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## *Germany Passes Bill on Mitigation of COVID-19 Pandemic Consequences*

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On Friday, 27 March, 2020, the German Parliament passed the so-called “Bill on Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedure Law”, which will therefore soon enter into force. From a real estate law perspective, this bill particularly restricts the landlord’s right of termination in the event of non-payment of rent by the tenant.

Against the background of the changes in the current law, we have prepared answers to relevant questions on tenancy law that have been raised by clients (both landlords as well as tenants).

- **Which leases are affected by the new law?**

In principle, the new law applies to all private and commercial real estate lease agreements. Leases of parking spaces and other subordinate areas should also be covered by this regulation.

- **Which grounds for termination are excluded?**

The landlord cannot terminate the lease if the tenant fails to pay the rent in the period from 1 April, 2020 to June 30, 2020 despite its being due, provided that the failure to pay the rent is caused by the effects of the COVID-19 pandemic.

According to the explanatory memorandum to the bill, the exclusion only applies to rent arrears that arise in the period from 1 April, 2020 to 30 June, 2020, but not to rent arrears that already existed prior to 1 April, 2020.

- **How can the connection between non-performance and the COVID-19 pandemic be demonstrated?**

The connection between the COVID-19 pandemic and non-payment of rent must be substantiated by the tenant, i.e. the tenant must present facts from which it can be assumed with a high degree of probability that his or her non-payment is based on the COVID-19 pandemic. According to the explanatory memorandum to the bill, the tenant can provide appropriate evidence for this purpose, make an affidavit or use other appropriate means.

Examples of appropriate evidence are certificates of state benefits and corresponding employer certificates. Furthermore, tenants of commercial properties shall have the possibility to substantiate the connection by stating that the operation of their enterprise has been prohibited or significantly restricted by statutory order or official decree in the course of the pandemic.



- **For what period does the exclusion of the termination right apply?**

Termination due to rent arrears incurred in the period from April to June 2020 is excluded until 30 June, 2022. Failure to pay the rent after 30 June 2020 would entitle the landlord to terminate the lease again.

- **Is there a possibility that the relevant periods may be extended?**

The bill already provides for the authorization of the Federal Government to extend the period of validity of the restriction on termination of lease agreements due to payment arrears to the period from 1 July, 2020 to 30 September, 2020. In addition, the Federal Government is authorized to extend this period beyond 30 September, 2020, if the adverse effects of the COVID-19 pandemic persist.

- **Is the rent automatically deferred because of the new bill?**

No — the tenant remains obligated to pay the rent. If the tenant does not pay on time, he or she will be in default with his or her payment obligation and will have to pay default interest. The landlord is free to pursue his or her payment claim in court. The tenant's right to refuse performance with regard to the rent is expressly excluded.

- **Can the landlord make use of the rent security?**

In principle, yes. Unless otherwise stipulated in the lease agreement, the landlord may, in the event of the tenant's undisputed or judicially determined default of payment, make use of the rent security (e.g. in the form of a rent deposit account or a bank guarantee). However, the tenant must be in default; the simple maturity of the claim is not sufficient.

In the case of disputed claims, however, the landlord cannot not make use of the rental collateral; in such cases, the tenant can protect him- or herself against the claim — if necessary, by way of injunctive relief.

- **Can the landlord give notice of ordinary termination or termination for cause for reasons other than non-payment of the rent (in particular due to deterioration of the tenant's assets)?**

Generally, the landlord can still terminate the lease at any time and — if the tenant has breached material obligations — also terminate it for cause. Only the termination due to rent arrears caused by COVID-19 within the period from April to June 2020 is excluded.

As long as the tenant fulfills his or her obligations under the lease, there is no cause for termination solely due to the deterioration of its financial assets. However, if further circumstances arise, such as the loss of a contractually owed security, such circumstances might give rise to a termination for cause; this occurrence must be assessed in each individual case by taking into account all relevant circumstances.

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*In case you have any questions regarding these topics, please do not hesitate to contact the Real Estate Team of the Frankfurt Paul Hastings Team:*

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