IMPACT OF COVID-19 ON DISPUTE RESOLUTION IN GERMANY

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The worldwide spread of Covid-19 has a major impact on dispute resolution in Germany, both in terms of pre-litigation concerns and dispute prevention, as well as practical consequences for the conduct of disputes in front of state courts and arbitral tribunals.

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Currently, the following issues should be considered:

PREVENTION AND PREPARATION OF DISPUTES

Covid-19 may give rise to disputes between contracting parties if and to what extent contractual claims and performance of obligations are affected. WFW has outlined the relevant information and recommendations regarding existing contractual relationships for you in a previous article available **here** in both English and German.

Parties should clearly document the causes and consequences of any potential impact of Covid-19 on their business operations and contractual performance. This documentation may become important as evidence in a later legal dispute, e.g. to determine whether a party was justifiably prevented from completing its contractual performance or to examine possible warranty rights and claims for damages. Currently, we are seeing counterparties giving generally held notices of Covid-19-related incidents (e.g. delivery delays, price increases) that are preventing them from meeting their contractual relationships (e.g. problems delivering goods or having them accepted, unavailable staff, price increases). Such notices should be assessed and rejected where appropriate.

EFFECTS ON DEADLINES

It should be also assessed, if contractual or statutory deadlines are affected by Covid-19.

The spread of Covid-19 can lead to various restrictions on business operations resulting from efforts to halt the pandemic's spread. Official orders to temporarily close non-critical operations and move to remote working, as well as sick or self-isolating employees becoming infected with the virus, may well hinder internal company processes.

No general suspension of contractual and legal deadlines

Notwithstanding these restrictions, contractual or statutory time periods, such as those on the notification of defects (e.g. defect notification periods) or notices of defects (Section 377 (1) German Commercial Code (HGB)), as well as contractual preclusion periods, are not suspended and remain the same.

In some cases, deadlines may be suspended if the parties can agree to an extension of the time limit. Alternatively, an extension can be requested from a contracting party referencing the restrictions resulting from Covid-19. Relevant deadlines should therefore always be kept in mind and necessary precautions taken to ensure that contractual and legal deadlines can be met.

Suspension of limitation periods

The Covid-19 outbreak also does not provoke an automatic suspension or interruption of limitation periods, which can only happen in certain exceptional circumstances.

Under Section 206 of the German Civil Code (BGB), a limitation period may be suspended for as long as the creditor is prevented by force majeure from taking legal action within the last six months of said limitation period. However, force majeure is only accepted if legal enforcement is rendered impossible, despite the utmost care reasonably to be expected in the circumstances being taken. As a result, all necessary precautions must be taken for the prosecution of legal action. In this context, even the slightest fault will exclude a case of force majeure:

- Restrictions on business operations alone are unlikely to suffice for this purpose if, through the adoption of necessary precautions, legal proceedings can still be brought (e.g. reorganisation of personnel or the involvement of lawyers). The same is likely to apply to business operations temporarily closed as a result of Covid-19; and
- Court restrictions will only constitute force majeure if there is an actual standstill in the administration of justice. At present, a predominant number of courts is operating in “emergency mode”, dealing primarily with urgent matters only.

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If there is a risk of a limitation period expiring, an agreement from the counterparty should be requested to either extend it as a result of Covid-19 or, alternatively, to waive any limitation defence. If such agreement cannot be reached, measures that will inhibit the expiry of the limitation period, such as proceedings for the preservation of evidence or a dunning procedure, legal action in state courts or arbitration proceedings, should be taken.

Delay in service to be considered

In relation to both court proceedings and arbitral matters, where deadlines must be met or there is a risk of a limitation period expiring, potential delays in the service of relevant pleadings should also be considered. Necessary precautions should therefore be taken to ensure service in due time. In addition to registered mail or fax, electronic delivery may also be appropriate, as long as receipt can be sufficiently proven.

For example, the International Chamber of Commerce (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the London Court of International Arbitration (LCIA) all currently recommend use of electronic communications. The Deutsche Institution für Schiedsgerichtsbarkeit e. V. (DIS) is taking the same approach, although it should be noted that the deadline mailbox of the Berlin office is currently out of order for an indefinite period. The DIS has also announced that measures to simplify formal requirements for the filing of a request for arbitration will be taken.

IMPACT OF COVID-19 ON COURT AND ARBITRATION PROCEEDINGS

In times of Covid-19 there are also some issues to be considered in relation to upcoming or ongoing court and arbitration proceedings.

Impact on pending proceedings

Currently, as mentioned above, many courts are operating in "emergency mode". Physical access to the courts is often restricted and various judges are working from home. The work carried out by the courts is generally limited to urgent matters, with hearings being postponed or cancelled altogether. The arbitration institution DIS has also said that delays in processing arbitration cases may also occur, even though its staff is working from home or it is maintaining emergency staff at its headquarters (e.g. at the DIS in Bonn).

