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Implications of the Coronavirus on Real Estate

After the initial primarily medical issues, the SARS-CoV-2 virus (hereinafter referred to as "**coronavirus**") is increasingly affecting all other areas of life. For the real estate industry, the main question is what effects does the coronavirus have on contracts which have already been concluded, in particular whether the coronavirus (1.) can be regarded as an event of force majeure, (2.) can justify impossibility of performance or (3.) can represent a loss of the basis of the transaction. It is also questionable who is to blame for what during these times (4.). In addition, some special features of individual types of contracts must be considered, in particular (5.) leases and (6.) contracts for work and services as well as (7.) possibilities of compensation for all such contracts generally.

1 Force Majeure

As a result of the coronavirus, we are frequently being confronted with the term force majeure. However, this term is not uniformly defined.

In the context of travel law, the German Federal Court of Justice ("**BGH**") has given a ruling: **force majeure** is an extraordinary event outside the company, externally caused by elementary natural forces or actions of third parties, which is not foreseeable according to human insight and experience and cannot be prevented or rendered harmless by economically acceptable means, even exercising the greatest care that can reasonably be expected (BGH NJW 1986, 2312; BGH 2017, 2677). In several decisions on travel law, epidemics have already been classified as force majeure (Employment Court ("**AG**") Augsburg, judgment of 09.11.2004 - 14 C 4608/03; AG Homburg judgment of 02.11.1992 - 2 C 1451/92-18). In addition, official measures such as embargoes or restrictions on production can also be classified as force majeure (Higher Regional Court ("**OLG**") Frankfurt a.M. judgment of 16.09.2004 - 16 U 49/04). In 2003, the SARS epidemic was classified as force majeure according to § 651 German Civil Code ("**BGB**") old version (travel contract). Since

the end of January 2020, Chinese companies have been able to apply for so-called Force Majeure Certificates from the China Council for Promotion of International Trade (CCPIT). In this context, such a process or the granting of corresponding certificates may possibly be used as an indication of the existence of force majeure.

In the absence of a special statutory regulation - with the exception of the travel contract, the so-called innkeeper's liability in German law or the VOB/B (German Construction Contract Procedures) - the existence of force majeure shall only result in concrete legal consequences if the corresponding contract contains an **effective force majeure clause** with corresponding legal consequences. Therefore, it must currently be examined whether epidemics or official orders based on them are explicitly regulated as force majeure, so that the legal consequences agreed upon in the contracts are to be applied to the coronavirus. However, if only the term "force majeure" is mentioned and examples such as natural disasters, strikes or armed conflicts are mentioned, the contract must be interpreted. If the clause does not define what is meant by force majeure or if the contract does not contain any provision on this matter, it may be necessary to refer to the quoted case law on travel law.

If the contract contains a force majeure clause, the legal consequences of this clause must be observed. In particular, two scenarios are conceivable: Either the contract is automatically terminated or the contractual obligations are suspended for a certain period of time and reinstated after the end of the event. In view of the (hopefully) time limited effects of the coronavirus, a termination of the contract, for example in the case of leases, seems inappropriate as a rule, not least because - e.g. in the case of a lease - the tenant would then no longer have a permanent establishment with the help of which he could clear any arrears of payment that may have occurred. If there are no contractual agreements for force majeure and even if an interpretation of the contract does not lead to a different result, the legal regulations are to be used, in particular § 275 BGB (impossibility) and § 313 BGB (interference with the basis of the contract).

2 Impossibility §§ 275, 326 BGB

In accordance with § 275 BGB, the claim to the performance is excluded if it is impossible for the obligor or for anyone else. Rights to refuse performance are recognised if the performance could only be provided with unreasonable effort. The same shall also apply in the event of temporary impossibility of performance. According to case law, temporary impossibility is to be equated with

permanent impossibility if the achievement of the purpose of the contract is called into question by the obstacle and one party can no longer be expected to perform the service.

