

INITIAL LEGAL ASSESSMENT OF THE CORONA-CRISIS EFFECTS AS OF 16 MARCH 2020

1. Introduction

- 1.1 Over the past few days, the Austrian government has adopted a number of far-reaching measures designed to contain, or at least slow down, the further rapid spread of the novel corona virus SARS-CoV-2, and the disease COVID-19 triggered by it, in order to prevent the health system from becoming overloaded because of an excessive number of patients requiring treatment at the same time. The aim of all these measures is to significantly limit contacts between people in physical proximity, and thus reduce the transmission of the virus.
- 1.2 These measures have an extensive impact on the economic life of businesses, employers, and workers. We have therefore summarized the current legal effects for you below.

2. Government Orders

- 2.1.1 The Federal Minister for Social Affairs, Health, Care, and Consumer Protection has issued temporary orders to prevent the spread of COVID-19¹, prohibiting people from entering shops and restaurants², with some exceptions.
- 2.1.2 Accordingly, many of these businesses are wondering whether they are obligated to continue paying the full rent for their establishments.

3. (Temporary) Inability to Use the Property

3.1 Laws regulating the reduction of rent

- 3.1.1 Articles 1096 and 1104 of the Civil Code of Austria (ABGB) regulate the reduction of, or exemption from, rent obligations in a situation such as the current COVID-19-Pandemic:
- (a) § 1096 Para 1 Sentence 2 ABGB states that the rent may be reduced if the property is defective and therefore cannot be used to the agreed extent, or for the agreed purpose.
- (b) § 1104 ABGB states that the rent may be reduced if extraordinary events prevent the property from being used to the agreed extent, or for the agreed purpose. The law expressly mentions fire, war, or epidemic. This list is not exhaustive.³ According to case

¹ BGBl 2020/96.

² At the time of this information, the orders of the Federal Minister of Social Affairs, Health, Care, and Consumer Protection on the hours the hospitality industry is allowed to be open (Federal Law Gazette 2020/97), require closure at 3 p.m. in order to prevent the spread of COVID-19. However, this Ordinance expires after 16 March 2020 and, pursuant to Ordinance Federal Law Gazette 2020/96, the hospitality industry will be ordered to close completely starting on 17 March 2020.

³ OGH RIS-Justiz RS0020783.

law, § 1104 ABGB covers all natural events that affect a significant number of people and are not controllable by humans, such that no individual can be expected to pay compensation for the consequences. In addition to the examples in the statute, case law includes other events which are not caused by the contracting parties, such as sovereign acts (measures of an occupying power, such as confiscation)⁴, fishing out (depletion of natural resources)⁵, and terrorist attacks.⁶

- 3.1.2 The result of these provisions is that the landlord bears the cost whenever the property is defective, and at any time that the property cannot be used as agreed. It does not matter whether the landlord is responsible for the loss of use, or whether it is caused by natural events.⁷ The liability attaches, regardless of fault.

Note: § 1104 ABGB expressly lists *epidemic* as a natural cause that exempts a party from having to pay rent, to the extent a property cannot be used. The case law also states that an event not caused by the contracting parties, such as a sovereign act, can be a reason to stop paying rent under § 1104 ABGB.⁸ A reduction in rent is therefore perfectly conceivable.⁹ However, this is a novel situation with no truly comparable precedent, so it is impossible to say for certain. The facts of each individual case would have to be considered in order to receive a definitive legal recommendation (wording of the rental agreement, industry, possibility of use for other types of business, duration of the contract, duration of the loss of use, etc.).

3.2 Extent of the rent reduction

3.2.1 *In general*

The prevailing view is that the reduction covers all rent components, including public charges, operating costs, etc.¹⁰

3.2.2 *Complete loss of use*

If there is a complete loss of use caused by an extraordinary event, the rent is reduced to zero, for both Rentals and Leases. (Austrian law has two kinds of tenancies, called "Rental" (*Miete*) and "Lease" (*Pacht*) in this document.)

⁴ OGH RIS-Justiz RS0038602 bzw RS0023985.

⁵ OGH RIS-Justiz RS0024903.

⁶ OGH RIS-Justiz RS0021342.

⁷ Lovrek in *Rummel/Lukas*, ABGB⁴§ 1096 Rz 1 (Stand 1.5.2017, rdb.at).

⁸ Vgl OGH RIS-Justiz RS0038602 bzw RS0023985.

⁹ This is the case whether the Austrian Landlord and Tenant Act (MRG) applies fully or only partially: Section 7 MRG says a landlord must restore the property in certain cases if the loss of use is complete and accidental. Section 1104 ABGB (the right to a rent reduction) applies regardless of whether Section 7 MRG applies or not. Although the measures taken by the Federal Government are only temporary in nature, in the case of the COVID 19 epidemic, it is not possible for the *landlord* to restore the property to a useful condition, so § 1104 ABGB also applies to tenancies fully regulated by MRG.

