

# Default of rent payment due to the COVID 19 pandemic – Tenant easement at risk?

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Tenants who cannot longer pay their rent due to the effects of the COVID 19 pandemic do not have to fear a termination of the lease agreement by their landlord due to late payment as per § 543 (2) clause 1 No. 3 of the German Civil Code. However, do they risk losing their tenant easement as a result of non-payment?

With the German Act on the mitigation of the consequences of the COVID 19 pandemic in civil, insolvency and criminal procedural law ("Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht", hereinafter "**German COVID 19 Pandemic Act**"), the legislator wanted to give tenants the chance to "take a breather" in the Corona crisis. The restriction of the landlord's right to terminate the lease agreement protects tenants from losing their home or commercial space if they are no longer able to pay their rent due to the effects of the COVID 19 pandemic.

See [our previous blog entry](#) on this topic.

In particular major commercial tenants have their locations secured in the land register by means of tenant easements in addition to their lease agreement. These easements, which are intended to take precedence over registered mortgages, usually correspond to the proposal of the Association of the German Pfandbrief Banks (VdP - Vereinigung der Deutschen Pfandbriefbanken e. V.) with regard to a standardized tenant easement deed ("**VDP Standard**"). However, the VDP Standard stipulates that the tenant easement is subject to a **resolatory condition** according to which it shall automatically cease to exist upon the occurrence of - inter alia - the following facts:

*The beneficiary or his legal successors either do not fulfil the current rent payment obligations under the lease agreement or the payment obligation from the tenant easement towards the respective owner(s) or a sequestrator in accordance with § 543 (2) clause 1 No. 3 of the German Civil Code;*

Does the tenant now run the risk of losing his right of use in rem from the tenant easement if he no longer pays the rent due to the effects of the COVID 19 pandemic? The loss of the tenant easement would in turn have serious **consequences** for the tenant:

- On the one hand, the tenant is **unlikely to have a claim against the landlord for granting of a renewed tenant easement**. The right to have a tenant easement granted entitles to a one-time performance only. With the appointment of the easement the respective

obligation under the lease agreement has been fulfilled. The easement therefore does not have to be renewed once it became void.

- On the other hand, the loss of the tenant easement also leads to a **loss of rank**, for example in regards to registered mortgages. The tenant likewise has no claim to a new subordination declaration regarding the rank to be issued by the mortgagee.
- As a result, in the event of the **landlord's insolvency** or in the event of a **foreclosure** auction, the tenant would no longer be protected against the loss of his location and his then possibly futile investment in the rented property.

The German COVID 19 Pandemic Act itself does not contain any regulation regarding tenant easements. It only temporarily suspends the landlord's right to terminate due to late payment. However, the resolutive condition of a VDP-compliant tenant easement does not, according to its wording, link to the notice of termination given by the landlord, but to the delayed payment of the tenant corresponding to § 543 (2) clause 1 No. 3 of the German Civil Code. Consequently, the tenant easement expires even if the landlord decides not to terminate the lease agreement, despite a delay in payment entitling him to do so. The regulation is designed objectively, which means a review of the reasons for non-payment is not foreseen.

It is possible, however, that the sense and purpose of the exclusion of termination specified in the German COVID 19 Pandemic Act could also lead to a restriction of the expiration reason for tenant easements:

- First of all, the reasoning of the draft bill states that the German COVID 19 Pandemic Act *'temporarily introduces special provisions in Article 240 EGBGB which, at the outset, allow debtors who are unable to fulfil their contractual obligations due to the COVID 19 pandemic to refuse or discontinue their performance without facing adverse legal consequences.'* This would argue in favor of not linking the non-payment of rent due to the pandemic to the loss of a tenant easement, which would be disadvantageous for the tenant. Otherwise, the tenant would in fact be forced to pay the rent in order to not risk the loss of tenant easements, which he can hardly be compensated for. The German COVID 19 Pandemic Act could be understood/interpreted in such way that the tenant's easement does not expire if the conditions for the exclusion of termination are given.
- However, the reasoning of the legislator underlying the new clause excluding the termination right states that *'the general civil provisions of the German Civil Code (BGB) on maturity and default, which continue to apply to claims for rent during the period of validity of the Act, remain unaffected. This means that tenants must continue to pay on time and may be in default if they do not pay on time.'* This, in turn, suggests that the exclusion of termination should be seen as a singular intervention by the legislator in the legal relationship of the parties. A more extensive protection of the tenant against the negative consequences of non-payment was apparently not intended by the legislator.
- In addition, the German Federal Court of Justice (BGH) has already decided in the context of § 112 of the German Insolvency Statute (*Insolvenzordnung – InsO*) that this exclusion of termination does not prevent the expiry of an easement which secures the right to use the encumbered property resulting from a lease agreement under the resolutive condition of the opening of insolvency proceedings on the assets of the beneficiary, if the resolutive condition occurs before the secured event. This is because *'the right to use the rented property should not be adversely affected by the expiration of the*

*easement if the condition subsequent occurs before the secured event and the right of use continues on the basis of the rental agreement'.*

- However, this case law has been criticized because, contrary to the opinion of the BGH, the legal position of the tenant can deteriorate drastically if the easement securing his right of use expires. Especially in the context of the COVID 19 pandemic – which effects may also threaten the financial conditions of landlords - the right of use in rem can become essential for the tenant in order to be able to maintain his business activities and recover after the crisis. The non-payment of rent can cause the landlord's finances to be "shaky" and although the tenant may have created a "short breather" for himself, in the medium or long term he risks his operating basis.

The German COVID 19 Pandemic Act prevents businesses from losing their rented rooms and spaces and thus the basis of their business due to a termination of the landlord. However, tenants are unlikely to be protected against the loss of their tenant easements if they stop paying rent and thus trigger the resolutive condition, which is included in the template easement documents. In a time when tenants are often encouraged from several sides to take a bold approach towards their landlords, this aspect should be taken into account when deciding whether or not to suspend rent payments.

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