

## **COVID-19 as a case of force majeure for construction contracts under German Law**

**By Ralf Leinemann, Berlin (03.04.2020)**

### **1. COVID-19 – a case of force majeure**

The German civil code (BGB) has no explicit provision covering a force majeure event. Force majeure is defined by case law as an event that cannot be assigned to any sphere of one of the contracting parties, but that affects the living conditions of the general public or an undetermined number of people from outside and is objectively inevitable and unpredictable (BGH, judgment of 22 April 2004 - III ZR 108/03). In principle, this term also includes diseases and epidemics (BGH, judgment of 16 May 2017 - X ZR 142/15). The COVID-19-crisis was classified as a pandemic by the WHO on March 11, 2020. German authorities have used this term shortly afterwards and have subsequently enacted strict regulations and restrictions on the economy and general social behaviour. By the end of March, the German ministries for construction and infrastructure released official statements saying that the current situation may be considered as a force majeure event, if the performance of construction projects is affected by the anti-pandemic measures.

### **2. No specific legislature introduced**

German legislature did not introduce new rules or regulations related to the construction sector coping with the crisis. Most construction sites were busy all through the month of March and April 2020, in parts even encouraged by government agencies.

### **3. Force majeure and frustration of purpose**

Through § 313 BGB, the German Civil Code provides for a Codification of a frustration of purpose event. The legal provision reads as follows:

*§ 313 BGB: “(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.”*

In Germany, almost every construction contract includes the standard conditions on construction contracts (Vergabe- und Vertragsordnung für Bauleistungen, VOB/B). The VOB/B addresses force majeure events only with respect to extension of time § 6 Para. 2 No. 1 c) VOB/B and by § 7 VOB/B, if the construction works are physically damaged or destroyed, which is not relevant in respect to the COVID-19-pandemic.

The legal consequences of a case of force majeure are diverse and must therefore be examined in each case individually in accordance with the respective contractual agreements. In this respect, cases of quarantine measures against the personnel, confinement in different countries and in particular restrictions on travel of personnel, construction sites in risk areas, restrictions on movement of goods, etc. should be considered. These consequences of the

Corona crisis may have an impact on the construction process and thus ultimately on the contractual obligation to fulfil agreed deadlines. If such difficulties must be considered as a consequence of force majeure, no mutual claims shall arise from that.

BGB-clauses as well as VOB/B-clauses apply to subcontracts and contracts regarding the supply of goods (sand, gravel, components) accordingly.

#### 4. Duty to notify

In most cases, German law does not require any formal notification. However, according to § 642 BGB, if an act by the employer is necessary to perform, then the contractor may demand reasonable compensation if the employer, by failing to perform the act, is in default of acceptance of the contractor's services. The highest German court (BGH) requires a formal notice from the contractor in such cases (BGH, BauR 2000, 732).

According to § 6 para 2 c) VOB/B, the contractor must send a written notice if an obstruction of the works occurs due to a case of force majeure. Such notice is a precondition for an extension of time claim by the contractor, unless it is obvious to the employer that the event in question does in fact obstruct the contractor's performance of the works.

There is no time limit for such notice ("Behinderungsanzeige"), but it shall not have retrospective effect (Leinemann, VOB/B-Kommentar, § 6, Rn. 20]. The employer is free to reject such notice or to ignore it, because its only relevance is to reserve claims for extension of time and compensation to the contractor.

#### 5. Consequences

- a) **Public procurement:** Neither German contract law nor procurement regulations provide rules to cope with Force majeure, which may also occur during formal procurement proceedings. Such proceedings – relevant in all infrastructure construction projects - are characterised by strict tendering procedures within certain time limits. It is recommended to extend such limits (e.g. bidding period) during the uncertain times of the Corona crisis. The deadlines set in the construction contract to be concluded may need to be moved forward after the contract was awarded if these deadlines were affected by force majeure. This may then be derived from § 313 BGB. At the time the offer was submitted, bidders could not foresee the effects of the upcoming crisis as such. Therefore, they have a valid claim for extension of time on the basis of a force majeure event.
- b) **Extension of time:** According to § 6 Para. 2 No. 1 c) VOB/B, **deadlines of the construction schedule** are postponed and, in case of doubt, have to be newly arranged by the parties. Extension of time by force majeure is only granted for so long until the obstructing event has passed. Some time may be added for mobilizing the machinery and workforce according to § 6 para 4 VOB/B. The BGB does not offer any rules on that issue.
- c) **No liability for breach of contract:** In the event of force majeure, the party to the contract which is affected shall in principle be temporarily released from its contractual performance

obligations without the other party to the contract being able to derive any rights or claims from this. Such interruption is conceivable above all in the event of difficulties in delivering materials or staff restrictions due to quarantine measures. A force majeure situation does not constitute a breach of contract on both sides, if force majeure has unreasonably disturbed or effectively rendered impossible the provision of services (see Palandt-Grüneberg BGB Commentary, 79th ed. 2020, § 313 BGB, para. 32).

A case of force majeure according to § 6 para 2 c) VOB/B only leads to a (temporary) release from the performance obligations, but is not by itself a basis for contractors claims for compensation. Extra payments may only be claimed by the contractor if the employer has negligently or wilfully caused additional delay by demanding changes or extra work, which constitutes a variation order according to § 2 para 5 VOB/B.

- d) The contractor is obliged to **mitigate the consequences** of any obstruction of its works according to § 6 para 3 VOB/B. This does not mean, however, that the contractor shall spend money to mitigate consequence of events not caused by him. He must only optimize his schedule of works, not more.
- e) In exceptional cases, pursuant to § 313 BGB, a force majeure event may even lead to a **termination of the construction contract** (resulting from a frustration of purpose). A contractual party – mostly the principal – may thus come to the solution that continuous adherence to the contract is no longer reasonable and appropriate (see Palandt-Grüneberg BGB Commentary, 79th Edition 2020, § 313 BGB, marginal no. 42). However, before terminating a contract, the parties are obliged to adjust the contract and change stipulations affected by force majeure.

The German standard conditions on construction contracts (VOB/B) also provide for an explicit right to terminate: according to § 6 para 7.1 VOB/B , each party may **terminate the construction contract**, in case of an interruption of the construction works for more than three consecutive months or if it is certain that an interruption of more than three months is unavoidable (Leinemann VOB/B-Kommentar, § 6 Rn. 275).

- f) There are **no specific German COVID-19 laws** which could entitle a party of a construction contract to claim damages or extra costs for that reason alone. Only general rules of contract law shall apply.
- g) **Remote effect of COVID-19 - official orders:** The official possibilities for averting the dangers to individuals or the general public according to the German Infection Protection Act (IfSG) are extensive. This includes, in particular, quarantine measures against personnel, which can be ordered even by local authorities in accordance with Section 30 IfSG. The implementation of such measures is ground for a claim for an extension to the construction period.



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