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Current developments in the real estate industry

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Effects of the coronavirus crisis on rental payment claims from commercial rental agreements

The government measures under the Ordinance on Protection against New Infections resulting from the COVID-19 pandemic have forced the (temporary) closure of many commercial facilities. It has not yet been decided by the courts what legal consequences this will have for the payment of rent. There is no explicit provision in the law that exempts the commercial tenant from the obligation to pay rent in the event of a prohibition/restriction of public access. In the absence of any prior contractual agreements on the statutory distribution of risk in the event of force majeure (so-called "force majeure clause"), the legal situation is therefore assessed in accordance with the general statutory regulations.

I. Impossibility

The tenant's loss of turnover does not in itself justify the assumption that it is impossible (§ 275 German Civil Code) to pay the rent. The German Civil Code (BGB) is based on the principle "money is to be had", i.e. in the case of monetary debts, impossibility and release from the obligation to pay cannot occur.

II. Rent reduction

Unless the tenant's right to reduce the rent was contractually excluded, a rent reduction (§ 536 German Civil Code) requires the defectiveness of the rental object. The decisive factors for the statutory rent reduction are the delimitation of the contractual risk spheres and the allocation of the risk concretely realised in the course of the COVID-19 pandemic. The landlord bears the risk of the usability of the leased property. In contrast, the tenant bears the risk of disruption to the purpose of the leased property and the generation of profits from its use (so-called use and profitability risk). A direct impairment of use is usually based on a defect that can be attributed to the landlord if the impairment of use is related to the property or building. The government measures attributable to the Corona Crisis are linked to the specific type of use of the rented property and are thus operation-related. The landlord can continue to fulfil his obligation to enable the tenant to use the leased property in a property-related manner. Within the contractual and governmental limits, the tenant is not prevented from temporarily converting the rented property without public access. The tenant's right to reduce the rent should therefore be excluded.

III. Adjustment of the business basis

In the event of a disruption of the basis of the business transaction, § 313 para. 1 German Civil Code grants the contracting party referring to it the right to adjust the contract. If an adjustment of the contract is not possible or is unreasonable for the other party, a special right of termination exists. The provision does not grant a right to a rent reduction. The rent reduction regulations have priority as special regulations, but their requirements are not fulfilled here. The basis of the contract could be the common understanding of the parties at the time of the conclusion of the contract that a regular business operation is possible during the contract period. If the tenant invokes the loss of this business basis due to a pandemic, he has no unilateral claim to adjustment of the rent without adjustment of the rental agreement in other respects. If necessary, the tenant could have a claim against the landlord for approval of a temporary adjustment of the purpose of use of the leased object while maintaining the balance of interests.

IV. Use of rental collateral

During the current rental period, the Landlord is advised not to offset the overdue rent against the rental security deposit as long as the rental claim is not undisputed or legally binding. Until the termination of the tenancy, the tenant is also not allowed to offset against the deposit (BGH, judgement of April 10, 2013 - VIII ZR 379/12).

V. Exclusion of termination

The new provision of Art. 240 para. 2 of the Introductory Act to the German Civil Code (EGBGB), which was introduced in the course of the Corona Crisis,

merely implemented protection against termination in the event of default of payment in favour of the tenant; it does not constitute an exemption of the tenant from the obligation to pay rent. Accordingly, the landlord's right to terminate the lease on the grounds of non-payment of rent due in the period from April 1, to June 30, 2020 is excluded until June 30, 2022 if this is due to the effects of the Corona crisis. To avert termination due to non-payment of rent during this period, the tenant must make up the payments by June 30, 2022 at the latest. From this date, termination by the landlord due to non-payment of rent for the period from April 1, to June 30, 2020 is possible.

VI. Conclusion

- In principle, the tenant is still obliged to pay the full amount of the rent even if the state prohibits public access (unless clearly stated otherwise in the rental agreement). A complete release of the tenant from his contractual obligation to pay rent is neither appropriate nor is it supported by law.
- In view of the common interest of the parties to the contract in the continuation of the (long-term) tenancy and the protection of the tenant's existence, it should be refrained from enforcing rent payment claims in court for the time being. The contracting parties should primarily pursue a concerted strategy of action which takes the interests of both parties into account. In addition to the granting of consent to a temporary conversion of the rented property by the landlord, for example the agreement of rent-free periods or periods of reduced rental payments in connection with contract extensions or further contract-optimising measures, deferral agreements, if necessary also in connection with an extension of the term of the contract, are conceivable.
- Caution must be exercised when adjusting long-term rental agreements with regard to compliance with the written form requirement.

