

Dispute avoidance + dispute resolution of conflicts caused by Covid-19

1. Implications for trading and supply chains

The measures for the containment of the Corona-virus had massive impacts on exports and imports and global supply chains:

- Reduction of the production;
- Supply disruption and delays in delivery;
- Significant increase of production costs;
- Lack of resources for investments and the need of prefinancing orders.

2. Problems encountered when raising claims

Who is liable for the damages caused? Who bears the increasing costs?

International contracts often include e.g. an ICC-*force major* clause or an ICC-*hard ship* clause (see <https://www.icc-austria.org/en/Service/Drafting-import-export-contracts/Force-Majeure.htm>).

Depending on the applicable national law, other legal grounds for raising a claim may exist (e.g. the doctrine of frustration).

However, the prospects of a successful claim goes hand in hand with a considerable decree of legal and commercial risks. National courts and arbitral tribunal so far didn't face or decide issues which are comparable to the current pandemic situation.

Companies operating internationally are also often facing additional problems, which cannot be dealt with in full in arbitration or court proceedings:

- Even if justified claims are raised, the risk of initiating arbitration or court proceedings is that trustful business relationships are severely damaged;
- Even if legitimate legal and economic goals are pursued, contentious disputes may lead to a loss of image in the public perception (e.g. because workers of low-wage countries have to fear for their jobs);
- Disputes tie up internal and external resources until a final and binding decision is reached. As more and more court proceedings are commenced – especially in cases of complex cross-border matters – a prolongation of the proceedings is expected;
- Any liquidity shortfalls have to be financed through interim loans for the time of judicial proceedings.

An alternative to arbitration and court proceedings is commercial mediation, which often provides for a much faster solution of the dispute.

3. Method of resolution: Commercial mediation according to the rules of the ICC

A mediator is a neutral, impartial third person who supports the parties in their attempt to settle their disputes. The mediator does not decide the dispute, but assists the parties during the process of resolving the dispute and ensures that the parties' respective interests are taken into account. Issues

such as an imminent impairment of strategically important business relationships, a threatening loss of image in the public perception (reputational risk), the careful use of internal and external resources and the safeguarding of company liquidity can be included in the solution at the request of the parties.

According to the ICC mediation rules (<https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>), the mediation is initiated - similar to an arbitration procedure - by submitting an application to the ICC, who administers the case. The ICC provides the administrative support. It supports the parties in selecting a qualified mediator, arranges for standard market fees and manages the finances. The ICC also monitors the progress and efficiency of the mediation.

4. Advantages of commercial mediation

Compared to arbitration or court proceedings, commercial mediation is characterized by its speed and procedural flexibility. The process can be adapted individually to the interests of the parties. The past few months have also shown that mediations can be carried out online without physical contact with the parties. Mediations are therefore efficient and preserve the parties' resources.

Arbitration often bears the risk that business relationships end. In comparison, mediations can help to maintain good business relationships.

Alternative, creative and above all future-oriented solutions can be found in mediation. In mediation, a self-determined and extrajudicial solution to the conflict is brought about. All effects of the Covid-19 pandemic and the future development of the business relationship can be discussed.

5. Enforceable agreements between the parties

The ultimate aim of the mediation is that the parties reach an agreement, which is enforceable. This can be achieved, for example, by issuing an arbitral award on agreed terms (in particular if arbitration has been initiated beforehand) or by converting the agreement reached in the mediation into an act, which is enforceable in the country, in which enforcement proceedings are likely to take place (e.g. an enforceable notarial act or a settlement before a judge (Prätorischer Vergleich) in Austria). In the future, such agreements between the parties of a mediation should be internationally enforceable on the basis of the Singapore Convention. The Convention will come into force on September 12, 2020 for three countries (Fiji, Qatar and Singapore).

In the international context, commercial mediation stands for an alternative approach to resolving disputes arising from the Covid-19 pandemic. By carrying out mediation procedures, entrepreneurs decide on a flexible, self-determined and future-oriented way to resolve their disputes.

This contribution was provided to the ICC Austria by Ms. Mag. Amelie Huber-Starlinger (Northcote.Recht, Landstraßer Hauptstraße 1/1/10, 1030 Vienna, email: a.huber-starlinger@northcote.at, Tel: +43 1 715 11 15)