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Impact of Coronavirus Emergency on Contract Law

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The Impact of Covid-19 in German Contract Law  
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# The Impact of Covid-19 in German Contract Law

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The Covid-19 pandemic has put the world to a halt. Not only public life but also the economy and trade partly have come to a standstill. On a global scale, the resulting impediments confront legal systems with unprecedented challenges. This contribution analyses the impact of the pandemic in German contract law.

Firstly, the (conventional) approaches of German contract law shall be illustrated briefly (**I.**),<sup>1</sup> before, secondly, turning to current legislative responses to Covid-19 (**II.**).

## I. Covid-19 as an Impediment to Performance under German Contract Law

The German law distinguishes between impediments rendering performance impossible (**1.**) and such that render performance considerably more onerous whilst remaining, physically, possible (**2.**).

### I.1. Impossibility of Performance

If performance is rendered impossible, the claim for specific performance is (temporarily)<sup>2</sup> suspended under s 275(1) of the *Bürgerliches Gesetzbuch* (German Civil Code, hereafter: “BGB”).<sup>3</sup> This section uniformly covers cases of physical (eg, closure of manufacturing plants) and legal (eg, trade restrictions) impossibility<sup>4</sup> as well as objective and subjective impossibility.<sup>5</sup> It is immaterial to s 275(1) BGB if impossibility traces back to the debtor’s fault.<sup>6</sup> Whether or not performance is, *sensu stricto*, impossible depends on the content of the obligation:<sup>7</sup> For a contract to produce a specific work (s 631 BGB), impossibility as the result of Covid-19 seems conceivable with view to business closures or a shortfall in

<sup>1</sup> This contribution reflects the scholarly discussion as of 1 July 2020. To the extent necessary, further updates have been included regarding the most significant recent developments. For an introduction to the concepts of impossibility of performance and change of circumstances under German contract law, see, eg, Larry A DiMatteo, ‘Excuse: Impossibility and Hardship’ in Larry A DiMatteo, André Janssen, Ulrich Magnus and Reiner Schulze (eds), *International Sales Law* (CH Beck/Hart/Nomos, Munich/Oxford/Baden Baden 2016) paras 53-56; Ewoud Hondius and Hans Christoph Grigoleit, ‘Overview: concepts dealing with unexpected circumstances’ in Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP, Cambridge 2011) 55-63; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP, Oxford 2005) 39-49.

<sup>2</sup> On the temporal perspective of impossibility in times of Covid-19, see Thomas Riehm, ‘Corona und das Allgemeine Leistungsstörungenrecht’ in Daniel Effer-Uhe and Alica Mohnert (eds), *Vertragsrecht in der Coronakrise* (Nomos, Baden Baden 2020) 27f. He rightly notes that most impediments following Covid-19 will only exist on a temporary basis. Consequently, s 275(1) BGB and other sections addressing permanent impossibility presently apply by analogy only.

<sup>3</sup> For instructive comments on s 275(1) BGB, see Zimmermann (n 1) 43f. For recent remarks, see Riehm (n 2) 24, 27ff.

<sup>4</sup> Thomas Liebscher, Stefan Zeyher and Ben Steinbrück, ‘Recht der Leistungsstörungen im Lichte der Covid-19-Pandemie’ (2020) 41 *Zeitschrift für Wirtschaftsrecht* 852, 857; Riehm (n 2) 24.

<sup>5</sup> Jens Kröger, ‘Vertrags- und AGB-Recht’ in Ludwig Kroiß (ed), *Rechtsprobleme durch Covid-19* (Nomos, Baden Baden 2020) para 23.

<sup>6</sup> Zimmermann (n 1) 44.

<sup>7</sup> Emphasising the importance of the case-by-case analysis: Kröger (n 5) para 29.

workforce.<sup>8</sup> In contrast, the threshold for literal impossibility is stricter for a market-related purchase of generic goods (cf s 433 BGB).<sup>9</sup> In any event, the debtor may not plead impossibility for a shortfall in liquidity.<sup>10</sup>

## 1.2. Disproportionality of Performance and Fundamental Change of Circumstances

Even if performance remains physically possible, Covid-19 may well impede contractual obligations significantly, for instance by drastically increasing the debtor's costs of performance. In principle, two provisions address such scenarios: s 275(2) BGB and s 313(1) BGB.<sup>11</sup>

The debtor may refuse performance under s 275(2) BGB if his expenditure for performance is rendered manifestly disproportionate in comparison to an unchanged interest in performance on part of the obligee.<sup>12</sup> Since increased market prices also lead to an increased interest in performance, s 275(2) BGB does not apply if market prices increase drastically.<sup>13</sup> Still, s 275(2) BGB might apply if market prices remain stable whilst the costs of performance increase, eg, because of Covid-19 related safety precautions.<sup>14</sup> It is a futile endeavour to establish a universal threshold for s 275(2) BGB. However, as guidance for its application, a discrepancy of 5-10% between the costs and the performance interest has been suggested, provided that the obligee is able to obtain performance from a third party.<sup>15</sup>

