Impact of the coronavirus pandemic on contractual relationships

THIS GSK UPDATE CLARIFIES LEGAL QUESTIONS REGARDING THE CORONAVIRUS PANDEMIC WITH RESPECT TO THE TOPICS OF CONTRACTUAL OBLIGATIONS, CONTRACT ADJUSTMENT AND TERMINATION AS WELL AS ON LEGISLATIVE CHANGES. POSSIBLE CLAIMS AGAINST INSURANCE COMPANIES AND THE STATE ARE ALSO DISCUSSED.

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By now, the coronavirus pandemic has a huge impact on the global economy. Contractual relationships are increasingly burdened: Many debtors experience difficulties meeting their contractual obligations. In some cases, the underlying rational to perform is frustrated, when creditors too are no longer able to meet their payment obligations in times of crisis. The question arises as to which claims businesses may face from their contractual partners and which legal instruments can be applied to manage the crisis and achieve relief.

This GSK update therefore deals with current legal issues, upcoming amendments in legislation and recommendations for action in the context of the coronavirus pandemic. It serves as an orientation in dealing with contractual and legal claims in times of the crisis.

A. Does an unrestricted legal obligation to perform apply in times of the coronavirus pandemic?

For many debtors the coronavirus pandemic raises the question whether they ought to perform their contractual obligations without restrictions despite the major effects caused by the pandemic. The answer to this question primarily depends on the contractual arrangements at hand:

I. Higher force/Force majeure clauses

In the current crisis, the contract shall be checked for the existence of a force majeure clause ("*höhere Gewalt*"). Force majeure clauses allow a party to the contract to exempt itself from contractual obligations in the event of force majeure by withdrawing from or by terminating

the contract. The clause must therefore be interpreted in accordance with the applicable law and with regards to the facts and the legal consequences in order to determine whether the coronavirus pandemic is covered by it.

However, the concept of force majeure hardly plays any role in the BGB and is touched upon only in a few side provisions. The Federal Court of Justice (BGH) defines force majeure in travel law as "*an event coming from the outside, with no connection to the business, impossible to avert even by the greatest diligence which can reasonably be expected*". Whether an event is to be classified as a case of force majeure is determined with regards to the respective case. Universially valid statements cannot be made. However, there are arguments in favour of the coronavirus pandemic being classified as a case of force majeure, at least according to the legislators' considerations on all-inclusive travel law. As early as 1977, he expressly included "epidemics" under the concept of force majeure. The legislature adhered to this even after a new amendment to the package travel law. In this context, the reasoning of the law speaks of circumstances in which there are "*considerable risks to human health such as an outbreak of a serious illness at the travel destination*".
If a regionally occurring epidemic already constitutes a case of force majeure, this may apply to a worldwide pandemic not only in travel law. However, if the obligation to perform is based on a contract that was concluded after March 8, 2020 and is a permanent obligation, the coronavirus pandemic may not constitute force majeure. At least, after the cabinet bill from March 22, 2020 as amended on 23 March 2020 on the consequences of the draft law to mitigate the COVID-19 pandemic in civil, bankruptcy and criminal procedure law for such contracts "at this point the crisis was no longer unpredictable". For consumer loan contracts, the unpredictability should no longer exist from March 15, 2020.
If there is no force majeure clause in the contract, the applicable law must first be clarified in international contracts. If the UN Convention on Contracts for the International Sale of Goods (CISG) is applicable, the debtor may be able to invoke Art. 79 CISG. According to this provision, a party does not have to vouch for the non-fulfillment of an obligation to perform if the non-fulfillment is due to force majeure or an obstacle beyond its control and it could not reasonably foresee this obstacle when the contract was concluded. Accordingly, the debtor is not released from his obligation to perform, but he does not have to fear any claims for damages of the creditor due to non-performance.

II. Hardship clauses

If contractual agreements provide for a so-called hardship clause, this may possibly release the debtor from his obligation to perform in the current crisis. This is because hardship clauses cover cases of aggravation of performance, i.e. cases in which one party is in certain situations faced with higher burdens in the provision of services than usual. In essence, hardship clauses primarily aim at adapting contractual rights and obligations in the event of an impairment in performance. Here too, however, the individual contractual regulation is decisive. It must therefore be examined in each individual case whether the performance impairment caused by the coronavirus pandemic fulfils the requirements of the hardship clause in question and what rights result from this for the party concerned. If, for example, the hardship clause provides for an obligation to adapt the contract, the parties must enter into negotiations.