However, with regard to the tenant's obligation to pay rent, for example, the principle "money is to be paid" applies, so that financial bottlenecks - even if they are caused by the fact that the rented property is not (fully) usable - do not make it impossible to pay rent. Therefore, only the landlord's obligation to grant the use of the rented property can be/become impossible. For this purpose, the concrete contractual agreements on the lease object and the purpose of use as well as the division of the risks between landlord and tenant must be interpreted and evaluated. With the entry into force of Art. 240 § 2 of the Introductory Act to the BGB as amended on 1 April 2020, the special legal regulations, which are limited to an exclusion of termination, as well as their legal justification, according to which the claims to payment of rent are to remain expressly unaffected, tend to argue against assuming impossibility. A blanket statement is therefore ruled out, but of course our experts will assist you with advice and support in evaluating a specific contractual relationship.

3 Loss of the basis of the transaction, § 313 BGB

§ 313 BGB deals with the case of interference with the basis of the transaction. In the event of a serious and unreasonable substantial impediment to performance, the contract may be adjusted (in particular with regard to a fee to be paid) or terminated. Whether a coronavirus-induced impediment to performance will lead to a loss of the business basis is once more a question of the individual case. In view of the **strict requirements** for such a loss and the foreseeable temporary nature of the effects of the coronavirus, this seems rather questionable. As in the case of impossibility (see no. 2 above), Art. 240 § 2 Introductory Act to the BGB as amended also argues against a loss of the basis of the transaction.

4 Fault: claims for damages and default

Possible liability from secondary claims for the consequences of failure of performance and delay in performance remains unaffected. The law requires (an important exception is the guarantee liability of the landlord for initial defects of the leased property) that failure and delay are the responsibility of one of the contracting parties.

4.1 According to § 280 (1)(2) BGB, fault is presumed in contractual constellations. In order to escape liability, therefore, the **proof of exoneration** must succeed. In principle, there is no fault if the event is accidental in the legal sense. This is the case when force majeure is involved. This would succeed relatively often in the case of viral diseases in general and the coronavirus in particular. In the case of culpability, it would be conceivable at most that a contracting party would be in breach of statutory or official duties of care (e.g. travel to the risk area, opening despite official prohibition); even then, the other requirements of compensation law must also be taken into account (e.g. causality with lawful alternative behaviour).

In particular, care must be taken to ensure that **not every delivery bottleneck** leads to delays due to the coronavirus. Rather, it is crucial to examine the scope of the specific contractual obligations in each individual case and to investigate whether a procurement risk has been assumed. Corresponding evidence that can be used in court must be collected and kept available, as it is to be expected that such cases will also be the subject of litigation in the future.

4.2 In individual cases, however, liability without fault may be agreed, for example by means of a **promise of guarantee**. If one of the parties to the contract has guaranteed certain circumstances, the effects of the coronavirus do not change this, unless the parties have agreed on recourse exceptions for such and similar cases (e.g. by force majeure clause, see No. 1 above).

4.3 In any case, **obligations to mitigate damages** (e.g. duties of information and notification) must be observed. Should a claim be asserted, special attention must be paid to a timely and effective complaint in accordance with § 377 German Commercial Code.

5 Initial assessment of the legal situation regarding leases

With leases, it is always important to carefully interpret and consider the exact provisions of the lease. This applies in particular to the agreed leased property and the specific purpose of the lease as well as the interface of the division of areas of responsibility and risk between tenant and landlord. This also applies in particular to the question of risk allocation in the event that permits are granted or not granted. You will find the new rules applicable to leases here.

5.1 Termination

In the event of termination of the lease, the contractual provisions must be given priority. In addition, the mandatory statutory extraordinary circumstances for termination without notice, e.g. in accordance with § 543 (1) of the BGB, remain in force if the continuation of the lease cannot be reasonably expected of one of the parties to the contract until the end of the term of the contract.

