

# Tenant cannot suspend rent for temporary impairment of use due to Covid-19 lockdown

In its judgement dated 30 July 2020 – file no. 5 O 66/20, the Heidelberg Regional Court ("Court") has dealt with the suspension of monthly rent payments during the government announced lockdown period based on applicable Covid-19 laws ("Covid-19 Ordinance"). The Court has held that the period of lockdown on account of Covid-19 does not justify non-payment of rental amounts.

## Facts

The parties have concluded a commercial lease contract regarding retail premises for daily use products. Under the lease, the tenant is obliged to pay a monthly minimum rent plus a turnover-based rent component (if applicable). Due to governmental Covid-19 lockdown in the period between 18 March and 19 April 2020, the tenant could not open the store for the public and therefore suspended rent payments – as a consequence, the landlord sued the tenant for unpaid rent.

## Ruling

The Court ruled that the tenant's rent payment obligation continues, despite the temporary impairment of use on account of the Covid-19 lockdown.

The lease contract did not contain express terms, such as a force majeure clause or similar. Therefore, the Court examined the rent payment obligation on the grounds of German statutory law.

### 1 No defect of the leased object

The Court observed that the temporary impairment of use of the leased object on account of the government announced Covid-19 lockdown does not qualify as material defect of the leased object, which would justify a rent suspension. The Court noted that the governmental Covid-19 Ordinance was not linked to the nature of the leased object but rather to the tenant's operational business and the fact that a retail store, being open to public traffic would facilitate the spread of

Covid-19 infections. According to Court, the Covid-19 Ordinance had no impact on the general suitability of the leased object for the use as retail store; the tenant bears the general risk of use restrictions or interruptions related to the tenant's business.

### 2 No impossibility of performance

The Court ruled further that the statutory concept of impossibility of performance (*Unmöglichkeit der Leistung*) according to sec. 275 of the German Civil Code does not apply in cases of temporary impairment of use due to Covid-19 lockdown given that the Covid-19 Ordinance restricts the tenant's use and business, but not the general usability of the leased object. The Court highlighted that, according to sec. 537 of the German Civil Code, the general risk of use is with the tenant.

### 3 No material adverse change

The Court finally observed that the Covid-19 lockdown does not qualify as material adverse change (*Wegfall der Geschäftsgrundlage*), which would justify adjustment of the lease contract according to sec. 313 of the German Civil Code including suspension of rent amounts.

The Court noted, that, while the landlord with respect to the turnover-based rent component would indirectly participate in the profits or losses made by the tenant (i.e. in the tenant's business), such participation was explicitly not agreed upon when minimum rent is in question. Therefore, according to the Court, the adjustment concept of sec. 313 of the German Civil Code, which is an exemption of the statutory rule, in this case might not be applicable at all.

Regardless of the above, the Court held that in this case at least the unacceptability-requirement was not fulfilled. Such requirement would have been fulfilled, if the tenant had brought evidence that it had suffered a substantial loss of income, that represents a threat to its existence. The Court considered that the tenant did not show any efforts to improve its financial situation (for example expansion of online-

shops, application for public aid). The Court further considered the short period of closure of only 26 working days, which – according to the Court - would not allow the assumption of an unacceptable financial threat.

### LPA-Conclusion

The Court has provided much needed clarity and set out in clear terms that there is no inherent right to claim suspension of rent payment by a tenant in light of the Covid-19 lockdown.

However, we note that the ruling cannot be considered to be generally valid and applicable.

The analysis of the grounds for the ruling shows that each case must be considered and evaluated individually on basis of (1) the relevant lease contract, (2) the content of the relevant governmental order and (3) the specific circumstances of the case (key words: "financial threat/acceptability/duration of use restriction").



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