III. MAC clauses

If a company sale is in the phase between signing and closing, the selling parties can invoke a Material Adverse Change (MAC) clause for crisis management purposes if the contract provides for such a clause. MAC clauses regulate the rights and obligations of the contracting parties if material adverse changes occur between signing and closing which affect the assets, financial and earnings position of the target company. Depending on the wording of the clause, rights to adjust or withdraw from the contract may arise. The adverse changes for which the MAC Clause is to apply may also be company- or market-related. In the case of the coronavirus pandemic, the existence of a market-related MAC-clause is decisive. This is because it regularly covers events originating from outside, such as a stock market or financial crisis, war, and natural and environmental disasters. The coronavirus pandemic has the potential of a market-related crisis, as it may be a case of force majeure. However, whether the coronavirus pandemic falls within the scope of a MAC clause depends on the individual case and the respective contractual agreement.

If the parties are still in the process of negotiating a contract, it is advisable to include a clearly worded MAC clause that leaves no doubt that a major adverse change, such as an aggravated development or even the outbreak of a pandemic caused by a virus such as COVID-19, is covered.

B. Does the law allow to not perform or to perform on an altered basis due to the coronavirus pandemic?

The law also grants the debtor various rights to request a contractual adjustment of the performance obligation or not to perform at all.

I. Impossibility of performance

The debtor can be released from his obligation to perform in accordance with sec. 275 of ther German Civil Code (BGB) if the performance of the service is impossible. This may be the case if the performance cannot be rendered for factual or legal reasons (genuine impossibility). However, even if the performance of the service requires a completely disproportionate effort compared to the creditor's interest in performance (gross disproportionality), the debtor may invoke the impossibility of performance. The debtor can ultimately also refuse performance if the obligation to perform is unreasonable for personal reasons. It cannot be determined uniformly whether impossibility is given.

Genuine impossibility, for example, requires an insurmountable obstacle to performance. The debtor must be unable to perform under all conceivable efforts. A (legal) impossibility can be assumed if the debtor would have to violate the legal system by rendering performance. A legal impossibility could be seen in, e.g. export and import bans or official operating bans imposed by the coronavirus pandemic. However, the individual case is decisive. Whether the coronavirus pandemic leads to a gross disproportionality in the performance of the service or whether the performance is personally unreasonablerequires a comprehensive weighing of interests in each individual case. General recommendations for action cannot be provided.

II. Disruption of the basis of business / Frustration of contract

The debtor also has the right to adjust the contract to the consequences of the coronavirus pandemic if the prerequisites for the so-called disruption of the business pursuant to sec. 313 BGB are met. If under this provision certain circumstances or ideas become the basis of business, but seriously change after the contract is concluded and if it is unreasonable to expect the burdened party to adhere to the contract ("*Wegfall der Geschäftsgrundlage*"), the burdened party is entitled to adjust the contract. Only if an adjustment of the contract is impossible or unreasonable, the burdened party may break away from the contract. For reasons of legal

certainty, the conditions of the disruption of the basis of business are very strict and are successful in a few exceptional cases only.

1. Subordinate to legal regulations, contractual agreements and contractual interpretation

Thus, the disruption of the basis of business is subordinate to special legal regulations (e.g. withdrawal, termination or warranty regulations).

With regard to the Cabinet bill of 22.03.2020 with amendment of 23.03.2020 on the draft law on mitigating the consequences of the COVID 19 pandemic in civil, bankruptcy and criminal procedure law, this means that there is no room for disruption of the basis of business if a contractual relationship and the disruption that occurs fall within the scope of the amendment to the law. This applies in particular to long-term debts in which a consumer or a micro-enterprise is a party to the contract, as well as to rental, lease and consumer loan agreements. Since the Cabinet bill of 22.03.2020 with the amendment of 23.03.2020 to the draft law on mitigating the consequences of the COVID 19 pandemic in civil, bankruptcy and criminal procedure law excludes employment contracts from the scope of application of the amendments, the disruption of the basis of business could be applicable here.

