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Force Majeure Provisions // German Legislator Aims to Mitigate Consequences of the Corona-Pandemic by Changing Civil, Corporate, and Insolvency Law

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You can find the German Version of our article under the following Link: <https://www.lto.de/recht/hintergruende/h/corona-massnahmen-bundesregierung-miete-stundung-darlehen-hauptversammlung/>

I. Introduction

The pace at which Corona-Pandemic restricts our way of life and imposes severe consequences on our economy is breathtaking. The results are already evident today with more to come. In widespread parts of the economy, current developments lead to considerable loss of income and drastic decreases in sales and profits.

The German legislator is now vigorously resisting this development by introducing urgent measures. In this respect, a draft bill dated 22 March 2020 that is currently under discussion aims to mitigate the consequences of the Corona-Pandemic in civil, corporate, insolvency and criminal law. Additionally, the legislator is developing a number of further measures, such as the establishment of an economic stabilisation fund to provide liquidity, a draft bill to defend against hostile takeovers and other provisions with regard to short-time working compensation.

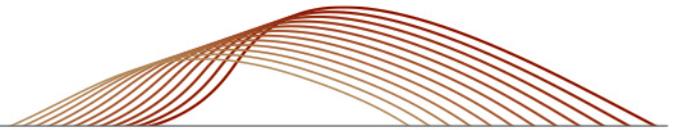
The following descriptions are based on the current cabinet draft.

II. Civil-law Moratorium

A. *General Rule: Right to Refuse Performance/Payment*

Within the framework of the emergency legislation, a temporary but very far-reaching right to refuse performance in the sense of a civil law moratorium for consumers and micro-enterprises (i.e. less than 10 employees and annual turnover or annual balance sheet totals less than EUR 2m each) is introduced.

The general right of consumers to refuse performance does not apply to lease and loan agreements as well as employment contracts, but only to all "essential" continuing obligations, i.e. those covering the provision of adequate standards of living (consumers) or the adequate continuation of business operations (micro-enterprises), which were entered into before 8 March 2020.



With this general right, the debtor can refuse performance until 30 June 2020 if he is unable to perform due to the Corona-Pandemic without endangering his (or his dependants') reasonable standard of living. This also applies to micro-entrepreneurs, although the debtor may refuse to perform if, as a result of circumstances caused by the Corona-Pandemic, he is (i) either unable to perform or (ii) is unable to perform without endangering the economic basis of his business.

The Consumers cannot refuse performance with regard to creditors whose economic basis would be endangered in the event of such non-performance. Additionally, the micro-entrepreneurs are not entitled to raise defense of the right to refuse performance towards creditors whose (or whose dependants') reasonable living standards are endangered by the non-performance. In any of such events, the debtor is entitled to terminate the respective "essential" continuing obligation.

The scope of application of the civil law moratorium appears to have been sustainably mitigated in comparison to the previous version of the draft bill of the evening of 20 March 2020, which was not limited to consumers and micro-entrepreneurs.

B. Special Provisions on Leasing of Land and Premises

1. No Termination Right due to Rent Arrears

The emergency draft bill provides for an exclusion of the landlord's termination right for all (private and commercial) leases of land or premises (only) due to rent arrears if the tenant fails to pay rent due in the period from 1 April to 30 June 2020, if this failure is caused by the impact of the Corona-Pandemic.

The connection between the Corona-Pandemic and non-performance must be substantially presented by the tenant according to the current draft bill. In this respect, the draft bill stipulates that the tenant must present the facts from which it can be concluded that there is an overwhelming likelihood that the non-performance is caused by the Corona-Pandemic. According to the official explanations to the draft bill, for the purpose of the substantial presentation, the tenant shall be allowed to refer, among other things, to the fact that the operation of his business has been prohibited or significantly restricted in the context of the Corona-Pandemic.

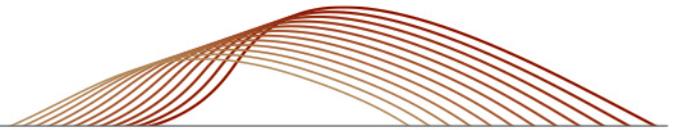
2. Other Landlord Rights Remain in Effect

In the draft bill, the legislator did not grant the tenant a general right to refuse payment of the rent. If the tenant does not pay the rent or does not pay it in whole, the tenant will be in default with the unpaid rent.

The landlord is furthermore entitled to enforce the rent claims, to realize any rental deposit or rental guarantee that may have been granted, to offset them against possible existing claims of the tenant or to make use of landlord's lien. The right to terminate the rental agreement for reasons other than the rent arrears shall also remain unaffected by the new regulation.

3. Suspension Period for the Termination Right due to Rent Arrears

The suspension of termination right due to rent arrears from the period 1 April to 30 June 2020 will last until 30 June 2022. According to the official explanations to the draft bill, the purpose of this provision is to provide the tenant with two years from 30 June 2020 onwards to make good any rent arrears that entitle the landlord to termination of a lease. If there are still rent arrears from the aforementioned period after this date, the landlord should be able to terminate the lease again under the statutory provisions due to such rent arrears.



4. Application to Demise Charters (Pachtverträge)

The draft bill states that the above provisions shall apply to demise charters (*Pachtverträge*) accordingly.

