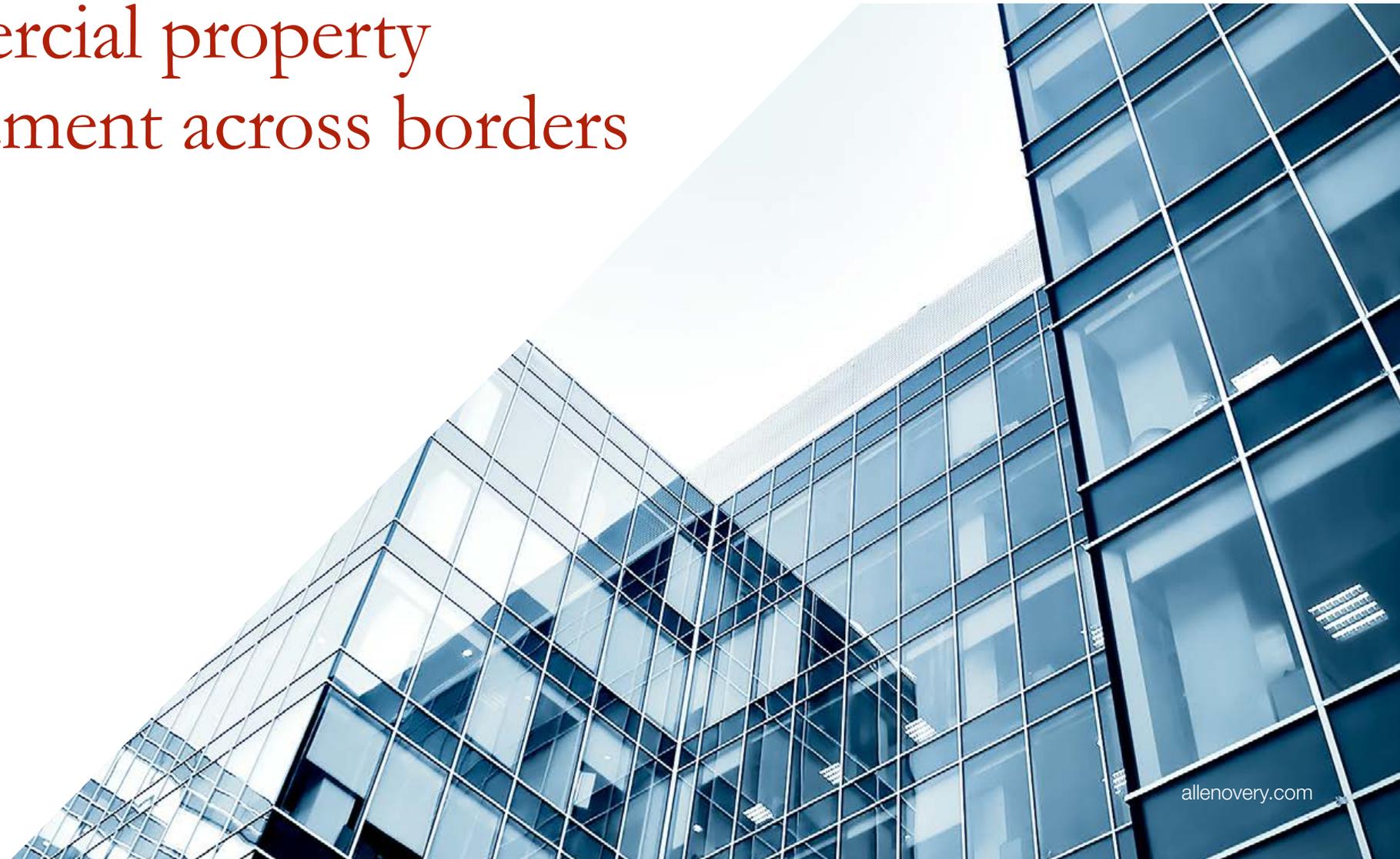


Commercial property management across borders

Germany



What can a landlord do when its tenant does not pay the rent?