Ultimately, the disruption of the basis of business is also subordinate to contractual agreements and the interpretation of the contract. If the contract contains a provision for certain disruptions, this provision applies without the principles of disruption of business basis being applicable. In the case of a force majeure, hardship or MAC clause, the institute of the disruption of the basis of business may therefore depending on its framing not be applicable.

2. Presence of a significant fundamental disturbance required

Moreover, only significant fundamental disturbances can justify an intervention in the contractual agreements. A disruption is not deemed to exist if the changed circumstance falls within the risk sphere of the party invoking the disruption of the basis of business. In particular, the contractual or normative allocation of risk and the unforeseeability of the changed circumstances are decisive in this regard.

Normatively, the debtor bears the risk of arranging financial means and financing. If, for example, in the case of a loan agreement with a fixed interest rate, there is a change in the general interest rate level, this falls within the risk sphere of the party at whose expense the change in interest rates is borne. Naturally, the guarantor also bears the risk of the creditworthiness of the principal debtor. In supply chains, the coronavirus pandemic currently sometimes leads to companies being unable to supply their contractual partners, which is why they, too are unable to distribute the goods to their end customers. However, the debtor of a performance of service generally bears the risk of the performance of the service or its difficulty. Therefore, the path to disruption of the basis of business may be blocked here as well.

The coronavirus pandemic shall be classified as a significant fundamental disturbance. The coronavirus pandemic is likely to constitute a case of force majeure. Furthermore, the coronavirus pandemic does not fall within the risk sphere of the debtor or creditor. This is because the Federal Court of Justice (BGH) considers force majeure as a circumstance which does not fall within the risk sphere of the contracting parties to an all-inclusive travelcontract, especially if the event externally impacts the living conditions of the general public. Due to the drastic restrictions of public life as a measure to combat COVID-19, the living conditions of the general public are affected in particular.

Therefore the risk distribution must be handeled in favour of the burdened party.

This result is also in line with the Cabinet bill on the mitigation of the consequences of the COVID 19 pandemic in civil law, bankcruptcy and criminal procedure law of March 22, 2020 with amendment of March 23, 2020. The legislator describes the "conditions caused by the SARS-CoV-2 virus (...)" as "extraordinary". It is an "extraordinary situation facing consumers, companies and ultimately the entire economy (...)". However, since the legislator denies the unpredictability of the pandemic for contracts concluded after March 8, 2020 (with regard to consumer contracts and contracts with micro-enterprises that are a long-term debt) or March 15, 2020 (if consumer loan agreement), the disruption of the basis of business will not be considerable as a means of contract adjustment for such contracts.

3. Unreasonableness of adhering to the contract

Finally, it must be unreasonable for the debtor to adhere to the agreed arrangement in times of the coronavirus pandemic. This is the case if adherence to the contract would lead to an intolerable result that is incompatible with law and justice per se. This is assessed on the basis of a comprehensive balancing of interests taking into account all circumstances. Due to the necessary consideration of the individual case of the respective contract, a generally valid recommendation for action is not possible.

4. Risks for the creditor

With regards to an adjustment of the contract, the creditor is faced with risks which should not be underestimated. After all, merely persisting in his position and refusing to make an adjustment to the contract may have heavy consequenses in the aftermath of the crisis: If, for example, the conditions for the disruption of the basis of business are met and the creditor refused to adjust the contract, the creditor's liability for damages may be ruled in subsequent court proceedings. This is because the party favoured by the disruption of the basis of business has a duty to cooperate in the adjustment of the contract. Risks also arise for credit institutions. The cabinet bill of March 22, 2020 amended on March 23, 2020 on the draft law to mitigate the consequences of the COVID 19 pandemic in civil, bankcruptcy and criminal procedure law not only denies them the right to terminate consumer loans due to late payment, but also imposes on them negotiating obligations with the debtor. In the case of consumer loan agreements, for example, the creditor shall offer the consumer a discussion on the possibility of an amicable arrangement and feasible support measures. If the creditor does not comply with this or if an amicable arrangement cannot be reached, the the contract duration is extended by three months. The due date of the contractual performane shall therefore be postponed by this period and thus affect the entire contract, hence the duration of is virtually extended.

