the usual regulations (continued remuneration in the event of illness).

If the employee is not acutely ill, but is in quarantine because of suspected infection, the employee receives compensation in the amount of the net salary for the first six weeks of the quarantine. The compensation is paid by the employer, but will be reimbursed by the competent authorities upon request. From the seventh week of quarantine onwards, the competent authorities pay compensation equal to the sickness benefit directly to the employee.

b) No offsetting of quarantine days against annual leave

If the employee is not acutely ill, but has been quarantined because of suspected infection, he is not incapacitated and is still obliged to work. The obligation to work only ceases when the employee becomes incapable of work due to the illness.

If the employee performs his work from home or from the place of quarantine, he will continue to receive his remuneration from the employer. If he is unable to do so, he will receive compensation equal to his previous net salary. There is no offsetting against his annual leave.

c) Home office vs. mobile working

The employer cannot unilaterally order the establishment of a home office. In addition, he would be responsible for the compliance with the provisions of occupational health and safety law in the employee's home office. For this purpose, the employer would have to carry out a risk analysis and inspect the home office accordingly.

Therefore, the arrangement of mobile work is more appropriate in the current situation. For this purpose, the employer provides the employee with the necessary work equipment (usually a laptop

with the software to be used) and temporarily instructs the employee to perform his work on the move. This is also conceivable using the employee's own devices (bring your own device), although the employer cannot order this unilaterally.

d) Release of the employee due to the closure of day-care centers and schools

If the employee's own child is ill, the employee can temporarily stay at home to care for the child while continuing to pay his salary. If the child does not fall ill and no suitable care is available, the limits of the temporary paid leave are quickly reached. However, the employee is prevented from performing his work if the child is in genuine need of care, for which the employee has been unable to find suitable care even after making serious efforts. The burden of proof lies with the employee. However, the obligation to temporarily take paid leave under § 616 BGB (German Civil Code) is often excluded by a regulation in the employment contract. Employees should therefore inform their employer in order to find a joint solution.

e) Order of short-time work by the employer

The employer can order short-time work if there is a basis for this in the employment contract, a works agreement or a collective agreement. The introduction of short-time work is also subject to the codetermination of the works council.

f) Requirements for applying for short-time work compensation

Entitlement to short-time working compensation exists if

- there is a considerable loss of working hours,
- the operational requirements are met,
- the personal requirements are fulfilled and
- the work stoppage has been displayed.

Employees can receive short-time work compensation if deliveries are not made due to the corona virus and working hours have to be reduced as a result. This also applies if a company is temporarily closed due to government protective measures.

A considerable loss of working hours is deemed to exist if at least 10% of the employees in the company are affected by a loss of earnings of more than 10%. Previously, the proportion of employees affected had to be at least one third. Access to the short-time working allowance is to be facilitated retroactively to 01.03.2020.

The operational requirements are met by every company in which at least one employee is employed.

An employee fulfils the personal requirements for receipt of short-time working compensation if he is in an employment relationship which has not been terminated and is subject to compulsory insurance. Accordingly, marginal part-time employees are exempt from short-time work compensation if they are not subject to compulsory insurance.

In order to facilitate access to short-time work compensation during the Corona period, it is also planned that employers will be reimbursed for social security contributions by the Employment Agency.

3. Real Estate / Tenancy law

a) Impacts of the Corona crisis on the obligation to pay the rent

Tenants who are exempt from an official order to close their shops remain obliged to pay the contractually agreed rent. A decline in the number of customers and visitors alone does not automatically lead to a reduction in rent or a tenant's claim to a rent reduction.

The legal situation for tenants affected by official orders to close shops must be viewed in a more differentiated manner:

b) Rent reduction

- **Independent closure for economic reasons**

  The prerequisite for a rent reduction is the existence of a defect in the rental object (§ 536 Para. 1 S. 1 BGB). If the tenant closes his business on his own responsibility for economic reasons, there is no such defect and the tenant must continue to pay the rent in full.

- **Officially ordered closure**

  According to previous case law, public law obstacles to use and restrictions on use only constitute a defect if they are based on the specific quality, condition or location of the rented item. In contrast, restrictions of use which are caused by personal or operational circumstances of the lessee shall not be qualified as a defect. If the closure is due to the fact that a certain object may no longer be operated, a rent reduction can be considered. The situation is different, however, if the respective arrangement relates to certain modes of operation. The risk of the operating mode is therefore borne by the tenant.

The store closures ordered to date in the course of the Corona crisis are purely business-related sovereign interventions that are not directly related to the rented property. The tenants affected can continue to use their rental object, for example, for internal purposes, physical inventory, decoration, and so on. The permission to reopen the property to the public is therefore equivalent to a decision on the business license. Based on the current legal situation and the previous legal situation, the obligation to pay rent therefore continues to exist.

c) Reduction of rent due to restriction of the transfer for use

According to the current legal situation, landlords should avoid a hasty restriction of the right to use the property on their own responsibility, without an official order addressed to them. Otherwise, the tenants concerned could - depending on the individual case - invoke a de facto impairment of the usability of the rented property and be forced to claim a rent reduction or damages.

d) Right to contract adjustment

If the tenant and landlord did not foresee special circumstances at the time of conclusion of the contract which lead to a serious change in the business relationship, a legal correction may be necessary in good faith. In special exceptional cases, there is therefore the possibility of a contract adjustment according to the principles of the so-called "disturbance of the basis of the business" (§ 313 para. 1 BGB). Until now, case law in commercial landlord and tenant law has been hostile to recourse to these principles. This means that even taking into account the legal institution of the disruption of the business basis, current case law assumes that the obligation to pay rent will continue. However, in view of the historical extent of the Corona crisis and the associated duration and intensity of the economic burden on tenants, a divergent line may develop in case law, which cannot be foreseen at present.