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Rent cap Berlin - Current status and outlook

When The Act limiting Housing Rents in Berlin (MietenWoG Bln) comes into force on February 23, 2020, the net cold rents for residential property, including graduated and index-linked rents (excluding operating costs and costs for heating and hot water) in Berlin are largely "frozen" for five years.
It is now generally "forbidden" to charge a higher rent than is permitted under the rent caps of the so-called rental cap. Prohibited are rents, that exceed the rent effectively agreed or owed on the effective date of June 18, 2019. The rent on the key date may not exceed the (statutory) upper rent limits. If the key date rent is lower, however, this applies. There are a few exceptions, such as for new buildings ready for a first occupancy since 2014, including student residences and publicly subsidised or non-profit housing (see catalogue under § 1 MietenWoG Bln).

I. Start of validity

Since February 23, 2020, the rent cap has been in force for new rental contracts concluded after this date.

For existing rental agreements concluded before February 23, 2020, the rent cap will only apply from November 23, 2020.

The law stipulates that excessive rent is prohibited in accordance with § 134 German Civil Code. Rents that are more than 20 % above the respective permissible rent ceiling are considered excessive.

As a consequence, only the permitted rent is owed and is reduced by law to the permitted rent ceiling "capping limit". A separate "reduction application" by the tenant to the authorities is not necessary.

II. Rent cap/Calculation according to § 6 MietenWoG Bln

The upper rent limit is to be determined on the basis of the living space, the initial occupancy of the

dwelling (age), its facilities, any modernisation that has been carried out and the residential location.

The following value factors are decisive for the classification of the applicable rent ceiling.

Apartment in a multi-family house, ready for occupancy before 2014	Apartment in one and two-family house, ready for occupancy before 2014
Rental table EUR 3,92 - 9,80 EUR/m²	Rental table EUR 3,92 - 9,80 EUR/m²
	+ 10 % allowance
+ if applicable EUR 1.0 for modern equipment if three of five criteria are met	+ if applicable EUR 1.0 for modern equipment if three of five criteria are met
+ if applicable up to EUR 1,0 after modification	+ if applicable up to EUR 1,0 after modification
+/- residential area = upper rent limit	+/- residential area = upper rent limit
+ (20 %) = maximum rent allowed	+ (20 %) = maximum rent allowed

III. Information on rent

Landlords must always provide information to tenants about the relevant circumstances for the calculation of the rent ceiling without being requested to do so.

Excluded from this is, for the time being, an obligation to provide information on the residential location for the purpose of adding or subtracting relevant categories of simple (EUR - 0.28), medium (EUR - 0.09) and good residential locations (EUR + 0.74). The ordinance required for this categorisation will probably not be issued before November 22, 2020 - until then, the address directory for the rent index 2019 should be used.

In its resolution of March 24, 2020, the Senate determined that sanctions for violations of reporting and information obligations will be waived for a period of six months if the violation is attributable to the effects of the corona pandemic. For all other cases, the obligation continues to apply unchanged.

IV. Violations of the rent cap

Fines of up to EUR 500,000 may be imposed for breaches of the rent cap requirements. As it is also possible to report to the district housing office, in case of doubt, no unnecessary risk should be taken.

V. Applications for hardship cases and rent increases at the IBB

If permanent losses are to be feared, as a result of the existing rent ceiling, landlords can file a hardship application with the investment bank of Berlin (IBB) for a rent increase.

However, not every "loss" constitutes a case of hardship within the meaning of the law. It should be noted that disappointed value appreciation, return expectations and income expectations, which are also based on excessive rents irrespective of this law, as well as financing costs, that are not within the range of normal market conditions and losses resulting from the division into economic units are explicitly excluded.

If a hardship case application by the landlord is successful, the affected tenant is also entitled to apply for a rent subsidy - provided his income is within the income limits of the Berlin WBS.

