

ÖSTERREICH

# Corona Virus (COVID-19) UPDATE

## Legal consequences for rent and lease of the measures taken in relation to Corona Virus (COVID-19)

***Does the lessee still have to pay rent or lease if a business is closed by the authorities due to COVID-19 or if a ban on entering the premises has been imposed?***

On 15 March 2020, temporary bans on entering the customer area of many businesses - currently in force until 22 March 2020 - were ordered as a measure to curb the spread of the Corona Virus.

§ 1104 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) regulates the instances and conditions for the remission of the rent or lease if a rental property becomes wholly or partially unusable due to extraordinary events. The legal text also mentions epidemics as a case of such extraordinary events. This also includes governmental acts such as closures or confiscation of the rental property that are not prompted by the tenant. Equally entry bans, which are equivalent to a closing, can under certain circumstances fall under this category. On 18 March 2020, the Austrian social partners expressed their legal opinion (which is not binding on the civil courts) that governmental measures with respect to COVID-19 shall be considered „extraordinary events“ and announced that discussions with the Ministry of Justice would be initiated.

However, § 1104 ABGB systematically aims at fulfilling a different purpose than that of granting the lessee of the property the possibility of exemption from the payment of rent or lease. Rather, the aim of the provision is to exempt the lessor from the obligation to restore an unusable asset.

Pursuant to § 1096 ABGB and § 7 of the Austrian Tenancy Act (Mietrechtsgesetz, MRG), the lessor of an existing object is obliged to carry out comprehensive repairs, even if the object is rendered unusable by accident (i.e. not caused by anyone). § Section 1104 ABGB is thus an exception to this obligation to restore.

Conversely, however, the leaser is also exempted from paying the rent for the period in question.

In principle, therefore, a lessee can invoke § 1104 ABGB in the event of a governmental closure of his business. The lessor does not have to (or cannot) restore the condition prior to closure and the lessee does not have to pay rent for the period of closure. In the event of an entry ban, it must be examined in each individual case to what extent the ban is equivalent to a closure. If the usability of the business premises remains at least partially intact (since it remains possible to offer a delivery service, continue to use office premises, etc.), the conditions of § 1104 ABGB may not actually be (entirely) fulfilled.

### ***Are the provisions of § 1104 ABGB compulsory?***

No! The provisions of §§ 1104 et seq. ABGB are non-mandatory and are often excluded in rental agreements. It is therefore advisable in any event to look at the rental or lease agreement to see whether separate provisions have been agreed upon.

### ***Do the provisions of §§ 1104 et seq. ABGB apply equally to rent and lease?***

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If you have any questions, please do not hesitate to contact your direct contact person or write to us at [covid19@benn-ibler.com](mailto:covid19@benn-ibler.com).

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Yes! § 7 MRG expressly refers to § 1104 ABGB for contracts subject to the MRG. The provisions of the ABGB apply in any event to lease agreements and other rental property contracts, unless otherwise agreed between the contracting parties.

***Does a right to a reduction of rent also exist for businesses which are not affected by a governmental closure but which due to accompanying measures (e.g. curfew) cannot (or can only to a limited extent) operate their business?***

Many companies are currently affected by the fact that they are required to place their employees on home office, short-time work or holidays so that they can, for example, fulfill their caretaking duties due to school closures. Other companies, for example in the retail and service sector, are dependent on customers coming to their premises to generate sales.

If, however, these businesses are not affected by an official closure or an entry ban, the business premises are not unusable from the point of view of laws governing rent and lease, so that, subject to an individual case review, a scenario pursuant to §§ 1104 et seq. cannot be assumed.

***How does an official closure or entry ban affect a contractually binding obligation to operate?***

An officially or legally ordered closure of a business or entry ban, if this is equivalent to a closure of a business, suspends a contractually binding obligation to operate. The lessor of the property may therefore not invoke it and is not entitled to terminate the contract in such a case.

***What about a (temporary) voluntary closure of a business as an indirect consequence of the measures of the COVID19 Measures Act (Maßnahmen Gesetz)?***

The question whether a lessor of a property may insist on a contractually

agreed operating obligation if a business is not affected by an official closure, but temporarily closes as a reaction to the currently recommended "social distancing", is not so easy to answer. Case-law has not yet had to deal with such a scenario, so that it must be examined on a case-by-case basis whether the justification for voluntary closure outweighs the justification for insisting on an operating obligation.

***Do §§ 1104 et seq. ABGB also apply to rental property contracts for residential purposes?***

In principle, the regulations of §§1104 et seq. ABGB also apply to residential rental agreements, but in this case there exists no unusability owing to governmental or legal measures, so that no reduction of rent can be requested for residential tenancies based on §§ 1104 et seq ABGB.

***What about accommodation contracts for short-term or medium-term rental, for example holiday homes or serviced apartments?***

Provided that the respective accommodation facility is not affected by a closure or an entry ban, it is to be assumed that the use of the individual accommodation facilities will remain usable. A guest may have restrictions in his or her holiday feeling due to official or legal measures, as he or she may not be able to use the cultural offerings in Vienna or only to a limited extent. However, as this is not part of the accommodation contract, the guest cannot demand a reduction of the accommodation fee. Other rules may apply in individual cases, if agreed additional services (e.g. cleaning) cannot be provided or can only be provided to a limited extent.