



# RESTRUCTURING, RECAPITALISATION & INSOLVENCY

## Obligation to file for insolvency due to rent arrears caused by the Coronavirus

### 1. NO TERMINATION DUE TO RENT ARREARS CAUSED BY THE CORONAVIRUS

The COVID-19 pandemic and the related lockdown have led to dramatic economic losses for many companies. As a result, many companies were and are currently unable to continue paying their rent on time. Accordingly, these companies were at risk of having their lease agreements terminated due to rent arrears caused by the coronavirus crisis. As a consequence, they would have been threatened with the loss of the rented premises and areas and thus of the basis of their business activities.

To counter this risk, the legislator has severely restricted the landlord's right to terminate the lease in the event of late payment. The landlord may not terminate a lease agreement due to rent arrears from the period from 1 April 2020 to 30 June 2020 insofar as these arrears are due to the effects of the COVID-19 pandemic (hereinafter: "Coronavirus-Related Rent Arrears"). This ban on termination shall apply until 30 June 2022, which means that tenants are granted two years to pay back any rent arrears, with regard to the landlord's extraordinary right of termination.

However, the provision only suspends the landlord's right of termination and does in fact not establish a right to refuse performance of the tenant. This means that Coronavirus-Related Rent Arrears are still due liabilities which the landlord may sue for and enforce if necessary, provided that this does not thwart the ban on termination.

### 2. CORONAVIRUS-RELATED RENT ARREARS AS A CAUSE FOR INSOLVENCY

Although terminations of lease agreements are excluded for now, there is a risk that Coronavirus-Related Rent Arrears could lead to the insolvency of companies in the short to medium term.

If a company is not in a position to meet its due liabilities, it is insolvent (section 17 of the German Insolvency Code (*InsO*)) and is therefore generally obliged to file for insolvency without delay (section 15a *InsO*). In particular also the Coronavirus-Related Rent Arrears must be taken into account here.

The current suspension of the obligation to file for insolvency for the period from 1 March to 30 September 2020 (extendable to 31 March 2021 by statutory instrument) does little to alter the risk of short to medium-term insolvency. If a company is not in a position to pay back the Coronavirus-Related Rent Arrears accrued during the period from 1 April 2020 to 30 June 2020 by 1 October 2020 at the latest, the company is generally insolvent and is then – again – obliged to file for insolvency.

As a result, the provisions of the Act on Mitigation of the Consequences of the COVID-19 Pandemic lead to the following paradoxical situation: On the one hand, termination due to Coronavirus-Related Rent Arrears is excluded until 30 June 2022. At the same time, however, it is precisely these rent arrears that could lead to an obligation to file for insolvency from 1 October 2020 at the latest.

In order to avert the worst-case scenario of insolvency due to Coronavirus-Related Rent Arrears, prompt action by the companies concerned is absolutely essential. Payment agreements can shift the due date for the rents to the future so that the Coronavirus-Related Rent Arrears do not (for the time being) lead to insolvency. With otherwise intact lease relationships, the willingness of landlords to conclude such payment agreements will generally be very high. Because nothing is of less use to a landlord in the current situation than an insolvent tenant.



#### Dr Moritz Handrup

Lawyer  
BEITEN BURKHARDT  
Rechtsanwalts-gesellschaft mbH  
Frankfurt am Main

## Imprint

This publication is issued by

### **BEITEN BURKHARDT**

Ganghoferstrasse 33 | D-80339 Munich

Registered under HR B 155350 at the Regional Court

Munich/VAT Reg. No.: DE811218811

For more information see:

<https://www.beiten-burkhardt.com/en/imprint>

### **EDITOR IN CHARGE**

Heinrich Meyer | Lawyer

© BEITEN BURKHARDT Rechtsanwalts-gesellschaft mbH.

All rights reserved 2020.

### **PLEASE NOTE**

This publication cannot replace consultation with a trained legal professional.

If you no longer wish to receive this newsletter, you can unsubscribe at any time by e-mail (please send an e-mail with the heading "Unsubscribe" to [newsletter@bblaw.com](mailto:newsletter@bblaw.com)) or any other declaration made to BEITEN BURKHARDT.

## YOUR CONTACTS

### **DUSSELDORF**

Cecilienallee 7 | 40474 Dusseldorf

Tel.: +49 211 518989-124

Christian Schenk | [Christian.Schenk@bblaw.com](mailto:Christian.Schenk@bblaw.com)

### **FRANKFURT AM MAIN**

Mainzer Landstrasse 36 | 60325 Frankfurt am Main

Tel.: +49 756095-414

Heinrich Meyer | [Heinrich.Meyer@bblaw.com](mailto:Heinrich.Meyer@bblaw.com)

### **HAMBURG**

Neuer Wall 72 | 20354 Hamburg

Tel.: +49 40 688745-173

Torsten Cülter | [Torsten.Cuelter@bblaw.com](mailto:Torsten.Cuelter@bblaw.com)

### **MUNICH**

Ganghoferstrasse 33 | 80339 Munich

Tel.: +49 89 35065-1379

Dr. Florian Weichselgärtner | [Florian.Weichselgaertner@bblaw.com](mailto:Florian.Weichselgaertner@bblaw.com)