

COVID-19 Update

Real Estate

30 March 2020

Coronavirus and commercial leases

The emergency measures taken by the Swiss Federal Council in response to the COVID-19 pandemic has forced various businesses throughout Switzerland to temporarily close their doors. The resulting effects for affected businesses are drastic. Last Friday, the Swiss Federal Council enacted further COVID-19 related regulations to grant tenants affected by the COVID-19 emergency regulations extended deadlines to pay overdue rents before the landlord can terminate the lease. The Swiss Federal Council further called upon tenants and landlords to seek measured and bipartisan solutions.

The Swiss Federal Council has taken a set of measures to curb the spread of COVID-19, inter alia prohibiting a vast number of businesses (shops, restaurants, bars, etc.) from being open to the public (lockdown). The resulting effects for affected businesses and their liquidity are drastic, forcing them to take all available measures to ensure their continuing existence as a going-concern. Such measures may include filing for hardship indemnities (Kurzarbeitsentschädigungen / Indemnité en cas de réduction de l'horaire de travail) to reduce their labour costs, applying for state-backed bridge financings at zero interest to re-establish liquidity and cover remaining fixed costs such as rent payments and profiting from extended tax and social security payment due dates.

Despite the significant economic measures taken by the Swiss Federal Council to provide short-term support to affected businesses, a partisan controversy has ensued in respect of commercial

leases as to whether or not affected businesses have the right to suspend or reduce their rent throughout the lockdown.

Last Friday, the Swiss Federal Council enacted a further emergency ordinance in response to the ongoing controversy to mitigate the consequences resulting from the COVID-19 pandemic under ongoing leases (COVID-19 Lease Ordinance). Pursuant to the COVID-19 Lease Ordinance:

- › it remains permissible to move in and out of leased premises if the applicable recommendations from the Swiss Federal Health Agency regarding hygiene and social distancing are adhered to; and
- › if tenants should default in the payment of the rent or ancillary costs as a result of the emergency measures taken by the Swiss Federal Council to curb the spread of COVID-19, the

minimum deadline for landlords to request payment and, upon failure to do so, to terminate the lease, has been extended from 30 days to 90 days for most residential leases and for all commercial leases. For usufructuary leases (Pachtverträge / bails à ferme) the minimum deadline has been extended to 120 days.

With this ordinance, the Swiss Federal Council is supporting affected businesses by granting them de facto an extended standstill before landlords will be entitled to terminate the lease following a tenant's payment default. By contrast, the ordinance does neither extend the payment due dates nor alter default interest to accrue in case of payment defaults. The ordinance entered into effect on March 28, 2020 and will remain in force until May 31, 2020. It applies to all rent payments, which fall due between March 13, 2020 and May 31, 2020.

While this will deserve a more in-depth analysis, the Swiss Federal Council – advised by the Swiss Federal Office of Justice (Bundesamt für Justiz / Office fédéral de la justice) and the Swiss Federal Office for Residences (Bundesamt für Wohnungswesen / Office fédéral du logement) – may have helped to resolve the partisan controversy that has been ensuing between tenant and landlord associations and their representatives and legal experts alike following the enactment of the lockdown as to whether affected tenants continue to owe the rent or have a right to reduce it due to and throughout the lockdown. This is because the ordinance does not effect a reduction of, or exemption from, the obligation to pay the rent as tenant associations have demanded. Rather, the ordinance conceptually presumes a payment default and, as such, in principle a continuing obligation to pay the rent and ancillary costs throughout the lockdown.

The Swiss Federal Council further called upon tenants and landlords alike to enter into negotiations in order to find measured, balanced and mutually acceptable solutions. Measured and

well-balanced solutions taking due regard to the specific circumstances of any given case will in most cases be of vital interest to affected tenants and landlords alike to facilitate a sustainable continuation of the leases beyond the COVID-19 crisis.

While the COVID-19 Lease Ordinance does not directly address any substantive legal issues, it certainly takes pressure off the current controversy and lays ground for sensible solutions on a case-by-case basis. In assessing each case individually, it must be considered whether the agreement contains relevant provisions addressing the current circumstances, such as force majeure clauses or fully turnover-based rents. It should also be paid due regard to the fact that both parties are held to mitigate damages caused by the COVID-19 pandemic. Affected businesses are therefore well advised to ensure that reasonably available other measures to mitigate the negative effects of the crisis (such as applying for hardship indemnities, state-backed bridge financings, etc.) have been taken.

Whether tenants have a genuine claim for exemption from, or reduction of, the rent (e.g. due to the leased premises being defective or based on the *clausula rebus sic stantibus*) will ultimately have to be decided by the courts. However, taking into account that the judicial system will not yield clarity in a timely manner and that precedents from the Swiss Federal Supreme Court are years away, either side will be well advised in many cases to seek a solution beforehand in order to remove the lingering uncertainties as quickly as possible and establish the basis for a continuing and sustainable lease.

Our real estate team is available to assist in assessing appropriate options for affected parties paying due regard to the particulars of any given case.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this COVID-19 Update is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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