In contrast, s 313(1) BGB has a seemingly broader scope of application. It addresses fundamental changes regarding the circumstances that the contract is based on.<sup>16</sup> Yet, s 313(1) BGB serves solely as a subsidiary safety net, which is why the existence of prevailing agreements or statutes deserves careful consideration.<sup>17</sup> In short, s 313(1) BGB establishes three

<sup>8</sup> Liebscher, Zeyher and Steinbrück (n 4) 857. The same should hold true for purchase contracts limited to the seller's stock or production, on this, see Riehm (n 2) 19.

<sup>9</sup> Cf Riehm (n 2) 19.

<sup>10</sup> Riehm (n 2) 16.

<sup>11</sup> On the relation between s 275(2) BGB and s 313(1) BGB, see Zimmermann (n 1) 46 who notes that the latter is regarded as a "conceptually different problem". Distinguishing both statutes in the adequate comprehensiveness is beyond the scope of this report.

<sup>12</sup> According to s 275(2) BGB, the claim for performance is not suspended *ipso iure*, cf BGH NJW 2014, 213 (at 214).

<sup>13</sup> Riehm (n 2) 22f; cf Hondius and Grigoleit, 'Overview' (n 1) 58.

<sup>14</sup> Riehm (n 2) 23.

<sup>15</sup> As suggested by Riehm (n 2) 23. If obtaining performance by a third party is not possible, as guidance, the discrepancy should be between 10-20%. Of course, Riehm himself acknowledges that the definite threshold is to be assessed on a case-by-case basis.

<sup>16</sup> Or, as it is phrased in German terminology: "*Störung der Geschäftsgrundlage*", cf s 313 BGB.

<sup>17</sup> See Jens Prütting, 'Wegfall der Geschäftsgrundlage als Antwort des Zivilrechts auf krisenbedingte Vertragsstörungen? Systemerwägungen zu § 313 BGB und sachgerechter Einsatz in der Praxis' in Daniel Effer-Uhe and Alica Mohnert (eds), *Vertragsrecht in der Coronakrise* (Nomos, Baden Baden 2020) 60 who emphasises that the hierarchy of statutes is to be assessed on an individual basis. Interestingly, Riehm (n 2) 15f suggests that the impact of Covid-19 regularly

requirements.<sup>18</sup> There has to be a material change of the circumstances that the contract is based on (the “factual” element). It is then necessary to establish that if the parties had foreseen this material change, they would have contracted under different terms (the “hypothetic” element).<sup>19</sup> Finally, binding the disadvantaged party to the initial contractual terms must appear unreasonable (the “normative” element). The threshold for the latter requirement is distinctively strict.<sup>20</sup> A constellation of s 313(1) BGB that may prove relevant under the current circumstances is the dramatic surge of procurement prices, drastically increasing the seller’s costs *and* the buyer’s performance interest, thereby fundamentally altering the equilibrium of the contract.<sup>21</sup> As the legal consequence, the disadvantaged party may request an adaptation of the contract, or – if adaption is not feasible – terminate the contract.<sup>22</sup>

### 1.3. Contractual Remedies

Turning to the scenario in which the debtor fails to perform:<sup>23</sup> Firstly, the obligee may then withhold his contractual performance, s 320(1) BGB. Secondly, after a reasonable period of grace set by the obligee,<sup>24</sup> he may terminate the contract by declaration, s 323(1) BGB. Thirdly, upon termination, any performance already received is to be returned by both parties, s 346(1) BGB.

Fourthly, in assessing if the obligee may claim damages for non-performance, s 280(1), 283 BGB,<sup>25</sup> or delayed performance, s 280(2), 286 BGB, the debtor’s responsibility for his contractual breach is key.<sup>26</sup> According to s 276(1) BGB, the debtor bears responsibility for

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exceeds what has been anticipated by individual and statutory provisions on risk allocation, which is why resorting to s 313(1) BGB seems adequate. See further Marc-Philippe Weller, Markus Lieberknecht and Victor Habrich, ‘Virulente Leistungsstörungen – Auswirkungen der Corona-Krise auf die Vertragsdurchführung’ (2020) 73 *Neue Juristische Wochenschrift* 1017, 1022 who note that s 313(1) BGB has the benefit that it does not merely provide for a “all or nothing”-solution, given that its primary legal consequence is the adaptation of the contract.

<sup>18</sup> For the terminology of the criteria, see, eg, Prütting (n 17) 58.

<sup>19</sup> Accordingly, s 313(1) BGB is inapplicable if the relevant incident was foreseeable, cf BGH NJW 2014, 3439 (at 3442).

