

# First judgments on rent payment obligations during pandemic-related restrictions

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In spring of this year, retail stores, among other places, were closed for several weeks due to pandemic-related official orders in Germany. In the meantime, the first judgments have been issued as to whether the tenants of the respective commercial spaces are obliged to pay the (full) rent for this period. In view of the new restrictions these judgments might be even more relevant:

## **Regional Court Heidelberg, Regional Court Zweibrücken, Regional Court Frankfurt a.M.: Full rent has to be paid**

The Regional Court Heidelberg (judgment of 30th July 2020, case no. 5 O 66/20), the Regional Court Zweibrücken (judgment of 11th September 2020, case no. HK O 17/20) and the Regional Court Frankfurt am Main (judgment of 2nd October 2020, case no. 2-15 O 23/20) have decided with regard to the closure orders in March and April 2020 in the individual cases underlying their judgments that the commercial tenants must pay the rent in full.

In this context, the above-mentioned judgment of the Regional Court Heidelberg, which is not yet legally binding, is particularly detailed. In it, the court argued, with reference to Federal Court of Justice case law, in particular with the fundamental distribution of risk in lease agreements. The court classified the official closure orders as related to the tenant's business and therefore rejects a rent decrease ("*Mietminderung*"). It also stated that the landlord has fulfilled his main contractual obligation.

Further, the Regional Court Heidelberg denied a reduction of rent due to any disturbance of the contractual basis ("*Störung der Geschäftsgrundlage*"). It was already questionable whether the scope of application of the corresponding Section 313 of the German Civil Code (BGB) was blocked by the law on the mitigation of the consequences of the COVID-19 pandemic in civil, insolvency and criminal proceedings of 27th March 2020. This, however, was not to be decided since the court considered it to be reasonable to stick with the contractually agreed rental payment obligation in the concrete individual case. In particular, no threat to the tenant's economic existence had been stated.

## **Regional Court Munich I: Rent reduction affirmed**

In contrast, the Regional Court Munich I (judgment of 22nd September 2020, case no. 3 O 4495/20) decided that both the official closure order and other pandemic-related official

restrictions (restrictions on sales area and number of customers) should be able to justify a rent decrease.

In this context, the court refers in particular to decisions of the Imperial Court (“*Reichsgericht*”) in which official prohibitions and orders (e.g. prohibition of dancing and prohibition of a factory operation) were each classified as a defect of the property – always with reference to the contractual use which was impaired. In addition, the Regional Court states that there were also strong voices in the academic literature which would primarily invoke the right of a rent decrease in the case of corona-related conflicts between lease parties.

As a result, in the case to be decided by the court, the court held that due to the defined purpose of use (the operation of a retail trade) the contractually presupposed possibility of use was affected by the official restriction and the closure order shall not fall within the tenant's area of risk.

The Regional Court Munich I also regarded the pandemic-related restrictions on sales floor space and customer numbers, which were subject of dispute in the specific case, as a defect of the rental object. It has staggered the amount of the reduction of rent on the basis of the respective restrictions (for example, 80 % for the period of the closure order).

In addition, the court found that there was also a disturbance of the contractual basis, which results in an adjustment of the rent. However, the court considered the rent decrease to have priority.

### **Awaiting further developments**

The above-mentioned judgments give a first impression of the opinions currently held in case law. However, it remains to be seen how Higher Regional Courts (or even the Federal Court of Justice) will decide on the question of any reduction of rent during COVID-19-related restrictions. For the time being, every argumentation remains a question of the individual case, since all Regional Courts base their decisions on the respective circumstances of the individual situation. It would have been, for example, uncertain how the Regional Court Heidelberg would have decided in the event of a prolonged closure order and/or threat to the tenant's economic existence – a rent reduction due to a disturbance of the contractual basis might have been possible in this case.

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