

Limitation of default interest and exclusion of collection-costs

Previous legal situation

The obligation to pay default interest in the event of a default qualifies as a standard legal consequence irrespective whether or not there is a corresponding contractual clause in place. Such legal consequence comes into effect as an objective as well as a subjective default of a debtor. Subjective default is caused delay based on fault. The damage resulting from a delay of payment suffered by a creditor shall be compensated by the statutory provision of default interest. The statutory provision provides for usually 4% p.a., for entrepreneurial business transactions 9.2% above the base rate. Should the debtor not responsible for the delay in the B2B area, the lower rate of interest will apply. According to general statutory provisions, the fault is presumed.

Any interest rate disadvantage, which exceeds the statutory interest, may be claimed as additional damage. This also includes the necessary costs of appropriate extrajudicial collection or recovery measures ("collection costs"), as far as they are in a reasonable proportion to the claim being pursued. For entrepreneurial businesses, a minimum amount of EUR 40.00 is accepted as lump-sum collection costs irrespective of the fault of the debtor.

Contractual terms which deviate from these regulations are acceptable, also if those terms are to the disadvantage of the debtor.

New temporary reliefs

It is obvious that default interest and collection costs are an additional burden for the debtor during the crisis. The current innovations (= § 3 of the 2nd COVID-19-Justice Accompanying Act ("2. COVID-19-Justiz-Begleitgesetz")) fit into the overall picture of the COVID-19 measures. The aim is to provide relief to companies whose liquidity suffers from outstanding debts with own outstanding receivables.

A debtor of cash payments is privileged as follows:

- They have to pay a default of interest with a maximum of 4% p.a., even if there are different contractual arrangements. The statutory interest rate for all transactions is temporarily frozen at 4 % p.a.
- The debtor shall not be obliged to reimburse the costs of extrajudicial debt enforcement or collection measures.

These facilitations only apply under the following conditions, which must be fulfilled simultaneously:

- The contract from which the payment obligation arises, must have been concluded before 1st April 2020 ("old-contract")
- The payment obligation shall be due between 1st April 2020 and 30th June 2020.
- The payment delay must be a consequence of the COVID-19 pandemic and must therefore affect the debtor's economic capacity in a significant way.

This should apply to all contractual relationships. Furthermore, the enforceability of the claim for payment of the outstanding amount will not be suspended temporarily. The creditor can therefore still sue for payment immediately.

It is significant that § 3 of the 2nd COVID-19-Justice Accompanying Act automatically expires at 30th June 2022. That means, a maximum of 4% default interest will incur and the according collection costs cannot be charged to the debtor. The previous regulations shall apply beyond mid of 2022, exact from 1st July 2022. Thus, if the default continues beyond the end of June 2022, higher contractual or (between entrepreneurs) statutory interest will apply (from then on); additionally, collection costs incurred after 1st July 2022 can be claimed. A difference must be made between such date and the due date: The temporary relief for the debtor is only relevant for debts that have become due between 1st April 2020 and 30th June 2020.

It is the responsibility of the debtor to claim and prove that his economic capacity has been significantly affected by the COVID-19-pandemic. The same standards applicable for the deferment of the termination of residential rental contracts come into effect. It may be assumed that these conditions are generously interpreted in favour of the debtor. The legal materials refer to a wide variety of constellations, in which the necessary commercial impairment may be presented, whether due to withdrawal or limitation of employment, or as a health (e.g. illness) or health political (e.g. quarantine) consequence of the pandemic.

Conclusion

The discussion of the appropriateness and balance of the transitional arrangements presented may remain open. As always, the role of being a debtor or creditor will have an impact on one's opinion. The objectivity of fairness may seem unreachable. The amounted interests on default and the collection costs will in many cases not sum up to an excessive amount. It shall be noted that it is important to carefully review existing contracts and assess the applications of the conditions of the temporary relief.

Our experts of the SAXINGER COVID-19-Unit will be happy to advise you in this issue.

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We point out that the legal situation may change constantly, but we are keeping our efforts to maintain the contents up to date.



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