VI. Current: Outlook

- From January 1, 2022, rent adjustments in the form of inflation compensation of up to a maximum of 1.3% per year will be possible for the first time, as far as the applicable rent ceiling is not exceeded.
- The competent senate department is authorised to adjust the rent ceilings two years after the law comes into force based on the real wage development.
- For the time being, the law must be complied with unconditionally until the Federal Court of Justice (or the Constitutional Court of the State of Berlin) decides otherwise.

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Outlook: New brokerage law 2020

When selling a property, it is common practice in many regions of Germany to charge the buyer of the property the full brokerage commission. This will no longer be possible for private buyers of residential properties from December 23, 2020. This is because the new brokerage law, which regulates the distribution of brokerage costs in a new way, comes into force from this date. The aim of the new regulation is to relieve private buyers of the ancillary purchase costs and thus promote the formation of residential property among the general population.

I. Buying real estate - High obstacle is high ancillary purchase costs

The agent's commission is between 4,76 % and 7,14 % of the purchase price and is therefore, together with the real estate transfer tax, a decisive item of the ancillary purchase costs. The ancillary purchase costs are often not financed by the bank and must therefore be financed by the buyer by means of equity capital. Therefore, high ancillary purchase costs often represent an additional hurdle when purchasing a property. The new brokerage law is intended to relieve private buyers of residential property of the brokerage costs.

II. Amendment of the German Civil Code - The buyer should pay a maximum of 50% of the brokerage commission

The "Act on the Distribution of Brokerage Costs for the Mediation of Purchase Agreements for Apartments and Single-family Houses" (printed matter of the German Parliament 19/15827) newly incorporates §§ 656 a - 656 d into the German Civil Code. This means that the distribution of the agent's commission between seller and buyer is now regulated in a new and uniform manner throughout Germany. In the context of renting flats, the ordering principle has already been standardised since June 2015, so that when apartments are rented, the person who ordered the services of the agent - usually the landlord - has to pay the agent's commission. In the context of the sale of a property, the ordering principle has not been incorporated into the German Civil Code, but in the future it will no longer be possible to charge the agent's commission in full to the buyer if the seller (also) has commissioned the agent.

It is still possible for an agent to act for both, the seller and the buyer. If the agent is commissioned by both parties, he can only claim his remuneration from both parties in equal parts in the future. In this constellation, a mandatory division of the commission is thus provided for in such a way that the seller and the buyer each pay 50% of the commission. If the agent has agreed with one party to work for this party free of charge, he can consequently not claim any remuneration from the other party.

If only one party has appointed an agent, that party is obliged to pay the agent's fee. Although it is still possible to pass on the brokerage costs to the other party, this is only effective if the costs passed on do not exceed a maximum limit of 50% of the total commission. To claim these passed-on costs from the other party, the party who has engaged the agent must also prove that he has paid the commission. If, for example, a seller hires an agent, the seller must pay the full agent's commission in the future and will still bear 50% of this commission even after the agent's costs have been passed on in full.

III. Brokerage order requires the text form

In the future, brokerage contracts that deal with the sale of a residential property will require text form. The text form will be maintained, for example, if the brokerage contract is concluded by means of an assignment and acceptance by e-mail. In the future, a simple handshake or a verbal agreement will no longer be sufficient; such a brokerage contract is void.

IV. Scope of application: Residential properties if the buyer is a consumer

The new regulations only apply if the buyer is a consumer. It is irrelevant whether the agent acts as an

entrepreneur or occasional broker and the seller is an entrepreneur or consumer.
In addition, the new regulations only apply to purchase contracts for apartments and single-family homes. It is harmless, however, if a single-family house also has a granny flat. The new regulations therefore do not apply to commercial real estate and multi-family houses, as long as not a single apartment but the entire property is sold.

V. Entry into force on December 23, 2020

The law was promulgated in the Federal Law Gazette on June 23, 2020 and will enter into force after a six-month transition period, thus on December 23, 2020. Thus, the new regulations apply to all brokerage contracts concluded from December 23, 2020 onwards.

