



The Global Supply Chain Crisis

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Current Challenges from a German/Civil Law Perspective

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Focus / expertise

- Construction/engineering projects - domestic and international, onshore and offshore, FIDIC and others
- Drafting/negotiating project contracts – Engineering, EPC, O&M etc.
- Project and claims management
- Dispute resolution - litigation, arbitration etc.
- Information Technology Law

Dealing with the Risks Resulting from the Disruption of International Supply Chains

Contributing Factors for the Disruptions in 2021

- Convergence of several developments (and for the most part not Covid-induced)
 - short term reasons (surge in demand + other obstacles), e.g.:
 - economic recovery after Corona + fiscal stimulus (globally \$ 10.4 trn.)
 - slow rebooting/expansion of production capacities
 - Market buy-outs and rollovers in shipping industry
 - Port congestions and accidents on top (Ever Given in the Suez Canal)
 - long term reasons (changing economic frameworks), e.g.:
 - decarbonization + digitalization
 - protectionism (US/China)
 - inflation/stagflation scenarios
- Short term recovery not in sight
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Resulting Risks

- Late deliveries -> liability for delay (LDs, damages)
- Cost increases

Beware! – This is not a Force Majeure event!

- No war/natural disaster/unexpected external event/"Act of God"
- Forseeable (especially since by now the a.m. facts are well known)
- **Force Majeure clauses do not apply and suppliers remain liable!**
(For the sake of completeness: Covid-19 clauses are not applicable either)

Suppliers are liable under German Statutory Law

- Supply/procurement contracts: strict liability for default/delay
 - **Sec. 286** German Civil Code (requirement: responsibility for default)
 - **Sec. 276** German Civil Code: "assumption of procurement risk" as implied term -> liability close to breach of contract doctrine
- German law expects you to sell from stock (in other words: to sell only what you have)
- If you decide to sell goods not yet procured -> transaction of a speculative nature -> you bear the risks
- A waiver from this fundamental risk allocation (at least in GTC) is possible only to a very limited extent.

Suppliers are liable under German Statutory Law

- Exceptions/defences in most cases will not apply
 - impossible performance (**sec. 275** German Civil Code)
 - grossly disproportionate expense/effort: does not exist as long as there is a market and a market price
 - doubtful and contended if applicable at all in case of mere delay
 - right to adjust the contract (**sec. 313** German Civil Code)
 - Problem 1: foreseeability
 - Problem 2: realization of a risk contractually assumed/legally assigned
 - Problem 3: high threshold of reasonableness

What to do - contract clauses

- In principle, parties are free to agree on different risk allocation and liability terms – however, most clauses will be deemed **General Terms and Conditions -> risk of being void**

- "Reservation of being duly supplied"-clauses

"Compliance with the delivery date specified in section XXX of the contract is subject to correct and timely delivery to us by our own suppliers."

Or very briefly: *"Subject to being duly supplied."*

- Price adjustment clauses (complex and tricky under German law)
- Valid Clauses: specific, transparent and reciprocal

What to do – pragmatic approach

- Proactive procurement
- Securing suppliers and shipment capacities
- Stockpiling
- Not accepting specific delivery dates
- Short time gap between conclusion and execution of contract

Conclusions

- (1) The current supply crisis is neither a case of Force Majeure nor attributable to the Covid-19 pandemic. The procurement problems are foreseeable.
- (2) Under German law, the supplier has almost no excuses in the event of procurement problems and resulting delays.
- (3) Generic standard clauses will not help in this situation.
- (4) The best chance the supplier has is with transparent, specific and reciprocal clauses.
- (5) Pragmatic approaches may mitigate the effects of the situation.

Thank you!