

COVID-19 - Modification to the disruption of the business basis in commercial lease law planned

December 2020

German government plans to qualify usage restrictions due to state Covid-19-related measures as a disruption of the business basis of lease agreements.

On 13 December 2020, the Federal Government and the Minister Presidents of the Federal States decided that for commercial leases and tenancies affected by state Covid-19 measures, it is legally presumed that significant (usage) restrictions as a result of the Covid-19 pandemic may constitute a serious change in the business basis (Section 313 of the German Civil Code (BGB)).

Previous case law

In our [blog post](#) of 30 October 2020 we had already reported on the first decisions on the obligation to pay rent during pandemic restrictions.

The regional courts of Heidelberg, Zweibrücken and Frankfurt a.M. had ruled in the respective assessed cases that the obligation to pay rent during state-ordered closures remains in effect. In the meantime, the Regional Court of Stuttgart has made a similar decision in a ruling of 19 November 2020. The Regional Court of Heidelberg had rejected a rent reduction due to a disruption of the business basis in accordance with Section 313 BGB, because although there was a disruption of the business basis, the lessee could still be reasonably expected to continue paying the rent, whereas the Regional Court of Munich I (34th Civil Chamber) concluded that the unchanged obligation to pay rent could not be expected of the lessee. The dividing line here was less on the question of whether there was a disruption of the business basis of the transaction at all, but rather on the question of whether, assuming that this was the case, an adjustment of the rent in the specific case was justified..

Decision of the Federal Government

The Federal Government and the Minister Presidents have confirmed the opinion of the Munich Regional Court by their resolution of 13 December 2020, insofar as this concerns the objective existence of a disruption of the business basis. In yesterday's decision, it was decided that for commercial leases affected by state Covid-19 measures, it should be legally presumed that significant (usage) restrictions as a result of the Covid-19 pandemic could constitute a serious change in the business basis. According to the decision, negotiations between commercial lessees or leaseholders and owners are to be simplified.

Even though it will be clear after the implementation of the decision that in the event of a closure due to Covid-19 measures, an adjustment of the agreement in accordance with Section 313 BGB can be considered in principle, the questions on which the minds have been divided in practice so far remain open. Section 313 BGB stipulates as further requirements that an adjustment of the agreement can be demanded if, taking into account all circumstances of the individual case, in particular the contractual or statutory distribution of risk, it is unreasonable to expect a party to adhere to the unchanged agreement. Only if an adjustment is not possible or unreasonable for a part, the agreement can be terminated. It is precisely here that the judgements already made in practice differ. And then, of course, there is still the question of the legal consequences (rent deferment, rent reduction, termination, etc.).

As a result, it will continue to amount to a balancing of interests between lessee and lessor in each individual case. It is possible that the weighing of interests will lead to different results in almost identical cases, for example, if the lessor is a private individual with low liquidity in one case and an institutional investor with high liquidity in the other.

For lessor and lessee this will initially continue to mean that they should preferably work together to find an amicable solution, as the announced presumption rule is unlikely to provide clarity for the adjustment of the agreement in individual cases.

Effects on lease law

This decision still needs to be implemented by law. The Federal Minister of Justice has already announced that the Federal parliament (Bundestag) is to pass a law before the end of 2020 which regularly recognises the disruption of the business basis as a reason for commercial rent reductions in Covid-19 periods. It is hoped that the legislator will bring more clarity. On the basis of the resolution, which only deals with the general right to disruption of performance (Section 313 BGB), the question arises as to whether the application of Section 313 BGB excludes the application of the (more specific) right to disruption of performance under lease law (Sections 535 ff BGB) or whether this right remains applicable. It is also unclear whether Section 313 BGB is applicable to lease agreements concluded after the outbreak of the pandemic or after the first lock-down. In such lease agreements the parties to the agreement must have acted with knowledge of the pandemic and a possible further lock-down, so that Section 313 BGB is actually not (no longer) applicable to these agreements. As a result, the decision would only have an effect on lease agreements concluded until shortly after the first lock-down. It remains to be seen whether the legislator will provide an answer to the above questions or whether the legal situation or legal consequences remain uncertain for lessee and lessor.

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