However, even if the principles of disruption of the business basis are applied, the distribution of risk defined in the affected lease agreement must still be taken into account.

e) Claims for damages

Claims for damages by the tenant against the landlord may only exist in exceptional cases. Because these presuppose regularly a fault of the landlord, at which it will be missing usually. However, claims for damages would be conceivable if the landlord - e.g. in a shopping center or retail park - decided to close rental space without an official order or if an official order for closure is issued specifically against an individual landlord (e.g. due to non-compliance with hygiene regulations).

f) Draft law amending the tenancy law

The federal government plans to limit the possibilities of termination due to non-payment of rent during the Corona crisis. The following measure is planned:

The lease agreement cannot be terminated due to rent arrears in the Corona crisis if the arrears are a result of the Corona crises. This is to apply to rent debts from the period from 01.04.2020 until 30.06.2020. However, the tenants' obligation to pay the rent will in principle remain in force. The draft law provides for the possibility of an extension for a further year. The law is to be passed on Wednesday, 25.03.2020.

Nevertheless, the landlord has the right to terminate the lease due to rent arrears that have arisen in an earlier period or will arise from a later period. The other reasons for termination also remain unaffected.

g) Recommendation for tenants

Tenants should contact the landlord as soon as they notice that the rent cannot be paid. A rent reduction and / or a deferment of the rent payment should then be negotiated.

4. Effects of Covid-19 to sales contracts

Due to Covid-19 pandemic, companies cannot meet their delivery obligations, supply chains are disrupted. Especially companies that purchase their products from foreign manufacturers are wondering at whose expense the omitted or delayed delivery is. Can the supplier invoke force majeure? If so, the consequence would be an at least temporary exemption from the obligation to perform and a simultaneous exclusion from liability for damages.

a) Force Majeure under Art. 79 sec. 1 CISG

It can be possible to qualify an epidemic such as Covid-19 as a case of Force Majeure according to Art. 79 sec. 1 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). However, it is important to note that many sales contracts contain a Force Majeure clause which may modify the legal conception. In both cases, however, it has to be determined on a case by case basis if the seller is exempt from performance due to Force Majeure.

Art. 79 CISG stipulates that a party need not be held liable for non-performance of its obligations if it proves that the non-performance is due to an impediment beyond its control and that it could not reasonably be expected to avoid or overcome such impediment or its consequences. This rather broad provision is of benefit to the supplier.

If CISG is applicable, there is a good chance that the affected party to the contract can successfully invoke force majeure. To do so, it must be able to prove that the delivery was omitted or delayed as a result of the coronavirus - for example with a Force Majeure Certificate, like those certificates issued by CCPIT (China Council for the Promotion of International Trade), which can be recognized as circumstantial evidence for a case of Force Majeure. However, the courts are free in their case-by-case assessment (is "force majeure" applicable to the specific case?) and not bound to such certificate issued by foreign agencies.

Recommendations :

- The certificate should precisely state the specific circumstances and exact timeline leading to the supplier's impossibility to perform the contract.
- It is of utmost importance that suppliers have a proper documentation on all circumstances such as administrative decisions or orders, domestic transportation restrictions, work prohibitions, quarantine orders etc. including the corresponding timeline.
- The supplier must immediately notify the buyer if the goods cannot be produced and shipped in time due to reasons related to Covid-19 (such as travel restrictions for employees etc.). If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt, cf. Art. 79 sec. 4 CISG.
- Besides notifying the buyers (also in written form), discussing and negotiating with the contractual partners, we strongly advise to collect any evidence on the occurrence of the Force Majeure event, adopted mitigation measures and incurred own losses.

b) Basic information on German sales law and service contract law

If the parties have agreed to the application of German law under express exclusion of the CISG, the following principles shall apply. Please note that these principles apply not only to contracts of sale but also to contracts of service.

Exclusion of the supplier's / service provider's obligation to perform

According to German civil law, obligations of suppliers or service providers to perform the contract can be excluded in case of

- **Impossibility of performance**, section 275 subsec. 1 BGB (German Civil Code)
  - Factual: e.g. export/import restrictions, production stop of supplier

- Legal: e.g. officially ordered temporary closure of operations, official ban on events

- **Disproportionate effort** of service provision or performance of delivery, sec. 275 subsec. 2 BGB
- **Unacceptability of the provision of services**, sec. 275 subsec. 3 BGB, Relevance of infection protection
  - In principle, the legal consequence would be the loss of the claim for payment according to the law, sec. 326 I BGB, however, a claim for damages by the service recipient or purchaser can arise in the case of culpable non-performance, sec. 283 BGB
- **Modification of the obligation to perform of the supplier / service provider**

  Furthermore, obligations could be modified by law if
  - there are **serious subsequent changes in circumstances** that have become the basis of the contract,
  - Parties would have concluded a contract with a different content if the change had been foreseen and it would be unacceptable to stick to an unchanged contract ("frustration of contract", so-called “disturbance of the basis of the contract”)

    In principle, there is a right to demand adaptation of the contract, sec. 313 I BGB. However, in exceptional cases there is a right to withdraw from the contract in the event of "loss of the basis of the contract", if adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, sec. 313 subsec. 3 BGB.

Our teams remain mobilized to answer your questions. Please contact:

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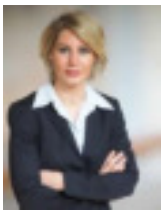

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