

## Rent Payment in the Days of COVID-19

Considering the drastic measures to avoid the spread of COVID-19, there is an increase on (media) reports that tenants would be exempted from their obligation to pay rent because of COVID-19.

Background: These reports are based on the legal provision of § 1104 ABGB. Pursuant to this provision no rent is to be paid in the case of "extraordinary coincidences" that lead to the rental object becoming completely unusable. An epidemic for example could qualify as such an extraordinary coincidence, connected to § 1104 ABGB. The legal situation is not as clear as these reports suggest!

The parties are free to agree on a different risk distribution in the rental agreement. Such transfers of risk to the tenant in the commercial sector take place on a regular basis, especially in case of official directives to close-down a business-sector. If a clause like that has been effectively agreed upon and is applicable to the current situation can only be determined by examining the individual case and contract.

Even without an individual contractual provision, it is necessary to assess if any state compensation regulation would prevent the application of § 1104 ABGB. According to the Austrian Supreme Court, "extraordinary coincidences" are such events which "cannot be adequately compensated by a statutory regulation on compensation claim". A compensation from a crisis management fund could – depending on its form – be regarded as such a claim for compensation.

It is furthermore questionable if the COVID 19 measures which are currently in force, render rental properties to be completely unusable. Focusing on the so-called "conditional use" it needs to be checked what the parties have explicitly agreed upon or otherwise agreed by implication. E.g. the rented object is not to be used exclusively as a sales area, but also for other purposes, it must be specifically checked whether and to what extent the object is still usable. The existing space may continue to be used as storage space, office space or a workshop. If there is an "extraordinary coincidence" and the property has become partially unusable, a claim to an aliquot reduction of the rent can of course exist (§ 1105 ABGB).

If business areas were voluntarily closed without an official order (for just precaution reasons), it will need to be checked exactly if there is any (total) uselessness of the rented property, caused by extraordinary coincidences.

If there is no case presented of total or partial unsuitability connected to "extraordinary coincidence", the lessors could be confronted with claims for the reduction of the rent. § 1096 ABGB for example entitles the tenant to a rent reduction if the use of the rented property is affected, completely independent of "extraordinary coincidence". Relevant for the review is the use agreed upon considering the purpose of the contract and the time of the contract conclusion.

There are some special rules for leases. To differentiate between rental and lease agreements is often difficult. According to case law, there are no fixed and established rules which are generally applicable to distinguish between renting business-areas and renting a whole business. It primary depends on the whole circumstances of the individual case.

Finally: The above-mentioned principles generally apply to all properties; this includes real estate as well as movable property.

In summary, it appears that a possible reduction of the rent should be preceded by a case-by-case examination of the corresponding lease agreement.

Our experts from the SAXINGER COVID-19-Unit will be pleased to assist you within this context and also to answer any further legal questions which occur in connection with COVID-19.

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We point out that the legal situation can change constantly, but we are on effort to keep the contents up to date.



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