

# DUTIES OF DIRECTORS AND BOARD MEMBERS DURING THE CORONAVIRUS PANDEMIC

19 MARCH 2020 • ARTICLE



## A FOCUS ON COMPANIES IN THE TRANSPORT, ENERGY AND INFRASTRUCTURE SECTORS

"Managing directors and board members are required to get an overview of the potential issues their companies may face in this crisis as quickly as possible."

The coronavirus pandemic presents companies with unprecedented challenges that may even overshadow the effects of the 2008 financial crisis for the foreseeable future. In this context, company managers may be concerned with the question of whether (and to what extent) their due diligence obligations might be redefined due to the pandemic caused by Covid-19 as well as the consequences for the economy that have already occurred and those still to be expected.

Managing directors and board members are required to get an overview of the potential issues their companies may face in this crisis as quickly as possible.

We recommend implementing a monitoring and documentation system adapted to the specific situation in question, allowing management to identify and analyse risks at an early stage and react to them appropriately.

The areas of risk that require examination in the current situation include are, in particular:

### Company Organisation:

- Establishment of a committee to continuously monitor the crisis and provide recommendations for action;
- Continuation of business to the extent possible; and
- Protection of employees against health hazards in coordination with shareholders/supervisory board.

### Liquidity Management, e.g. to the extent possible by:

- Installation of a system for the early detection of liquidity shortages;
- Timely issuance of invoices;
- Collection of outstanding claims;

- Arrangement of deferrals;
- Adjustment of payment obligations;
- Review of state financial aid from the KfW (*Kreditanstalt für Wiederaufbau*);
- Review of tax benefits;
- Review of insurance claims; and
- Contacting financing banks in due time regarding a joint solution of crisis-related issues.

## **Contract Management:**

- Examination of performance obligations in the context of any force majeure clauses or supplementary interpretation of contracts;
- Examination of information and notification obligations towards contractual partners in the context of any force majeure clauses;
- Examination of rental agreements regarding negotiation possibilities for tenants and landlords;
- Arrangements for contractual adjustments to find mutually acceptable solutions with respective contractual partners;
- Examination of possible “chain-reactions” from upstream, downstream or otherwise interlinked contracts, e.g. grid connection or power purchase agreements; and
- Examination of contractual rights in the event of loss of frequency in publicly accessible infrastructure.

## **Personnel Management:**

- Measures to protect the health of employees;
- Home working arrangements;
- Reduction of overtime hours; and
- Consideration of part-time or temporary contracts.

## **Regulatory Management:**

- Examination of official requirements and deadlines within the framework of official procedures and approvals and consideration of the possibility that these cannot be met due to the pandemic; and
- Examination of whether any delays by authorities due to the pandemic may have an impact on the project, grid connection, etc.

## **Compliance:**

- Observe any current legal and regulatory requirements in relation to the pandemic; and
- Ensure that HSE requirements are complied with.

The above measures will not be equally relevant for all companies. In addition, some companies may have other relevant issues that are not specifically mentioned above. It is important that detailed management records are taken so the reasons any particular decision was made are clear and transparent.



## THE IMPACT OF THE CORONAVIRUS PANDEMIC ON SUPPLY COMMITMENTS IN THE TRANSPORT, ENERGY AND INFRASTRUCTURE SECTORS

### (i) Where there is a “force majeure” clause

In the transport, energy and infrastructure sectors (with regard to possible material shortages or restrictions on the mobility of employees) it is important to ensure that existing delivery obligations and ongoing payment obligations can be met. If this is not the case, the question arises as to how to deal with this and, in particular, whether the delivery obligations must be met from a legal perspective.

This requires an analysis of the relevant contracts and determining whether they contain “force majeure” clauses, which provide for exceptions to delivery obligations in the event of force majeure. This is particularly the case with long-term (framework) supply contracts.

Force majeure clauses allow for contractually agreed exceptions to contractual obligations, so the wording of a force majeure clause is crucial in determining whether an exception applies. If, for example, the clause contains an exemption from the obligation to supply in the event of pandemics and diseases, it is very likely that the coronavirus pandemic would be covered by this clause.

If the clause contains a blanket exemption from the obligation to supply in the event of “force majeure”, the legal situation is less clear, as the clause will be subject to interpretation (potentially by the courts in the case of a dispute). However, looking at how similar crises have been dealt with by the courts previously (e.g. in the case of the outbreak of the SARS virus) suggests that the coronavirus pandemic could be regarded as “force majeure”.

In any case, the obligation to supply will only cease to apply if the performance obligation cannot be met solely because of the coronavirus pandemic, and not because of internal company reasons in existence before the crisis.

The legal consequence of such a “force majeure” clause is typically that the performance obligations are suspended for the period in which the respective event giving rise to force majeure continues, with the result that the obligation to deliver no longer applies for that period. In addition, it is often also stipulated that if the force majeure event lasts for a certain longer period of time, both parties have the right to withdraw from or terminate the contract. In some cases, it is also explicitly stated that the supplier is not in default or liable for damages.

