Delivery stops, contract adjustments and contract termination in supplier constellations

A dynamic global market, crises and sometimes explosive increases in energy and raw material prices in recent years - many players in the supply chain are currently facing major challenges. In addition, there are often long-term contracts with fixed prices, which are putting suppliers in particular under increasing pressure. Contract adjustments, delivery stops or even contract termination promise a remedy - but the hurdles are high and the risks of careless action should not be underestimated.

Supply bottlenecks and increased costs are making it increasingly difficult for suppliers to fulfill their (often long-term) delivery obligations. So, what should you do if the performance structure within the individual contracts along the supply chain is disrupted - for example due to a shortage of raw materials and price increases? And how to react if the contractual partner refuses to adjust the contract?

In order to assert one's own interests, it is becoming increasingly common to consider delivery stops in addition to adjusting and terminating contracts. But be careful: careless use of this method jeopardizes the results of negotiations and can lead to substantial claims for damages from the customer. At the customer's request, there may even be the threat of an enforceable title in the form of a preliminary injunction.

Contract adjustment

When considering whether and under what conditions a contract adjustment can be considered, two fundamental principles must be taken into account: (i) contracts must be complied with (**pacta sunt servanda**) and (ii) contractual agreements (whether set out in individually negotiated contracts or by means of standard terms and conditions) generally take precedence over the statutory model. The parties are also generally free to subsequently amend their contract by mutual agreement (**principle of private autonomy**).

Priority: Contractual provisions

Ideally, an (overriding) **contractual agreement** has been reached with the contractual partner that allows for subsequent adjustments to the contract in response to changed circumstances. A distinction must be made here as to whether the clause grants a unilateral right of adjustment or merely requires the parties to re-enter into negotiations. **Clauses** that can be classified as **change and adjustment clauses** include, for example, the reservation of self-supply, price adjustment clauses and force majeure clauses (with adjustment option).

If such clauses are not included in the contracts, it will be difficult to achieve an **amicable contract amendment.** This is because such an amendment will often run counter to the interests of the contractual partner, and the latter is - in the absence of the inclusion of one of the above-mentioned contractual clauses - generally not obliged to make subsequent adjustments/negotiate.

Interference with the basis of the transaction, § 313 I BGB (German Civil Code)

In order to assert a claim for contract adjustment, the only remaining route is via statutory bases for claims, in particular **§ 313 I BGB (interference with the basis of the transaction)**.

A contract adjustment pursuant to Section 313 I BGB requires that a

- circumstance that has become the basis of the contract
- has subsequently changed, namely
- so serious that it can be assumed that the parties would not have concluded the contract or would not have concluded it in the same way if they had foreseen the change.
- It must be unreasonable for one party to adhere to the contract and the specific circumstance must not be exclusively attributable to that party's sphere of risk.

The hurdles for an adjustment in accordance with these principles are high, as a subsequent unilateral contract adjustment runs counter to the aforementioned principle of "pacta sunt servanda". For this reason, the courts tend to apply this provision with restraint and **only assume** that **the requirements are met in exceptional cases**.

A circumstance becomes the basis of the contract if it was not raised to the actual content of the contract but was part of the parties' common understanding when the contract was concluded and the parties' business intention is based on it. This also includes the expectation that the fundamental political, economic and social framework conditions of the contract will not change.

Ultimately, however, only in absolutely exceptional cases will it no longer be reasonable for the party to adhere to the contract. The question of reasonableness is answered **on a case-by-case** basis, taking all circumstances into account. **Relevant assessment criteria** are, in particular, the foreseeability, attributability and controllability of the occurrence of the risk, as well as the contractual or statutory distribution of risk.

Price fluctuations in particular do not regularly **justify unreasonableness**. This applies even if the transaction is economically disadvantageous for the seller and he will now make a loss instead of the expected profit.[1] A different assessment can only be considered in individual cases if the price increases are due to circumstances outside the supplier's sphere of influence and risk and their extent far exceeds the usual market fluctuations[2] . So far, however, courts have considered even serious cost increases for raw materials to be a typical entrepreneurial risk of the supplier and therefore "reasonable".

In principle, this also applies to a devaluation of money due to rising prices in the context of **inflation.** In this respect, the courts follow the line that such a devaluation of money falls within the scope of risk of the creditor of the monetary debt.[3]

If the requirements of § 313 I BGB are met in an individual case, the party invoking the frustration of contract has a claim to an adjustment of the contract as a **legal consequence.** This claim requires the other party to cooperate, which in case of doubt can also be enforced in court.

Termination of contract

With regard to a possible termination of the contract, it is also possible to terminate the contract at any time by mutual agreement (**termination of contract**).

If this is not an option - which will usually be the case - **the contractually agreed** termination rights (e.g. withdrawal or termination) must also be **given priority.**

[1] BGH, judgment of. 25. 5. 1977 - VIII ZR 196/75; OLG Düsseldorf, judgement of 19.12.2008 - I-23 U 48/08.
[2] BGH, judgment of 15.12.1955 - II ZR 130/54.
[3] Thus, already BGHZ 86, 167 (168) = NJW 1983, 1309; BGHZ 77, 194 (198) = NJW 1980, 2241.