An important reason **for the tenant** may in particular exist if the tenant is deprived of the contractual use of the leased property (§ 543 (2)(1) BGB). A withdrawal of the lease object is possible in the event of an official prohibition of use. Previous case law was mainly based on prohibitions from restaurant law or building regulations (MüKo BGB/Bieber § 543 marginal note 22; BeckOK-Mietrecht/K.Schach § 543 marginal note 13). Here it is particularly decisive whether the prohibition of use has its cause in the condition of the premises or whether the operation of the tenant is prohibited per se. In the latter case, a right of termination without notice is likely to cease to exist. Furthermore, a right of termination is negated according to § 543 BGB, since in the case of the coronavirus the basis of the possibility of use which is missing due to an official prohibition order lies neither in the sphere of the landlord nor in the general condition of the premises.

The legislator reacted to a **landlord's notice of termination** due to arrears in rental payments caused by coronavirus-related revenue losses by passing the Law to Mitigate the Consequences of the COVID 19 Pandemic in Civil, Insolvency and Criminal Law on 25 March 2020. Subject to the approval of the Bundesrat, Art. 240 § 2 Introductory Act to the BGB as amended will enter into force from 1 April to 30 June 2020. This special provision for leases excludes landlords' notices of termination, if these are solely based on non-payment of rent in the period from 1 April to 30 June 2020, if the non-payment is due to the coronavirus pandemic. In view of the inherent uncertainty about the further course of the coronavirus pandemic, the German government is already authorized to extend this period to 30 September 2020 by statutory order, and even beyond that date with the approval of the Bundestag. This statutory special right of termination does not expire until the end

of 30 June 2022. The causal link between the coronavirus and the non-performance must be made credible by the tenant because the tenant is solely in his own sphere of influence. This can be done, for example, by means of an affidavit, submission of documents on economic development, application for state benefits. For this purpose, concrete facts must be presented from which a predominant probability that the non-performance is due to the coronavirus can be concluded. Naturally, documents submitted by tenants or claims made by them can easily become the subject of disputes. The exclusion of termination is semi-mandatory, i.e. no deviations can be contractually agreed at the expense of the tenant.

Furthermore, it must be doubted whether, in view of this clear statutory provision, a tenant will be able to successfully assert the special circumstances of the coronavirus consequences when weighing up the necessary interests within the framework of an examination of the appropriateness of a termination in good faith, § 242 BGB.

In addition, other reasons for termination, such as repeated substantial breaches of contractual obligations, remain unaffected. Against the background that the legislator seems to have overlooked the fact that if the rental payment obligation is maintained, the landlord should be entitled to make use of any rent guarantees (see also no. 5.2, loc. cit.), the follow-up question arises as to whether the landlord may give extraordinary notice of termination for good cause because the rent guarantee has not been replenished. Even if technically such a reason for termination is generally accepted and should not be covered by the exclusion of termination, there are some arguments in favour of not permitting such terminations according to the meaning and purpose of the law, so that this should be used very cautiously.

5.2 Rent reduction

The question increasingly arising is whether the rent can be reduced as a result of the effects of the coronavirus. The focus is on the tenants' efforts to avoid negative cash flow by immediately reducing the expenditure on rent. Before turning to the question of whether the coronavirus and the resulting restrictions might constitute a defect entitling the tenant to a rent reduction, it must first be examined whether and to what extent the right to reduce the rent is **restricted by the lease**. Very often under commercial leases the tenant is only entitled to a rent reduction if the defect is notified a certain time in advance or the defect is legally established or undisputed. If a reduction of rent is to be notified a certain time in advance, the rent reduction is only suspended until the corresponding deadline after the tenant has given notice. With regard to the other cases, it is unlikely that it will be

possible to obtain a judgment in the short term, nor is it likely that landlords will voluntarily concede a pandemic rent shortfall. In these cases, the question of whether a pandemic is to be regarded as a defect will only be answered later in a possible recovery process by the tenant.