C. What role does the so-called new contract moratorium play for the rights to refuse performance?

If the contractual relationship cannot be adapted to the effects of the coronavirus pandemic due to a lack of contractual provisions, if a termination is not possible, and if a party to the contract cannot invoke the impossibility of performance, the parties may have a right to refuse performance under the so-called Moratorium:

The cabinet bill of March 22, 2020 amended on March 23, 2020 on the draft law to mitigate the consequences of the COVID 19 pandemic in civil, bankcruptcy and criminal procedure law provides for a temporary right to refuse performance for consumer or mirco-enterprise debtors and who are obliged under a long-term debt (so-called Moratorium pursuant to Art. 240, para 1 Introductory Act to the Civil Code). Micro-enterprises are enterprises with up to 9 employees and an annual turnover of up to EUR 2 million. For them, the long-term debt must be substantial. Substantial long-term debts are those that are necessary to cover them with services for the appropriate continuation of the business.

According to this moratorium, the right to refuse performance shall last until June 30, 2020 if the concerned obligation is an obligation under a contract concluded before March 8, 2020 and the debtor is unable to fulfil his contractual obligations due to the coronavirus pandemic without jeopardising his reasonable livelihood. Accordingly, in the case of micro-enterprises, the economic basis of the business ought to be at risk. The contract moratorium does not apply to employment, rental, lease and consumer loan agreements. The right to refuse performance may also be waived if the creditor cannot reasonably be expected to exercise the right to refuse performance. In this case, the debtor shall be able to withdraw from or terminate the contract. Whether the creditor can reasonably be expected to exercise the right to refuse performance is again assessed on the basis of a comprehensive weighing of interests. Whether a temporary right to refuse performance exists (for the future) can therefore not be determined in general, but only after an individual examination of the case.

D. Is it possible to terminate work, loan and rental agreements without further notice?

The following explains the possibility of extraordinary termination with regards to work, loan and rental agreements in principle as well as with regards to the legal situation, which will apply for a limited period from April. In principle, the right to extraordinary termination - also known as termination without further notice - represents a legally regulated possibility to break away from the contract for good cause.

I. Work contract

Both the client and the contractor have an extraordinary right of termination if, taking into account all circumstances of the individual case and considering the respective party interests, the continuation of the contractual relationship until completion of the work is unreasonable, cf. sec. 648a BGB. The planned amendment of the law due to the COVID-19 pandemic shall not change this.

The question of the reasonableness in continuing the contractual relationship is subject to the examination of an individual case. As a result of an extraordinary termination by the client, the contractor can demand the remuneration attributable to the work performed up to the termination. Caution is required, however, as an invalid, extraordinary termination is generally reinterpreted as an ordinary termination. If the client terminates the contract, the contractor shall regularly have the right to terminate the contract for good cause as a result of the ordinary termination. If the client terminates the contract in an orderly manner, it is to be expected that the contractor will demand full remuneration for the work in return.

If the parties have agreed on the application of the VOB/B (public procurement and contract regulations for construction work), construction deadlines are to be initially extended in the event of force majeure or other circumstances that are inevitable for the contractor. If an interruption of the construction work lasts longer than three months, there is an additional, mutual right of termination.

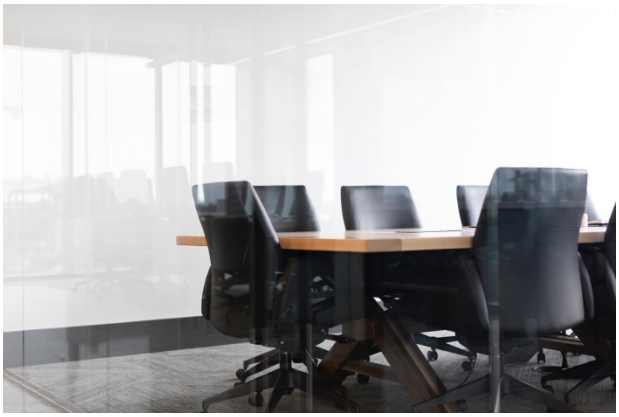
II. Loan agreement

The right of extraordinary termination of a loan agreement is generally governed by the general terms and conditions of the respective credit institution or by sec. 490 BGB. In principle, the creditor has a statutory right of extraordinary termination if the financial circumstances of a debtor or the value of a security provided for the loan deteriote significantly or threaten to deteriorate , which jeopardizes the repayment of the loan, even if the security is realized. Events of force majeure do not generally shorten the right of extraordinary termination.