¹⁰ *Iro/Rassi* in *Koziol/Bydlinski/Bollenberger* (Hrsg), *Kurzkommentar zum ABGB*⁵ (2017) § 1096 Rz 9; *Riss* in *Kletečka/Schauer*, *ABGB-ON*^{1.02}§ 1096 Rz 31 (Stand 1.10.2016, rdb.at)

3.2.3 *Partial loss of use*

For a partial loss of use caused by an extraordinary event, § 1105 ABGB differentiates between Rentals and Leases:

- (a) For a Rental, the rent will be reduced proportionally. In practice, the percentage of rent due will be calculated based on the loss of use.¹¹
- (b) For a Lease, only agreements with a term of one year or less qualify for a rent reduction under § 1105 ABGB.¹² Additionally, the loss of use must be at least 50%.
- (c) Since the distinction between a Rental and a Lease is very complex and nuanced, each contractual relationship must be individually assessed. For example, before 2006, most shopping center tenancy agreements were considered to fall under Lease rules, but since that time have mostly been considered to fall under Rental rules.

Whether the property can be "partially used" depends on the language concerning use in the contract. Here are a few examples:

- (a) **Fashion retailer:** The orders issued over the past few days prohibit customers from entering the premises of clothing stores, which means the stores cannot serve their purpose. If the rental agreement stipulates that the property is intended to be used exclusively for fashion retail, the rent may be reduced to zero.
- (b) **Restaurant:** The orders affect restaurants as well, but provide an exception for businesses that offer delivery services. If the rental agreement stipulates that the property is intended to be used as a restaurant with delivery service, the rent may be reduced only partially, because the delivery service may still operate.
- (c) **Time period before the official order:** Some tenants suffered loss of use from the COVID 19 pandemic even before the closure was ordered. The law does not require an official order for a rent reduction to be valid, so there are potential claims here. The question to be determined in each case is whether a business can be reasonably expected to continue operating on the property. Some businesses were not ordered to close, but have directed employees to work completely from home if possible, in order to aid the government's efforts.

3.3 Burden of proof

The parties each carry the burden of proof to support their position with evidence. The tenant must prove the extent to which the property cannot be used. The landlord must prove that the

¹¹ Lovrek in *Rummel/Lukas*, ABGB⁴§ 1096 Rz 111 (Stand 1.5.2017, rdb.at); Riss in *Kletečka/Schauer*, ABGB-ON^{1.02}§ 1096 Rz 31 (Stand 1.10.2016, rdb.at)

¹² The legislature assumed that for longer terms, reduced income from one year would be offset by increased income from subsequent years: Lovrek in *Rummel/Lukas*, ABGB⁴§ 1108 Rz 6 (Stand 1.5.2017, rdb.at)

loss of use was caused by an extraordinary event, because it is to the landlord's benefit if they do not have to restore the property in that case.¹³

4. Significance of Contractual Agreements

4.1.1 Although the law provides certain rights to tenants, they are not necessarily justified in withholding rent, because the facts must be evaluated in each individual case.

- (a) First, the parties must define the purpose for which the property is to be used. If the contractual language provides other available uses for the tenant, they may not demand a reduction in rent.
- (b) Second, the parties have the ability to allocate risk by agreement, so the exact language must be reviewed in order to determine whether the tenant has contractually assumed certain risks that would preclude a demand for rent reduction.
- (c) Third, the extent to which parties have the ability to contract around certain legal principles must be individually assessed. Some contractual provisions may not be effective. Standard provisions in rental agreements can be deemed to be general terms and conditions of business pursuant to § 879 para. 3 ABGB, incurring a stricter level of scrutiny.

5. Extraordinary Termination of the Tenancy

5.1 Under § 1112 ABGB, a rental agreement terminates automatically if the property is destroyed, and the landlord is not obliged to restore it (under § 1104 ABGB). The question is whether a loss of use caused by the coronavirus can be considered a destruction of the property.

5.2 A property may be destroyed physically, but also by permanent legal impossibility of use. For example, the *final* demolition order or the *final* building permit rejection would already be considered the destruction of a property.¹⁴

5.3 The government's orders to address the COVID 19 pandemic are *not permanent*, even if they will remain effective for some time. Therefore, these restrictions would not seem to constitute destruction of property, with the caveat that there is no relevant case law to provide further guidance.

5.4 For tenants who have the available liquidity, it is advisable to continue paying the full rent for now, stating that the payment is made with a reservation of rights. This way the payment can be disputed later, once the orders have been lifted, without running the risk of unintentionally terminating the tenancy.

¹³ OGH 12.02.1987 7 Ob 520/87.

¹⁴ OGH 30.04.2014 3 Ob 16/14w.

6. Full Payment may be Construed as Waiver of Rights

If a tenant knows they have a right to demand a reduction in rent, and they pay the full rent without reserving their rights, they may lose the ability to dispute the payment later.¹⁵ Given the case law, businesses should exercise caution in this regard.

¹⁵ Lovrek in *Rummel/Lukas*, ABGB⁴§ 1096 Rz 118 (Stand 1.5.2017, rdb.at); Iro/Rassi in *Koziol/Bydlinski/Bollenberger* (Hrsg), *Kurzkommentar zum ABGB*⁵ (2017) § 1096 Rz 11; Riss in *Kletečka/Schauer*, ABGB-ON^{1,02}§ 1096 Rz 34 (Stand 1.10.2016, rdb.at).