Irrespective of the generally customary contractual restrictions of the reduction in rent, an official prohibition of use is generally considered a defect of the lease object if it is based on an aspect attributable to the tenant's area of risk. For a reduction, the **distribution of risks and duties** as described above in the lease is decisive. On the legal consequences side, the reduction at least offers the possibility of adequately taking into account remaining residual uses of the leased property (as a warehouse or office) by means of a lower reduction rate. This applies accordingly to restrictions of use that are only pro rata temporis on a monthly basis.

The landlord is also well advised to fulfil his contractual secondary obligations and **obligations to mitigate damages** and to work towards ending the prohibition of use within the scope of his possibilities. For example, proof of special infection-protection measures (such as minimum distance between the persons involved or similar) can help. It is recommended to carry out such measures in coordination with the tenant and in particular to agree on the obligation to bear the costs.

From the tenant's point of view, the worst of all solutions is the **arbitrary suspension or reduction of the rent payment**, possibly with reference to a rent deficiency. If the tenant regularly falls into arrears with a not inconsiderable amount of two months' rent, the landlord may - subject to the exclusion of termination as described above under point 5.1 - terminate the tenancy extraordinarily and without notice. This also applies if the reduction of the rent was justified with the pandemic as a rental deficiency and a court later determines in the event of a dispute that the pandemic does not constitute a rental deficiency and the reduction was inadmissible. The tenant is threatened with further substantial consequences if he/she terminates the lease for cause. The landlord could claim damages from the tenant. And in the worst case, this would consist of lost profit in the amount of the agreed rent for the remaining term of the lease or in compensation for the difference to a lower subsequent rent.

The legislator has made it clear that the **obligation to pay rent** remains unaffected by the exclusion of termination described above under point 5.1. This indicates that the coronavirus or the resulting restrictions on use do not constitute a defect of the leased property. Late payment shall automatically constitute default at the contractually agreed due date (which is customary in the market), with the consequence that interest on arrears shall be payable at a rate of 9 percentage points above the base rate, i.e. currently 8.12% p.a. The landlord should thus be entitled to realise a rent deposit

without obligation (see also above under point 5.1 loc. cit.). In the case of bank guarantees, which are widely used in the market, the question arises (unless they are issued on first demand) whether the guarantors can refuse to pay out the guarantee on the grounds that this would be an abuse of law and could run counter to the objectives of the exclusion of termination. On the other hand, a cash deposit could actually have a liquidity-saving effect for both parties because it saves the tenant the considerable interest on arrears and enables the landlord to maintain his cash flow. However, the landlord is then no longer able to use the rent security for further security purposes (such as additional costs to be paid, cosmetic repairs or repair of damage). The same applies to further security mechanisms such as the **submission of the tenant to immediate enforcement** (which is particularly common in the Berlin market). In the case of eviction, the termination of the tenancy, which requires a notice of termination, will probably not be required. However, a bailiff will not have to examine this question under enforcement law, but will enforce it independently. However, the possible inadmissibility of a termination would have to be determined in a later court case, in which the strict liability of a creditor who enforces without justification would also have to be decided. On the other hand, the same applies to the subjection to enforcement of payments into the tenant accounts, which sometimes even occurs, as to the realisation of the rent security deposit (see the immediately preceding paragraph). It remains to be seen whether and, if so, how the legislator will react when it becomes aware of the aforementioned “gaps” in the intended tenant protection.

5.3 Compensation

Claims for damages in favour of one party seem to be possible only under very specific circumstances due to the requirement of fault - despite the presumption rule applicable in the contractual area. A conceivable example would be the commencement of a lease at the time of the validity of a prohibition of use order, where it could be argued that this constitutes an initial defect for which (unless excluded - as is often the case in the market) the strict legal guarantee liability of the landlord could apply.

5.4 Shopping centres

There are special features of leases to be found in **shopping centres** in two respects: on the one hand, there are often **special regulations** in the form of obligations on the part of the landlord or tenant regarding the operation of the shopping centre or the shop. On the other hand, current official prohibitions sometimes explicitly concern the operation of a shopping centre.