C. *Special Provisions on Loan Agreements*

In connection with loan and credit agreements, the German Legislator stresses the need to keep these agreements in place. Initially, the changes apply only to consumers, but the inclusion of micro-entrepreneurs is explicitly possible. The draft bill initially aims to ease the situation for consumers by granting them a right for transitional deferral in respect of lender's claim. Furthermore, the German Legislator expressly suggests that the contracting parties agree on an amicable adaptation of the contract by way of restructuring negotiations:

1. Statutory deferral for three months / exclusion of the lender's right of extraordinary termination

The German Legislator imposes a statutory deferral of claims due in the period between 1 April and 30 June 2020. The deferral relates to claims for repayment of the principal amount as well as regular interest and redemption payments, which are usually made monthly.

The deferral is subject to the following conditions:

- The borrower is subject to a loss of income due to the exceptional circumstances caused by the occurrence of the Corona-Pandemic; and
- the performance of the Borrower is economically unreasonable for the Borrower, e.g. because his (or his dependents') adequate living standard is at risk

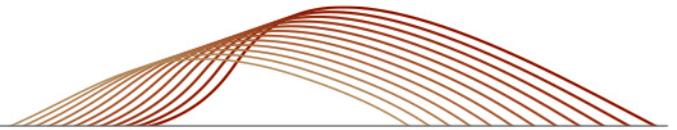
The connection between the loss of income and the Corona-Pandemic is presumed. This deferral is flanked by the temporary exclusion of the lender's termination rights due to default of payment and due to a deterioration of the borrower's financial situation. Furthermore, the obligation to provide additional collateral during this period is also excluded.

2. Restructuring negotiations

In addition, the draft bill suggests that lenders should offer their contractual partners the possibility of a discussion in order to sound out possibilities of finding a joint solution in the course of restructuring talks. If the parties will not have found a negotiated solution regarding the continuation of the loan relationship after June 30, 2020, the German Legislator provides for a further deferral of the due date of the service by another three months (including a corresponding extension of the contract).

III. Measures in the Field of Insolvency Law

In this respect, the primary goal is to enable and facilitate the continuation of companies that have become insolvent or are experiencing financial difficulties due to the Corona-Pandemic. The background to these regulations is the fact that many companies that are currently affected were, in essence, absolutely sound and in good standing prior to the Corona-Pandemic. Such companies (and their statutory representatives) should now be given the time to overcome the current situation, for example by making use of the of German governmental liquidity support or by concluding standstill agreements with investors and other creditors.



A. Temporary Suspension of the Obligation to File for Insolvency (retroactive from 1 March 2020)

According to German insolvency law, a company shall file for insolvency immediately, at the latest within three weeks after illiquidity or over-indebtedness has occurred. A breach of this duty to file for insolvency is a criminal offence.

Under the draft bill, the obligation to file for insolvency is suspended until 30 September 2020 unless

- the insolvency is not caused by the impact of the Corona-Pandemic; or
- there is no prospect of an over-indebtedness being resolved.

The right of creditors to file for the initiation of insolvency proceedings is also suspended for a transitional period of three months.

B. Other Measures

In the event of suspension of the obligation to file for insolvency, the legislator foresees a limitation of statutory liability for managing directors and board members. This applies in particular to payments that serve to maintain or resume business operations or to implement a restructuring plan. In addition, the granting of credit in the relevant period will be considerably facilitated against the background of a potential claw-back risk/rescission.

IV. Changes in Corporate Law

In order to enable companies to adopt necessary resolutions and thus remain capable of acting despite existing restrictions on the possibility of holding meetings, the executive board of a stock corporation (*Aktiengesellschaft*), partnership limited by shares (*Kommanditgesellschaft auf Aktien*) and a European public company (*Societas Europaea/ Europäische Gesellschaft*) is entitled to:

- enable online participation in the shareholders' meeting;
- implement virtual shareholders' meeting and restrict the right file an action for rescission;
- reduce the notice period of invitation to shareholders' meeting to 21 days;
- make advance payments on the balance sheet profit; and
- hold the shareholders' meetings until December 31.

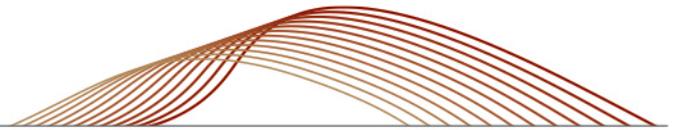
Furthermore, in deviation from Sec. 48 German Limited Liability Companies Act (*GmbHG*), resolutions of the shareholders can also be passed in written form or by submitting votes in writing without the consent of all shareholders.

V. Changes to Transformation of Legal Entities

According to changes in transformation of legal forms, the eight-month period for the presentation of a balance sheet is extended to 12 months in order to prevent transformation measures from failing due to impracticability of shareholders' meetings.

VI. Impact on Notarization Practice

Notaries remain obliged to keep their offices open and to carry out notarizations. The notary remains bound by the usual notarization procedures and therefore attendance of parties is still required; notarization via video or telephone is not permitted. We therefore recommend to make



use of notarizations with only one party to the contract, subject to approval of the other party, or to authorize notary's office employee as representative.

VII. Other Measures

It is foreseeable that based on the current cabinet draft analyzed in this article, a draft bill will soon be introduced into the legislative process. However, it cannot be ruled out that by then or in the further legislative procedure, the bill will be subject to various (potentially substantial) changes. It therefore remains to be seen how these changes will turn out in detail. We will inform you immediately as soon as there are important additions or changes.

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