If the contract provides for a right to extraordinary or ordinary termination, this may also be a way to withdraw from the unfavorable contract. However, this is often not the case, for example because the relevant cases are not specified as grounds for termination or there is generally no express provision for a termination option. In this case, the following statutory termination options are more important.

Avoidance according to §§ 119, 123 BGB or withdrawal according to § 323 BGB

In cases of price increases or shortages of raw materials, there will often be **no grounds for avoidance**. If the supplier is mistaken about the availability or prices of goods when concluding a contract, this is usually an irrelevant calculation error.

The existence of a right of rescission pursuant to § 323 I BGB **will often fail** because the supplier's contractual partner has duly rendered its performance (payment of the agreed remuneration). A right of rescission pursuant to § 326 V BGB will also generally not be assumed. Such a right requires that the debtor (in this case the supplier) is released from its obligation to perform in accordance with § 275 I-III BGB (impossibility). This can be assumed in exceptional cases if the products owed are no longer available on the market as a whole - however, mere difficulties or additional costs in procurement are not sufficient.

Ordinary termination in accordance with §§ 624, 725 BGB by analogy

Ordinary termination for framework supply agreements is not expressly regulated by law. However, according to current case law, it can be considered by analogous application of §§ 624, 725 BGB. **Certain requirements** must also be met for this:

- Ordinary termination must not be excluded by a contractual provision;
- The supply contract must be a continuing obligation for an indefinite period, i.e. the end of the contractual relationship must not be determined in advance (neither by a specific end date nor by a determinable event, such as a final fixed delivery quantity);
- A "reasonable" notice period must be observed in individual cases.

The notice period must be determined in accordance with the principles of fairness and good faith. With regard to the duration, this can be based, for example, on the time required by the customer to establish an alternative supplier.

Extraordinary termination for cause in accordance with § 314, § 313 III S. 2 BGB

Similar to the right to adjust the contract in accordance with § 313 I BGB, the right to **terminate the** contract **on the basis of § 314 BGB** only exists under strict conditions. Good cause within the meaning of § 314 I BGB exists if the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed termination or until the expiry of a notice period, taking into account all circumstances of the individual case and weighing up the interests of both parties.

As the supplier bears the procurement risk in the absence of deviating agreements, a price increase or a shortage of materials will **probably not constitute good cause** in this sense **in most cases** either.

Way out: delivery stop?

Before suppliers resort to a delivery stop - whether to avoid a supposedly costly legal dispute or to emphasize their demand for a price adjustment - they should not ignore the potentially far-reaching consequences.

Breach of duty

If there is an obligation to supply on the basis of an individual supply or framework agreement, **the supplier may be liable for damages in the event of an (unjustified) delivery stop and non-delivery**. This is because the non-fulfillment can then constitute a breach of duty with the consequence that the customer must be compensated for any damages incurred as a result (§§ 280 I

1, 281 BGB). In view of the effects of a delivery stop on the entire supply chain, including a production stoppage at the OEM, there is a risk of considerable damage.

Avoidance

Communication with business partners should also be made with caution and only after a thorough examination of one's own legal position. This is because **declarations of intent that one's own customer only makes to avoid unlawfully threatened delivery stops are voidable under § 123 I Alt. 2 BGB** with the consequence that agreements based on them (e.g. price adjustments) may be null and void pursuant to § 142 I BGB.[4] If suppliers communicate a need for adjustment and place this in connection with a possible (short-term) delivery stop, courts sometimes see this as an (implied) threat to stop deliveries.

Termination of contract

In addition, the unjustified delivery stop constitutes a breach of contract, which may entitle the contractual partner in individual cases to **terminate the existing contracts with immediate effect** (by termination in accordance with § 314 II S. 1, 2 BGB or withdrawal in accordance with § 323 II No. 1, 3 BGB).

Preliminary injunction

There is also a risk that the customer will apply for a **preliminary injunction**. In summary proceedings, courts can issue an order stating that the supplier must refrain from failing to supply its customer (in accordance with the contract) under threat of a substantial penalty payment. It is true that an objection can be lodged against such an order. Nevertheless, an enforceable title is now in the world, which may not only take months or even years to be removed and entail additional work and costs, but which may also block further negotiations with the contractual partner.

What can be done?

The most effective means remains forward-looking contract drafting. Precisely because the hurdles for a subsequent, non-contractual right of adjustment are very high, recognized (price) risks should be mapped and excluded in the contract as far as possible in order to avoid finding yourself in the situations described above in the first place. The key here are contractual clauses tailored to the individual situation. Blanket clauses or even clauses copied from textbooks rarely adequately reflect your own situation and often make it unlikely that the contractual partner will accept the provisions.

A delivery stop can be helpful, but it should be carefully considered and communicated as well as legally checked in advance. Otherwise, there is a risk of far-reaching consequences, from high claims for damages from the customer to the issuing of a prliminary injunction.

Next step: Get in touch

We will be happy to support you in safeguarding your contractual risks - be it by drafting contracts with foresight, examining options for adapting or terminating contracts and determining the next steps. We would be happy to explain our approach to you in detail in a personal meeting. Contact us now with no obligation!

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[4] See e.g. OLG Stuttgart, judgment of 07.04.2022 - 2 U 63/21.