The cabinet bill of March 22, 2020 amended on March 23, 2020 on the draft law to mitigate the consequences of the COVID 19 pandemic in civil, bankcruptcy and criminal procedure law provides for a different protection for consumer debtors. For consumer loan agreements concluded before March 15, 2020, the right of termination due to default of payment or significant deterioration of the debtor's financial circumstances shall be waived until June 30, 2020. A deferral arrangement shall cover claims of the creditor against the debtor for repayment, interest or redemption payments due between April 1, 2020 and June 30, 2020. The deferral is subject to the condition that the debtor has lost income due to the extraordinary circumstances caused by coronavirus pandemic. The debtor must demonstrate this. In addition, the debtor's loss of income must result in the debtor being unable to reasonably perform the owed obligation without endangering his or her or the reasonable livelihoods of his or her dependants.

In addition, the creditor has negotiating obligations with the debtor. In the case of consumer loan agreements, for example, the creditor shall offer a discussion on the possibility of an amicable arrangement and on support measures. If the creditor does not comply with this or if an amicable arrangement cannot be reached, the agreement's duration shall be extended by three months. The respective due dates of the contractual obligations would be postponed and thus lead to a de facto extension of the entire contract's duration.

In order to ensure the effectiveness of the termination, the following should be noted: In some cases, the effectiveness of a termination without further notice requires a prior warning of the termination's opponent. The termination must also be declared within a reasonable period of time after the circumstances justifying the termination have become known. Rapid action is required. A longer wait than two weeks before giving notice of termination, bears the risk that a good cause will be rejected. If the termination without further notice is ineffective, the reinterpretation into an ordinary termination and unintended legal consequences must be expected (see above). If the termination is declared by an authorized representative, the original authorization shall be presented. Otherwise, there is a risk of the termination being rejected by termination's opponent. The recommended procedure depends on the specific case and requires legal examination.



III. Rental agreement

The cabinet bill of March 22, 2020 amended on March 23, 2020 on the draft law to mitigate the consequences of the COVID 19 pandemic in civil, bankcruptcy and criminal procedure law with regard to real estate, commercial and residential leasesrestricts the right to extraordinary termination for late payment. In this context, we

refer to the corresponding notes and news by our real estate experts.

E. Does the coronavirus pandemic play a role in the statute of limitations of claims?

Under no circumstancesshould the (expiration) course of the statute of limitations of claims be lost sight of. The statute of limitations of claims courses serveto provide legal certainty as to how long contracting parties can assert their claims. In this respect, the outbreak of COVID-19 may lead to the suspension of the limitation period in certain constellations, i.e. the temporary interruption of the running course and the new running of the course after the circumstances which led to the suspension have been removed.

In principle, the statute of limitations is suspended by legal action, see sec. 204 BGB. It may therefore - where necessary - be advisable to initiate legal action against the debtor.

If the creditor is unable to pursue legal action due to force majeure, the statute of limitations is suspended in accordance with sec. 206 BGB. The prerequisite is that circumstances exist which make it absolutely impossible for the creditor to manage his affairs and which could not have been foreseen and averted even with the greatest diligence. Shutdowns for which the debtor is not responsible may constitute such a case. The complete cessation of administration of justice by the courts having the jurisdiction in a case should fulfil the facts of sec. 206 BGB.

Under no circumstances should one refrain from filing of an action in times of the COVID-19 crisis - even if immense delays in notifications etc. are to be expected - since a later notification has an effect on the time of receipt of the action, see sec. 167 ZPO. Consequently, the course of the statute of limitation can still be suspended if the action is filed in time. Otherwise, a contractual regulation of the statute of limitations of claims may also be appropriate.

F. Is there insurance cover for loss of revenue as a result of COVID-19?

Your company's insurance cover for loss of revenue due to business interruptions or shutdowns or delays in delivery and acceptance depends on the specific insurance contract and policy. In general, insurance cover is strongly limited in times of the coronavirus pandemic. If general or business interruption insurances do not provide coverage, the use of credit default insurances can be considered.

I. Business interruptions and shutdowns due to official measures

Common business interruption terms and conditions do not provide insurance cover following official measures due to infectious diseases. In this respect, the prerequisite for an insured event is material damage that caused the business interruption. Official measures in the sense of protection against infection are unlikely to constitute property damage.