Nevertheless, it remains to be examined in each individual case how far the respective obligation and the respective order extend, e.g. a tenant will be able to continue to use the rented property as a warehouse and office - despite a dormant shopping operation.

Conversely, it should be clear that (premature) **arbitrary closure by the tenant** without an official order does not affect his obligation to pay the rent and does not justify any other claims against the landlord. Even a duty to operate would still have to remain effective in corresponding application of the previous highest court rulings on rental deficiencies. The parties move in a grey area when they follow a recommendation (e.g. of the Robert Koch Institute). In these cases, there is, on the one hand, a strong case for possibly already considering this as an obligation to act. On the other hand, it can also be argued that these do not constitute a legally binding obligation and that therefore appropriate measures are taken at the (also economic) risk of the respective party.

5.5 Hotels

As with shopping centres, special features apply to hotels as operator properties.

As a rule, hotel lease agreements provide for an **operating obligation** on the part of the operator. This is often particularly far-reaching - regularly 24/7 365/366 days p.a. Closing the hotel to reduce running costs could therefore lead to claims for damages by the landlord, contractual penalties and extraordinary termination without notice for good cause. It is also possible, however, that the obligation to operate the hotel due to the loss of the basis of the business in accordance with § 313 BGB (German Civil Code) could cease to apply as a result of an amendment to the contract because the tenant is no longer able to operate the hotel economically as a result of the coronavirus.

However, the lack of profitability of the hotel operation affects the entrepreneurial **risk of use and profit** normally assumed by the hotel operator. The mere fact that the landlord has agreed to an operating obligation of the tenant is an indication that the landlord deliberately wanted to burden the tenant with the risk of the lack of profitability of the hotel operation. Especially in the case of an agreed turnover-based rent, the operating obligation should regularly protect the landlord and oblige the tenant to generate the highest possible turnover-based rent. Against an unlimited operating obligation, however, it could be objected that even if a turnover-based rent is agreed upon, an operating obligation would be in vain if, as a result of the coronavirus, no significant turnover could be generated. In addition, it must be taken into account that landlords are pursuing the interest of maintaining the attractiveness of the hotel property with the operating obligation. A hotel that

has been taken out of operation is often tainted by the fact that a hotel cannot be successfully operated at this point, which naturally has an impact on the value of the hotel property. However, this should not apply if the hotel cannot be successfully operated because the hotel guests do not visit the hotel for exogenous reasons. In such cases, strict insistence on the operating obligation would not have a positive effect for the landlord and would ultimately serve only to damage the tenant. Such conduct is likely to violate the principle of good faith (§ 242 BGB) and is not worthy of protection. Ultimately, every single lease agreement will have to be examined individually to determine whether an exception to the duty to operate can be justified. For the reasons mentioned above, there are probably good reasons to justify a deviation from the operating obligation in coronavirus-related cases via the legal institution of the loss of the basis of the transaction.

6 Initial assessment of the legal situation regarding contracts for work and services

6.1 Delivery bottlenecks, obstruction of the provision of services, execution deadlines

Supply bottlenecks are increasingly coming into focus due to the coronavirus. Unless contractually agreed, the procurement of materials is generally the **responsibility of the contractor**. If he culpably fails to do so, this can result in a claim for damages. However, there is no such culpable breach of duty in case of force majeure. This should apply accordingly if foreign specialists are unable to return home and/or enter the country due to the coronavirus regulations of their home countries.

In accordance with § 6 (1) VOB/B (German Construction Contract Procedures), the contractor must immediately notify the client in writing if he believes he is hindered in the proper execution of the service. In addition, § 6 (2)(1)(c) VOB/B also extends the execution deadlines if **force majeure** is the cause of the hindrance. In particular, it must be checked whether the delivery bottlenecks are actually due to the coronavirus or whether the contractor is actually at fault. If there is a circumstance that leads to an **extension of the execution period** according to § 6 (2) VOB/B (German Construction Contract Procedures) and if the hindrance is duly notified, the execution period is regularly extended automatically, i.e. without further declaration by one of the contracting parties. The VOB/B therefore stipulates that the contractor can unilaterally extend the deadline by giving notice of the hindrance as a right to design. If obstructions and obstructive effects are obvious, the

corresponding extension shall take effect without further ado. However, one should not rely on this “manifestness” and instead, as a precaution, always choose the safe way of a written notification.