Landlord remedy for failure to pay rent	Covid-19 measure	What can the landlord do now?
<p>Termination of the lease agreement</p> <p>Under normal circumstances, the landlord can terminate the lease with immediate effect for cause. In the event of payment default as described in section 543 (2) no. 3 of the German Civil Code (<i>Bürgerliches Gesetzbuch</i>; BGB), such cause will be deemed to exist if the tenant defaults on the rent or a not insignificant portion of the rent for two consecutive payment dates or has fallen into rent arrears over a period spanning more than two payment dates in an amount equal to two months' rent.</p>	<p>As of 1 April 2020, the German legislature introduced an extraordinary protection against termination in article 240 section 2 of the Introductory Act to the German Civil Code (<i>Einführungsgesetz zum Bürgerlichen Gesetzbuche</i>; EGBGB). This states that the landlord is not permitted to terminate a lease agreement relating to property or indoor space purely on the grounds that the tenant failed to pay all or part of the rent due in the period from 1 April 2020 to 30 June 2020, insofar as such failure to pay was exclusively the result of the impact of the Covid-19 pandemic. If the tenant is able to credibly demonstrate the link between its inability to pay and the effects of the Covid-19 pandemic, termination pursuant to section 543 (2) no.3 BGB is therefore ruled out.</p> <p>This provision no longer applies, however, to any payments which the tenant failed to make after 30 June 2020 and has not been extended by the legislature.</p> <p>Whether or not termination on the grounds of non-payment is justified after this date depends on the level of arrears owed by the tenant. This in turn is based on the actual rent owed by the tenant. This is where another piece of Covid-19 legislation passed by the German government comes into play, with the aim of strengthening the tenant's negotiating position. As of 31 December 2020, the following provision contained in article 240 section 7 EGBGB came into force: If government measures imposed to combat the Covid-19 pandemic have rendered it impossible to use leased non-residential property or indoor space for the tenant's business or only possible subject to material limitations, it is assumed that circumstances as described in section 313 (1) BGB which became the basis of the contract have significantly changed since its conclusion.</p> <p>The government has thus confirmed that the principle of frustration of contract is fundamentally applicable. This in turn keeps the option of performing a rent adjustment open, provided it can be proved that all other requirements, including in particular the fact that it would be unreasonable to expect the tenant to stick with the original contract, have been met. In this context, the legislature has set out that in certain exceptional circumstances, the appropriate legal consequence may be to cancel rather than to amend the lease (section 313 (3) BGB).</p>	<p>Where a tenant failed to make payments after 30 June 2020, the landlord may thus lawfully terminate the contract on these grounds.</p> <p>If, however, the tenant requests an adjustment of the rent in line with section 313 BGB on account of the Covid-19 pandemic, termination on account of payment default may be rendered unjustified because the threshold amount specified in section 543 (2) no. 3 BGB has not been reached.</p> <p>Termination, in particular following a tenant request for adjustment of the rent, is thus subject to particular risk due to the rent adjustment via section 313 (1) BGB, as promoted by the government.</p>

Landlord remedy for failure to pay rent	Covid-19 measure	What can the landlord do now?
Pursuing securities or liable third parties		
<p>The landlord may pursue the security provided by the tenant under the lease or approach any guarantors acting on the tenant's behalf.</p>	<p>No specific Covid-19 legislation applies in this respect, but the potential rent adjustment referred to as above resulting from the frustration of the contract will apply.</p>	<p>The landlord may use the rent security to satisfy its claims. At the same time, as soon as the landlord requests that the security be topped up again, the tenant is likely to react by claiming a rent adjustment on the basis of section 313 (1) BGB. The same applies where claims are raised against any guarantor acting for the tenant.</p>
Seeking court judgement		
<p>The landlord may sue the tenant for payment of the rent by filing a claim for performance with a civil court.</p>	<p>In the context of a claim for payment filed by the landlord, the tenant will generally raise the objection that it is not obliged to pay the rent or is obliged to pay only a reduced amount, and thus the court proceedings will often also address questions relating to a rent adjustment. As of 31 December 2020 under section 44 of the Introductory Act to the German Code of Civil Procedure (<i>Gesetz betreffend die Einführung der Zivilprozeßordnung</i>; EGZPO), proceedings relating to the adjustment of rent for non-residential property or indoor space on account of governmental measures to combat the Covid-19 pandemic are to be handled with priority and on an accelerated basis.</p> <p>Whilst this has no impact in terms of substantive law it is also beneficial to tenants. The potential rent adjustment on the basis of a frustration of contract referred to above will also apply.</p>	<p>The landlord may launch legal action to pursue its claim for payment. But such legal action would expose the landlord to not insignificant procedural risks. No ruling has as yet been passed at the highest instance on the question of the duty to pay rent during ongoing restrictions on account of the Covid-19 pandemic. No consensus can be identified in the judgments passed so far by courts at various lower levels.</p> <p>The decisive element will be whether the tenant can convincingly prove that it would be unreasonable in the sense of section 313 (1) BGB for it to be expected to stick with the original contract. In this context, it is necessary to comprehensively investigate both in general terms and for each individual case whether and to what extent the governmental restrictions have had a traceable impact on the tenant's business, i.e. manifested in a substantial (e.g. year-on-year) decline in revenues or on the basis of other quantifiable parameters. It will also be necessary to verify whether the tenant received any public or other subsidies which it could use to at least partly compensate for lost revenues resulting from governmental restrictions and whether expenses were reduced as a result of short-time work or reduced procurement of goods. Moreover, in some instances the courts viewed relatively short closures of approximately one month to the detriment of the tenant's case. In this context, it is also necessary to take into account whether the tenant can use the space for other purposes, for instance as storage for online trading, click-and-collect or similar arrangements. Overall it may be said that the judgments show a slight tendency in favour of landlords. At the same time, we must wait and see how the courts will react to the ripple effects of the new legislation relating to section 313 BGB.</p>
Agreement with the tenant: adjustment of the rent		
<p>The landlord may endeavour to reach an out-of-court settlement with the tenant on a (temporary) adjustment of the rent.</p>	<p>The government hopes that the new addition in article 240 section 7 EGBGB will encourage this approach. The intention is to appeal to both parties' willingness to negotiate.</p>	<p>The landlord should attempt to reach a mutually agreeable solution with the tenant. In this context, clear provisions for the respective forms of restrictions due to the Covid-19 pandemic, from complete closure of businesses to a restriction of customer numbers per square metre, can be determined.</p> <p>The judgments passed by the Regional Courts of Mönchengladbach and Munich I can provide some orientation; a rent adjustment of 50% was ordered in these cases, where complete closure had been imposed on the rented retail premises. This 50:50 arrangement has already been adopted as a practical solution in a number of cases in the market.</p>

Key Contacts

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