Extended insurance protection clauses promise a more extensive insurance cover if infectious diseases have been agreed as an insurance risk. If retroactive losses are covered, an insurance company regularly also bears such losses of revenue caused by a contractual partner for the same reasons. On the basis of the disease catalogue expanded by the CoronaVMeldeV of January 30, 2020 to include SARS-Cov-2/COVID-19, business interruption insurances may offer insurance cover if the insurance policy refers to the March 29, 2013 version of the German Infection Protection Act (IfSG) .

If the insurance contract contains a pandemic exclusion clause, the insurer bears the burden of proof and demonstration of the existence of a pandemic at the time of the insured event. The World Health Organisation declared the COVID-19 pandemic on March 11, 2020. Provided an exclusion, cases subsequent to March 11, 2020 are therefore no longer deemed as insured events.

II. Business interruptions and shutdowns resulting from internal company decisions

If companies shut down their operations at their own discretion, there is a risk of non-effective insurance cover. In this respect, it is advisable to consult with the insurer in good time.

III. Recommendation for action

Check your insurance policies and insurance contracts for the insurance risk covered. Many insurance companies impose duties on the policyholder to cooperate and require compliance with safety regulations in the event of an insured event. Document how you deal with an (imminent) insured event, including any measures taken, and work closely together with your insurer. Even at this point in time it may still be advisable to close an appropriate insurance deal.

G. Can business closures result in claims against the state?

If an authority issues a shutdown order or a corresponding general ruling, the implementation of which results in loss of revenue, the assertion of state liability claims may be considered. The authorities have a wide range of discretion with regard to measures to contain COVID-19 in order to protect health. Hence, even seemingly borderline measures could withstand subsequent judicial review. In general, the possibility to hold the state liable for lawful actions is limited.

Claims for compensation against the state for lawful acts exist only in exceptional cases - in the case of expropriating interference by the state in property or in the case of a so-called special sacrifice on the part of the claimant. A claim from expropriating interference is assumed if the property of the claimant is impaired by unforeseen, atypical secondary consequences of lawful, official action in such a way that this would not be reasonable for the claimant without compensation. The claimant has a claim of sacrifice following a special sacrifice if he is burdened unequally by the property sacrifice (not impairment of property) in the public interest compared to others.

The question whether the described claims could bes- successful in times of COVID-19 is subject to a case-by-case examination. However, it is to be assumed that authorities, when adopting measures, expect high losses of revenue of the affected companies, i.e. these would not occur as an atypical secondary consequence. Furthermore, a business is unlikely to make a special property sacrifice in comparison to other business with regard to an identical or similar measure.

The German Infection Protection Act also gives the by official preventive measures against communicable diseases according to secs. 16, 17 Infection Protection Act (IfSG) affected a right to compensation under special law if the measures do not only lead to insignificant financial disadvantages for the affected, see § 65 IfSG. In the meantime, however, due to the worldwide outbreak, authorities no longer impose only preventive measures but primarily combatting measures according to sec. 28 IfSG. Whether these measures are covered by the wording of sec. 65 IfSG and whether the above-mentioned state liability claims take second place to the more specific compensation claims remains to be seen.

As a matter of principle, one should carefully assess- which form of official action one's company is subject to. Official recommendations are only voluntary instructions, i.e. non-enforceable acts by the administration. This is different in the case of business interruptions and shutdowns in the form of an administrative measure or general ruling. Exemptions may be applied for. In case of doubt, urgent legal protection should be considered in order to comly with periods for appeal.

H. Who provides legal support and support regarding measures for action in the crisis?

GSK Stockmanns' Corporate and Dispute Resolution teams support you in all legal and factual issues related to the coronavirus pandemic and beyond. The successful assertion of your interests is our goal. Whether in the run-up to or during litigation proceedings - we support you in all matters relating to the review of existing contracts, out-of-court contract adjustments, the preparation and conduct of settlement discussions, mediation, and in court and (international) arbitration proceedings. With the GSK teams, experienced crisis advisors stand by your side to develop tailor-made strategies and solutions based on extensive conflict resolution expertise. Last but not least, GSK lawyers were able to successfully support our clients in contract adjustments following the Lehman Brothers insolvency. Please do not hesitate to contact us atany time.

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