As to whether a force majeure clause applies depends on contractual interpretation, it is advisable to contact respective contractual partners and discuss the content of the provisions. In addition, legal advisors should be consulted to analyse the respective contracts.

## **(ii) In the absence of a “force majeure” clause**

If the contract does not contain a “force majeure” clause, statutory provisions apply, which provide various solutions in this situation.

In particular, § 275 of the German Civil Code (*BGB*) provides that in the event a manufacturer is unable to provide his service or can only do so at a disproportionately high expense, they are released from their obligation to provide service or given the right to refuse to provide services (this is called ‘impossibility’). Such an impossibility releasing a contractual partner from an obligation to deliver will have to be assumed, for example, where a production facility is closed down by the authorities due to the coronavirus pandemic.

In cases where contractual performance is not impossible in principle but is associated with considerable expenditure, a cost-benefit analysis is decisive, which will ultimately be determined on a case-by-case basis. In any event, suppliers must invoke their right to refuse performance to their end customers in good time. It must also be considered to what extent additional financial expenditure for replacement purchases to meet delivery obligations for suppliers can reasonably be expected, even if this would involve significant losses.

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WHETHER AN ADJUSTMENT OF THE CONTRACT OR A WITHDRAWAL FROM THE CONTRACT IS FEASIBLE SHOULD BE ASSESSED ON A CASE-BY-CASE BASIS.

Separate from this is the question of whether a manufacturer/supplier is liable to his customer for damages in the event of non-delivery. This is only the case if the supplier is responsible for the non-delivery, which is fundamentally excluded in the event of force majeure. However, the manufacturer/supplier may have to procure the parts elsewhere if they are still available. If this is not possible or if the delivery of a specific item has been agreed on, the supplier is not at fault and, accordingly, is not liable to pay compensation.

Finally, it should be noted that in such a case the potential customer does not have to meet his payment obligations.

In addition, the regulations on disruption of the basis of the contract (*Störung der Geschäftsgrundlage*) (§ 313 BGB) may also apply, which either allows for an adjustment of the contract or a withdrawal from it. While this has not yet been clarified as regards the present situation as the courts have not previously dealt with such an occurrence, it is likely to be the case that they will apply for the most part. Whether an adjustment of the contract or a withdrawal from the contract is feasible should be assessed on a case-by-case basis.

Since the absence of a “force majeure” clause will make evaluations in individual cases even more important, it is recommended to seek legal advice and to communicate with the contracting parties in such cases.

## EXAMINATION OF STATE SUPPORT

Financial support for companies affected by the crisis has been promised by the German government at both the federal and state levels. It is important for managing directors and board members to keep track of daily developments to be able to benefit from such support as needed.

From a tax perspective, potential advance payments on income, corporation and trade tax will be adjusted. If a taxpayers' income is expected to be reduced in the current year, their tax prepayments will be reduced quickly and efficiently. In addition, the tax authorities have been given more flexibility to allow the deferment of tax payments if their collection would mean considerable inconvenience.

The federal government has also committed to providing liquidity grants to bolster the economy, which will be administered by KfW. Existing financial instruments (such as working capital loans or KfW loans) will be extended and the conditions for access made easier to meet. The terms and conditions of the loans will be based on a company's market history and relate in particular to the assumption of risk (indemnity against liability) for on-lending financing partners (usually the house banks).

In addition, KfW is preparing a special programme for companies, depending on their size, to overcome crisis-related financing difficulties.

## THE TEMPORARY SUSPENSION OF THE OBLIGATION TO FILE FOR INSOLVENCY

It should also be noted that the basic obligation of company management to file for insolvency without delay in the event of insolvency or over indebtedness will be suspended. The Federal Ministry of Justice and Consumer Protection (*BMJV*) is currently drafting a regulation to implement this.

Suspension will be granted if the reason for insolvency is based on the effects of the coronavirus pandemic and if there are reasonable expectations of financial recovery due to an application for state support or financing or reorganisation measures.

In this context, managing directors and board members need to continue to analyse and document whether the conditions for filing an insolvency are met. At the same time, however, it is also necessary to sufficiently document justification for claiming that the coronavirus pandemic is the reason for insolvency.

## CONCLUSION

The coronavirus pandemic presents managing directors and board members with challenges that they have most likely never experienced before. The essential requirement to emerge from this crisis as unscathed as possible is to comply with existing due diligence obligations even more thoroughly and to evaluate the best practicable solutions in a constant dialogue with contractual partners and legal advisors.

We would be happy to provide further guidance on some of the topics listed above from a legal perspective. Please do not hesitate to contact us if you have any questions.

Please click **here** to read our latest article on the effects of the pandemic on employment issues in Germany (in German) and **here** to read our advice surrounding the emergency financial regulations imposed by the Federal German government (in English).

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