In pending proceedings, courts may further choose between different procedural options:

- In the case of ongoing proceedings, state courts may suspend proceedings under Section 245 of the Code of Civil Procedure (ZPO) for as long as the court is not active as a result of a war or other event. However, as long as courts are operating in emergency mode, there is no need to fear such interruption of the proceedings;
- It is conceivable, however, that in exceptional cases courts may order the suspension of proceedings as a result of Covid-19. Under Section 247 of the Code of Civil Procedure (ZPO), a court may make such an order while a party is cut off from contact with the trial court as a result of government orders, by war or other circumstance. Such difficulties may arise as a result of local restrictions on movement and lockdown orders. However, where parties are legally represented, it is unlikely that courts would consider such a suspension of proceedings; and
- Courts might also, upon application by the parties, order that proceedings be stayed pursuant to Article 251 of the Code of Civil Procedure (ZPO). In such circumstances, however, the plaintiff should demand a waiver of the limitation period from the other party. If not, suspension of the statute of limitation resulting from the court proceedings will end six months after the order to suspend the proceedings (Section 204 paragraph 2 sentence 3 BGB).

RELEVANT DEADLINES SHOULD ALWAYS BE KEPT IN MIND AND NECESSARY PRECAUTIONS TAKEN TO ENSURE THAT CONTRACTUAL AND LEGAL DEADLINES CAN BE MET.

Impact on legal and judicial deadlines

Caution is also required in relation to ongoing proceedings with regard to legal and judicial deadlines:

- In principle, procedural deadlines can be extended upon request of the parties at the discretion of the court. Supreme Court case law indicates that, as a rule, an initial request for an extension of time limits will be granted if adequate reasons are given. However, parties should explain, in detail, the extent to which Covid-19 specifically prevents them from meeting the specific deadline.
- No extensions are possible on emergency deadlines ("Notfristen"). These include time limits for the defendant to lodge a statement of defence against an action, to appeal against a judgment by default or to lodge an appeal or remedy. If, for example, the time limit for appealing against an unfavourable judgment is missed, the judgment may become final. Should such an emergency deadline be missed, the relevant party may apply for a reinstatement to the previous status ("Wiedereinsetzung in den vorigen Stand") in accordance with Section 233 ZPO. However, in order for such an application to be successful, they cannot be at fault and will have to carefully and conclusively explain why, as a result of Covid-19, the emergency deadline cannot be met. Here too, therefore, it is important that sufficient organisation is maintained.
- In arbitration proceedings, the arbitral tribunal may schedule deadlines at its own discretion. In our experience, arbitral tribunals are open to applications to reschedule a deadline or hearing, for example if a written witness statement cannot be provided in due time because the witness is affected with Covid-19 or is receiving in-patient treatment. With regard to administrative deadlines, the DIS has announced it is open to rescheduling applications.

In any event, in all cases necessary precautions should be taken to ensure that time limits are respected in ongoing proceedings.

Impact on oral hearings

Travel bans, exit restrictions and illness are only some examples of the challenges resulting from Covid-19 to the conduct of oral proceedings. This is particularly true where parties from overseas are required to attend. In addition, in state court proceedings the principle of publicity according to Section 169 German Court Constitution Act (GVG must) be observed.

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There are different ways to deal with the practical difficulties of the spread of Covid-19:

- In principle, it is at the discretion of the courts and arbitration tribunals to hold or conduct oral hearings. However, unless a hearing is postponed ex officio, it is likely that courts will follow the parties' suggestion to adjourn. Difficulties in holding oral hearings should therefore be considered in good time and postponements suggested;
- Several courts have already taken precautions to reduce the risk of infection during oral hearings (e.g. use of face masks, keeping a minimum distance, restricting the audience or partially excluding the public); and
- It is also possible to conduct oral proceedings using information technology, in particular video conferences, both in state court proceedings (Section 128a ZPO) and arbitration proceedings. The DIS Rules of Arbitration explicitly support the use of modern information technology. Alternatively, the proceedings can be transferred to a written procedure (Section 128 paragraph 2 ZPO), whereby written examination of witnesses (in arbitration proceedings "witness statements") and written expert opinions are admissible.

Provisional Legal Protection

For urgent matters, interim legal protection by state courts and arbitration tribunals remain possible. Interim relief proceedings may be conducted entirely without an oral hearing if necessary. In view of the existing restrictions imposed by Covid-19, it is likely that in urgent matters courts will make use of such a course of action.

Against this background, the necessary precautions should also be taken to defend against possible interim measures, e.g. by filing a protective brief with the central register of protective letters.

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