

## New statutory provisions for commercial leases regarding the adjustment of contracts due to governmental COVID-19 measures

On 31 December 2020 parts of a new law\* entered into force which state the applicability of Sec. 313 of the German Civil Code (*BGB*) - regulating the frustration of contract (*Störung der Geschäftsgrundlage*) - to commercial lease agreements (*Gewerbemiet-/Pachtverträge*) in the event of state measures due to the COVID-19 pandemic, as well as an acceleration of court proceedings in this regard.

### Objectives

- Elimination of legal uncertainties
- Strengthening the bargaining position of commercial tenants
- Increase of procedural efficiency
- Alleviation of the courts' work load

### The new regulations

#### Art. 24 Sec. 7 of the Introductory Law to the German Civil Code (*EGBGB*)

- 1) If, as a result of state measures to combat the COVID-19 pandemic, leased property or leased premises other than residential premises cannot be used for the tenant's business or can only be used under considerable restrictions, it shall be presumed that a circumstance within the meaning of Sec. 313 BGB which has become the legal basis of the lease agreement has severely changed after the conclusion of the contract.
- 2) Paragraph 1 shall apply accordingly to lease agreements (*Pachtverträge*).

#### Sec. 44 of the Introductory Law to the German Code of Civil Procedure (*EGZPO*)

- 1) Proceedings concerning the adjustment of rent for property or premises other than residential premises due to state measures to combat the COVID-19 pandemic shall be prioritised and expedited.
- 2) In proceedings under Paragraph 1, an early first hearing shall be held within one month from the service of the statement of claim.

### Key Points

- In principle, Sec. 313 BGB is applicable.
- It applies a rebuttable presumption that state measures in connection with the COVID-19 pandemic constitute a severe change of the contractual basis of commercial leases (*Gewerbemiet-/Pachtverträge*)
- The primacy of contractual agreements and other legal regulations - such as warranty law - over Sec. 313 BGB remains unchanged.
- There are no time restrictions with regard to the application of Art. 240 Sec. 7 EGBGB
  - The first "lockdown" in March and April 2020 is covered by the wording.
  - No exception for contracts concluded after the outbreak of the pandemic; however, in these cases, the legal presumption shall be rebuttable.
- The legal consequences of Sec. 313 BGB remain the same: claim for an adjustment of the contract if the court decides that the continuation of the contract constitutes an unreasonable burden for a party as the result of an individual case-related comprehensive balancing of interests.

\* Law on the further Reduction of Residual Debt Discharge Proceedings and on the Adjustment of Pandemic-Related Provisions in Company Law, Cooperative Law, Association and Foundation Law as well as in Tenancy and Lease Law (*Gesetz zur weiteren Verkürzung des Restschuldbefreiungsverfahrens und zur Anpassung pandemiebedingter Vorschriften im Gesellschafts-, Genossenschafts-, Vereins- und Stiftungsrecht sowie im Miet- und Pachtrecht*)

# Update Commercial Leases and COVID-19

## Conclusions & Implications

- The legal presumption only affects one of the three prerequisites of Sec. 313 BGB - *the severe change of the contractual basis* - therefore, it is expected to hold merely a small practical significance.
- The question whether the other requirements of Sec. 313 BGB are fulfilled has to be evaluated on a case-by-case basis, i.e. *no conclusion of the contract or a modified contract if the parties were aware of the severe change and a comprehensive balancing of interests on the basis of the contractual/legal allocation of risk*.
- Regarding contractual risk allocation in commercial leases, the tenant bears the risk of usage (*Verwendungsrisiko*), unless otherwise explicitly agreed.
- The **core element** of individual case decisions remains the question of **unreasonableness** for the tenant if the concluded contract is continued in unmodified form.
- In the event of unreasonableness, the tenant has a claim against the landlord for adjustment of the commercial lease agreement.
- The new statutory provision (Art. 24 Sec. 7 EGBGB) does not specify the extent and the details of the contractual modifications.
- The new regulations only create incentives for negotiations between the parties of commercial leases; in the event of a dispute, the courts will still (as before) have to examine the possible adjustment of the individual contract.
- So far, the tendency of case law in the context of balancing interests has been landlord-friendly, i.e. contract adjustments have so far predominantly not been made according to Sec. 313 BGB.
- From the current perspective, any noticeable relief of the courts is not to be expected. The new provision in Sec. 44 EGZPO intends to give priority to, and accelerate proceedings by, the courts in legal disputes regarding the adjustment of commercial leases; this could encourage commercial tenants to seek judicial clarification. As a consequence, the volume of court proceedings could increase significantly. It should also be noted that Sec. 44 Para. 2 EGZPO does not impose any obligations on the courts.

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