

Compensability of personnel costs in the event of defects

If a defective delivery occurs, action often needs to be taken quickly to prevent further damage. There is usually no time for a mutual preliminary clarification of responsibilities and competencies. It is therefore not uncommon for the customer to deploy personnel to remedy the defect—e.g., for quality inspection, sorting, reworking, or carrying out recalls—without first clarifying with the supplier whether the latter will bear the costs. This often leads to discussions about who will bear the costs, especially if the customer demands reimbursement for the costs of its own personnel. This article outlines the legal situation and solutions for these conflict-prone situations.

The fact that a customer receives a defective delivery from its supplier does not usually change its own delivery obligations to its own customers.

In this respect, the customer will usually do what it considers necessary to be able to fulfill its contractual (delivery) obligations to its customers. Even if this results in (additional) costs.

A frequent cost factor of the customer is personnel expenses for a wide variety of actions related to the rectification of defects. A wide variety of measures with high cost potential come into consideration here, such as quality testing, sorting, transport, storage during the rectification phase, but also the performance of (international) recalls or the investigation of the causes of defects.¹

After such measures have been carried out, the customer usually requests the supplier to reimburse all costs incurred. This also includes the personnel costs for any personnel deployed by the customer.

In the following article, we explain the recoverability of the aforementioned personnel costs.

Principle: Entitlement to subsequent performance and reimbursement of expenses

In the event of delivery of a defective item, the customer is entitled to the rights under

§ 437 of the German Civil Code (BGB). § 437 BGB is the central provision governing the buyer's legal remedies in the event of defects in the purchased item and refers to various bases for claims in No. 1 to 3. If the (further) requirements for a claim are met, the buyer (customer) is entitled to claims against the seller (supplier).²

The customer's primary interests are

- subsequent performance (§ 437 No. 1 in connection with § 439 (1) BGB); and
- reimbursement of expenses incurred for the purpose of subsequent performance (§ 437 No. 1 in connection with § 439 (2) BGB); and
- possibly also compensation for damages pursuant to § 437 No. 3 in connection with § 440, 280 et seq., 311a BGB or reimbursement of futile expenses pursuant to § 437 No. 3 in connection with § 284 BGB.

This article is limited to comments on the claim for reimbursement of expenses pursuant to § 439 (2) BGB.

Scope of the claim pursuant to § 439 (2) BGB

The claim under § 439 (2) BGB entitles the customer to demand reimbursement of any costs necessarily incurred for subsequent performance. This far-reaching claim implements the provisions of Art. 14 (1) (a) of

¹ Maultzsch in: MüKoBGB, 9th ed. 2024, BGB § 439 marginal no. 27.

² Faust in: BeckOK BGB, 74th ed. 1.5.2025, BGB § 437 marginal no. 1.

the Sales of Goods Directive (EU) Directive 2019/771, according to which subsequent performance must be “free of charge” for the buyer³

The transport, travel, labor and material costs referred to in § 439 (2) BGB are not to be understood as exhaustive (“in particular”). This initially covers all costs incurred for proper subsequent performance within the meaning of § 439 (1) BGB in the seller's sphere of responsibility. This also includes the costs of investigating the causes of the defects, the expenses for the replacement item in the event of a replacement delivery, and any storage costs during the subsequent performance phase.⁴

Over time, the highest court has expanded this claim under § 439 (2) BGB into a far-reaching claim for reimbursement of all costs incurred by the buyer in connection with the respective defect “at the stage of subsequent performance”, regardless of whether the seller is at fault for the breach of contract.⁵

Reimbursement of costs for (own) personnel

In accordance with this jurisdiction, it can first be stated that, in any case, labor costs for external service providers commissioned by the supplier of defective goods (seller) must be reimbursed.

A distinction must be made in cases where the customer uses its own personnel for the purpose of subsequent performance.

From a legal perspective, it is undisputed that the customer's personnel costs are reimbursable if they are incurred through personnel employed specifically for the purpose of specific subsequent performance (e.g., temporary workers) or through necessary overtime.

The situation is less clear in cases where the customer assigns existing personnel to perform other tasks during their regular working hours in order to deal with a defect.

A common objection raised by suppliers is that the costs for the customer's own personnel are so-called “anyway costs,” i.e., costs that would have been incurred anyway, regardless of whether there was a defect or not. The customer would have paid the labor costs “anyway”; the personnel are now simply performing a different task.

Supplier must bear the costs

The prevailing opinion in this case tends to be that the supplier must also reimburse the personnel costs. The main argument is that the customer who uses its own personnel would otherwise be at a disadvantage compared to customers who hire (often more expensive) external service providers.

This opinion is convincing. If the customer were denied a claim in this case because the costs would have been incurred anyway, this would penalize the customer who acted more cost-efficiently and thus ultimately spared the supplier.

In practice, however, individual cases can be more complex. For example, according to prevailing opinion, personnel costs for administrative activities are generally not reimbursable, whereas costs for the actual rectification of defects are.

The amount of compensation is also often questionable: without a specific agreement (as customary in the automotive supply industry, for example), neither lump sums nor lost profits are reimbursable (and are often not covered by insurance). According to prevailing opinion, the actual wages of the personnel employed for the duration of the work performed are decisive.

Practical guidance

Even if the customer may have a legal claim against the supplier, successful (legal) enforcement often depends on the contractual agreements made and whether the customer can sufficiently demonstrate and

³ *Maultzsch* in: MüKoBGB, 9th ed. 2024, BGB § 439 marginal no. 27.

⁴ BGH NJW 2017, 1100, marginal no. 40.

⁵ BGH NJW 2011, 2278; BGH NJW 2014, 2351; BGH NJW 2017, 2758; BGH NJW 2019, 292.

prove that personnel were deployed and to what extent.

Therefore, one should always document its personnel assignments precisely in terms of start, duration, type, and scope so that one can prove the corresponding costs in court in case of doubt.

In addition, one should review its contracts and negotiate contracts depending on how personnel costs are to be handled in the event of a defect. This also avoids unpleasant discussions afterwards.

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We are happy to support you. We would be happy to explain our approach in detail in a personal meeting. Contact us now with no obligation!

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