6.2 Termination

The BGB and also the VOB/B provide for an extraordinary right of termination for good cause. This is basically also possible in the case of breaches of duty such as default. However, the breach of duty alone is not sufficient; instead, it must lead to a profound disruption of the relationship of trust necessary for the continuation of the contract. Thus, simple default or defective performance is not sufficient. **Serious breaches of duty** are necessary, which make an immediate termination of the contractual relationship necessary (Kniffka/Koeble/Jurgeleit/Sacher-Jurgeleit 6th Part marginal note 38).

In principle, a termination of the contract by the client according to the VOB/B (German Construction Contract Procedures) due to **delay** is also possible, § 8 (3)(1) VOB/B. The VOB/B contains three types of delay: delay with the start of execution, delay with completion, and insufficient manpower, equipment, scaffolding, materials or components. If one of these three facts is present, the client can set a deadline for the fulfilment of the contract and declare that he will withdraw the order after the fruitless expiry of the deadline, § 5 (4) VOB/B. After fruitless expiry of the deadline, the client can terminate the contract in writing, § 8 (3)(2) VOB/B. However, the automatic extension of the deadline due to force majeure in accordance with § 6 VOB/B must also be taken into account here. § 6 (7) (1) VOB/B provides for a right of termination for both contracting parties if the interruption of performance lasts longer than three months.

6.3 Other possibilities of contract termination, in particular revocation of the contract according to § 323 BGB

Revocation of the contract is possible if a due service is not provided or not provided in accordance with the contract. The due date shall be determined by the deadline specified in the contract. Changes to the deadline, such as those in § 6 (2) VOB/B (German Construction Contract Procedures), must be taken into account. A non-contractual service may be provided in the event of partial or defective performance.

In the case of the coronavirus, there is likely to be a frequent delay in performance. Since a partial performance will usually already have been rendered for current contracts, a revocation of the entire contract can only be considered if there is no longer any interest in the partial performance, § 323

(5) (1) BGB. It follows from this that, in the event that the client is interested in the services already rendered, the client can only declare revocation with regard to the service not rendered. This is of particular importance in the case of building matters, because in the case of delayed construction work, the interest of the client in the work performed generally continues to exist, even or even more so if the client has the work completed by another contractor. It will therefore be difficult to justify a withdrawal according to § 323 (1) BGB if partial performance has already been rendered.

7 Compensation, in particular under the Infection Protection Act

7.1 Compensation according to § 65 Infection Protection Act

In the case of measures ordered by the authorities (e.g. closing of shops), monetary compensation in accordance with § 65 of the Infection Protection Act (hereinafter referred to as "**InfSchG**") shall be considered if, as a result of a **preventive measure**, objects are destroyed, damaged or otherwise reduced in value or another not insignificant loss of assets is caused. However, this presupposes that the object is not already afflicted with pathogens, viruses or other things harmful to health or is suspected of being so. In the latter case, such danger prevention measures are to be accepted without compensation.

The first three items of damage related to objects refer to the competent authority's power to secure and destroy objects contaminated with pathogens. As a rule, in the absence of a specific contamination when shops are closed due to the coronavirus, the fact of "causing another not only immaterial property loss" should be relevant. According to the general clause of § 16 InfSchG, the authority is entitled to take the necessary measures to avert the **dangers threatening** the individual or the general public if facts are established or "it can be assumed that such facts exist which could lead to the occurrence of a transmissible disease".