VI. What sellers must observe now

If the seller is the person who commissions the estate agent to sell a single-family house or apartment to a consumer, the following should be noted:
The brokerage contract must be drawn up at least in text form (for example, by e-mail). Since the landlord pays at least 50% of the agent's commission himself, he will now have an interest in negotiating the agent's fees.
If the landlord wants to pass on a part of the brokerage costs to the buyer, he must make a corresponding agreement with the buyer. The landlord can pass on a maximum of 50% of the brokerage costs incurred to the buyer, and this only after he has paid the entire brokerage commission himself and has proven this to the buyer, for example in the form of a statement of account or a transfer slip.

VII. Conclusion

- It is true that the legal model of the ordering principle has not been included in the draft law and the agent's commission has not been capped for the sale of residential property. Nevertheless, a positive political compromise was found with the law in order to relieve the buyer of the ancillary costs of acquisition.
- A further step in the right direction would be a reduction of the land transfer tax or a tax-free allowance for the first-time purchase of residential property. The political scope has not yet been exhausted here.

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Sales tax reduction as of July 1, 2020 - Supplement required for commercial leases?

As a result of the "Second Act on the Implementation of Tax Aid Measures to overcome the Corona Crisis", the statutory sales tax was temporarily reduced from 19 % to 16 % from July 1, 2020 until December 31, 2020. In this light, the question arises as to whether in commercial leases with a fixed term, an option to pay sales taxes is required for a change to the lease, in which case the parties must observe the written form of § 550 German Civil Code in order to avoid the possibility of ordinary termination of the lease.

I. Initial situation

Commercial leases are long-term contracts and contain so-called permanent benefits. A monthly settlement is made on a regular basis about the partial services rendered monthly. If sales tax is opted for in the case of commercial leases, it must be shown on the respective invoice.

II. No need for changes when using the usual standard clauses

The large number of commercial leases will not require a change of lease, so that there is no risk of a lack of written form. It is recognized by the highest court of law that a change in the rental agreement, which results in its details from the rental agreement, in particular from corresponding automatic / escalator clauses, does not require a supplement to be made in writing. Also, a change of the rental relationship based on the law does not require a supplement to the written form, as § 550 German Civil Code only covers contractual changes of the rental agreement.

At any rate, in the case of standard contract clauses which state a net rent, which is to be paid, for example, "*plus the statutory value-added tax/or sales tax, which was 19% at the time*", no supplement is required in the event of a statutory change in the amount of sales tax. In this case, "only" a new permanent rental invoice with 16 % instead of 19 % sales tax must be issued.
The situation is different in the case of rental agreements that already serve as a basis for permanent invoices or that include a fixed gross rent, including the explicit mention of 19 % sales tax: In this case, the payment of this fixed gross rent is part of the contract under civil law and should be adjusted for the period of the sales tax reduction. Within the scope of such an adjustment of the contract to the changed legal circumstances, the rental contract must be amended in writing in order to exclude risks.
It should also be noted that the entrepreneur liable for sales tax must continue to pay the 19% according to para. 14c Sales Tax Law if he invoices this as sales tax and collects it from the tenant, for example because he fails to adjust the invoices.

III. Conclusion

- The respective wording in the rental agreement concerning the payment of the sales tax by the tenant is decisive. In principle, the rental agreements must be examined individually in this respect and it must be assessed whether a supplement is necessary or not.
- The decisive factor is whether or not the rental agreement already covers the adjustment of the amount of sales tax due to legal changes.
- In case of doubt, a supplement is the safest and most secure way and therefore preferable, especially since a supplement with an effective form could also correct any current written form defects.
- The permanent rental invoices are to be adjusted for the period of the temporary reduction of sales tax.

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Architectural law: What will become of the fee regulations for architects and engineers (HOAI)? - On the decision of the Federal Court of Justice (BGH) of May 14, 2020

It was a sensation when the European Court of Justice (ECJ) stated on July 4, 2019 that the German fee regulations for architects and engineers (HOAI) partially violates European law and may therefore no longer be applied (Ref. 377/17). Since the decision, however, much has happened and even a recent decision of the Federal Court of Justice (BGH) can only be seen as an intermediate stage.

I. Architect's fees: Statutory minimum and maximum rates

Until mid-2019, fees of architects and engineers were generally only negotiable within a certain price corridor - the so-called minimum and maximum rates (cf. para. 7 (1) HOAI 2013). Above all, undercutting of the statutory price law often led to serious consequences. Under certain circumstances, planners were able to demand payment from their clients even many years after the planning services had been provided and to assert additional claims with reference to the mandatory price law of the HOAI.