In the case of **concrete prohibition orders**, a distinction must be made between precautionary measures for the prevention of infectious diseases (such as the general clause of § 16 InfSchG) and protective measures to combat infectious diseases (including § 28 InfSchG). According to its wording, the claim for compensation in § 65 InfSchG is limited only to prevention (here: § 16 InfSchG), not also to those combating measures according to § 25 ff. InfSchG which include for example the closure of institutions pursuant to § 28 InfSchG. § 16 InfSchG and § 28 InfSchG are

mutually exclusive (Higher Administrative Court Lüneburg on school closure in case of measles on 3 February 2011, Ref. 13 LC 198/08). The transitions between preventive measures (to be compensated for) and **protective measures (without compensation)** are fluid. In particular, in the absence of previous application of these provisions, there is no administrative practice, let alone significant case law, to which recourse could be had in questions of interpretation. Accordingly, it is highly unlikely that any loss of assets following a specific infestation with the coronavirus will be subject to compensation. This also applies to prohibition orders pursuant to Section 28 of the Infection Protection Act, as issued by the Bavarian State Ministry of Health and Care on 16 March 2020. Nevertheless, it is advisable - especially in view of the announced generous handling by the Federal Government of the consequences of these extraordinary burdens caused by the coronavirus - to examine and, if necessary, assert claims for compensation against the respective state.

b)

A claim for compensation is conceivable both in favour of the tenant and in favour of the landlord (depending on which of the two has suffered a “not only immaterial loss of property”). Depending on the result of the respective concrete consideration for the individual case, the person affected by the pecuniary disadvantage arising from the temporary closure of businesses can file an application. This will often be the tenants, whereby the claim for compensation will have to be taken into account in the weighing up of interests and will eliminate a possibly otherwise existing special case of hardship for the tenant. For the landlord, the facts of the case are primarily of secondary importance, e.g. if a prohibition order leads to tenant insolvency and therefore the rent is not paid. However, this is only likely to be the case if there is a significant loss after the realisation of a rent security deposit

c)

Compensation is paid in the amount of the common value of the object. In the case of compensation for not only insignificant property damage, the person affected must not be put in a better position than he would have been without the measure. In addition, any expenses shall be reimbursed.

Within the scope of a compensation claim under § 65 Infection Protection Act, the claimant must allow any **contributory negligence** to be offset. Within the scope of his duty to mitigate damages, he is therefore obliged to examine primarily civil law options vis-à-vis his contractual partners. Since the compensation for an event ban merely compensates for the disadvantage caused by it, but

does not bring any additional profit, a claim for compensation will be considered for the companies concerned at best as ultima ratio. Before doing so, it is advisable to carefully examine whether existing **insurance policies** could be liable to pay compensation. Typically, however, such pandemic risks are excluded in insurance conditions. Nevertheless, it seems highly advisable for each party to contact their insurance brokers to check whether and to what extent the insurance policies cover business interruptions. If, for example, the landlord's insurance policy covers loss of rent due to coronavirus, this will benefit the tenant, even if the tenant does not have to bear the costs of such insurance under the incidental expenses.

7.2 Other compensation

In the course of its current statements, the Federal Government has also announced that it intends to compensate for the unreasonable hardships caused by the coronavirus. However, details of the conditions and legal consequences of such compensation remain to be determined. Eligible are **Reconstruction Loan Corporation loans**, which should be handled by the respective local bank.

This guide is only an initial discussion of the legal difficulties and challenges and in no way replaces the necessary **examination of the specific individual case and/or legal advice**. Legal statements on the implications of coronavirus can only be made on a very preliminary basis at present, as it is by nature extremely difficult to refer to relevant court rulings. This is due to the measures associated with the coronavirus (ordinances/prohibition orders), which go far beyond measures taken in the context of past epidemics and therefore have a completely different quality. If you have any questions regarding your specific contract or your specific circumstances, we will of course be happy to answer them and to provide you with advice and assistance.

PLEASE FEEL FREE TO CONTACT US!

Further insight into the coronavirus crisis:

https://deutschland.taylorwessing.com/de/coronavirus

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