II. Special risk: Undercutting of minimum rates

In practice, cases of undercutting of minimum rates were of particular relevance. In this regard, case law had repeatedly clarified that building owners could only rarely successfully object to subsequent additional claims due to minimum rate shortfalls, and that they had relied on the fee agreement (often flat-rate fees) when concluding the architect's contract. In the event of a dispute with the client, the architect could demand with relatively high chances of success an "increase" of his fee by the difference up to the statutory minimum rate if he discovered that the minimum rate had been undercut.

III. ECJ decision from 2019

Within the framework of infringement proceedings against the Federal Republic of Germany, the ECJ determined in July 2019 that the mandatory price law violates Art. 15 of the so-called EU-Services Directive and is therefore not compatible with the freedom of establishment guaranteed under European law. The German regulations are incoherent, unsystematic and contradictory.

The practical consequence of the ruling is that, since the decision, all organs and agencies of the Federal Republic of Germany are obliged to no longer apply the HOAI - until its amendment - with regard to the regulations on the minimum rate. At least if the client is a government agency, the statutory price law of the HOAI is no longer relevant.

IV. What currently applies in the relationship between private clients and architects/engineers?

However, the fate of the minimum and maximum rates does not seem to have been completely sealed. In recent months, a dispute has developed at the level of the Higher Regional Courts on the question of how the ECJ ruling will affect the relationship between private individuals. While this question - as already described - can be answered unambiguously if state agencies are contracting authorities (they were directly addressed virtually by the ECJ ruling), this is more difficult to assess in the relationship between private individuals.

For example, in its ruling of July 23, 2019, the Higher Regional Court of Hamm (Ref. 21 U 24/18), took the position that the price law of the HOAI should continue to apply in architectural fee litigations despite the ECJ ruling. The reason for this is that the ECJ ruling only binds the member state - i.e. the Federal Republic of Germany - but not automatically individual citizens or companies.

The ECJ ruling would not have changed anything for these legal relationships. Rather, it was solely up to the legislator - as the actual addressee of the ruling - to deal with the regulations and adapt them. Until then the HOAI would continue to apply unchanged (similarly e.g. Higher Regional Court of Berlin, resolution of August 19, 2019, Ref. 21 U 20/19).

V. Clarification adjourned by the Federal Court of Justice (BGH) – Now it's ECJ's turn

Several Higher Regional Courts had also referred proceedings to the Federal Court of Justice for a decision, in which the aforementioned question was at issue. It was therefore hoped that the Federal Court of Justice would provide clarity in the short term.

However, this hope has recently been dashed. In a decision of May 14, 2020 (Ref. VII ZR 174/19), the Federal Court of Justice did not clarify the question of the effect of the ECJ ruling on the HOAI between private individuals itself, but in turn referred relevant questions to the ECJ for a preliminary ruling. It can therefore be assumed that probably another 1.5 to 2 years will be necessary for final clarification by the ECJ.

VI. Conclusion

- Therefore, the question of the scope of the ECJ ruling from 2019 has still not been conclusively clarified; the ECJ will have to comment on this first.
- Nevertheless, it can already be seen from the decision of the Federal Court of Justice that the court tends not to assume a direct effect of the Services Directive in such a way that the regulations listed there, which conflict with the statutory minimum and maximum rates from para. 7 HOAI, can no longer be applied between private individuals.
- Ultimately, it is therefore possible that at least in the relationship between private individuals (without the participation of public authorities), the statutory minimum rates of HOAI will apply after all. This could be particularly relevant with regard to cases still pending before courts.
- As there are far-reaching consequences, both clients and contractors should therefore deal with the relevant issues in the drafting of

contracts etc. at an early stage and comprehensively. We will be happy to provide the appropriate legal advice if required.

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On our own behalf: News from Andersen

Best Lawyers 2020

The renowned US publisher Best Lawyers has voted our Andersen lawyers as some of the best lawyers in Germany in various fields of law.

This year, a total of 15 colleagues are recommended by name under the headline "Germany's Best Lawyers" published in the Handelsblatt, including Philipp Zschaler in the field of real estate law.

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