<sup>20</sup> On this threshold, see BGH NJW 1984, 1746 (at 1747: “unbearable consequences”); Kröger (n 5) para 31. For an instructive case study on the application of s 313(1) BGB, see Ewoud Hondius and Hans Christoph Grigoleit, ‘The case studies’ in Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP, Cambridge 2011) 181-185.

<sup>21</sup> On this constellation, see, eg, Weller, Lieberknecht and Habrich (n 17) 1021f who appear to lean towards the application of s 313(1) BGB regarding the surge in market prices for sanitizers.

<sup>22</sup> Liebscher, Zeyher and Steinbrück (n 4) 859. For further remarks on the particularities of enforcing these rights in court, see Prütting (n 17) 59.

<sup>23</sup> On the following legal consequences, see Riehm (n 2) 26ff.

<sup>24</sup> In German: “Nachfrist”. If the parties assign particular importance to the *timing* of performance, setting a “Nachfrist” is not necessary, see s 323(2) No 1 BGB (or for merchants s 376(1) of the German Commercial Code). It is subject to debate whether s 326(5) BGB also allows for termination without a “Nachfrist” if s 275(1), (2) BGB suspends the performance claim only temporarily and thus by analogy. On this debate, see, eg, Riehm (n 2) 30f.

<sup>25</sup> As most impediments following Covid-19 will be temporary, s 283 BGB applies by analogy (*supra* n 2).

<sup>26</sup> This follows from s 280(1) BGB and s 286(4) BGB. Both provisions shift the burden of proof on the debtor. Accordingly, the debtor has to prove that he is *not* responsible for the contractual breach. However, the threshold for this is not overly strict, cf BGH NJW 1953, 59f (on the former law of obligations).

deliberate and negligent<sup>27</sup> acts unless the statutes or the contracting parties' agreement provide otherwise. Regarding the latter, in contracts for the market-related purchase of generic goods, the seller is deemed to have (impliedly) assumed the risk of procurement.<sup>28</sup> Arguably, however, the risk of procurement covers only typical risk but not unprecedented impediments caused by a pandemic.<sup>29</sup> The debtor might also be found not to be responsible for non-performance caused by business closures. This likely applies to closures by authorities but could equally apply to closures on the debtor's own initiative if they followed a thorough assessment of the pandemic's risks.<sup>30</sup>

## II. Contemporary Legislative Responses in the Wake of the Covid-19 Pandemic

The German legislator has further enacted new laws to address Covid-19, including the *Act to Mitigate the Covid-19 Pandemic in Civil-, Insolvency and Criminal Procedure Law* (hereafter: "Covid-19 Mitigation Act").<sup>31</sup> This act has amended Art. 240 of the German *Introductory Act to the Civil Code* (hereafter: "EGBGB"). The provision now establishes the contractual rules occasioned by the Covid-19 pandemic. It entered into force on 1 April 2020.<sup>32</sup>

### II.1. Temporary Moratoriums on "Essential" Continuous Obligations, Art. 240 s 1 EGBGB

Firstly, Art. 240 s 1 EGBGB enacts a moratorium for B2C contracts as well as for contracts concluded by microenterprises. In substance, both moratoriums are limited to contracts for continuous obligations that are "essential". Regarding their substantive scope of application, both further do not apply to lease agreements, loan agreements and entitlements under labour law.<sup>33</sup> Their temporal scope of application covers such obligations that were

<sup>27</sup> Note that according to the statutory standard in s 276(2) BGB, a person acts negligently if he fails to exercise reasonable care.

<sup>28</sup> Cf BGH NJW 1972, 1702 (at 1703).

<sup>29</sup> See Riehm (n 2) 28 who raises this argument.

<sup>30</sup> This has at least been suggested by Weller, Lieberknecht and Habrich (n 17) 1019.

<sup>31</sup> See (2020) *Federal Law Gazette Part I* 565 ff. The Covid-19 Mitigation Act was adopted on 27 March 2020. For instructive case studies regarding the Covid-19 Mitigation Act, see Christian Wolf, Rainer Eckert, Christian Denz, Lissa Gerking, Alina Holze, Simon Künnen and Niels Kurth, 'Die zivilrechtlichen Auswirkungen des Covid-19-Gesetzes – ein erster Überblick' (2020) 52 *Juristische Arbeitsblätter* 401-411.

<sup>32</sup> See Art. 6(5) of the Covid-19 Mitigation Act. For an English translation of Art. 240 s 1-4 EGBGB, see, eg, <[www.gesetze-im-internet.de/englisch\\_bgbeg/englisch\\_bgbeg.html#p0219](http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0219)> accessed 25 October 2020. This contribution draws upon the English translation provided by the link above.

<sup>33</sup> See Art. 240 s 1(4) EGBGB.

concluded before 8 March 2020.<sup>34</sup> The effect of both moratoriums expired on 30 June 2020.<sup>35</sup>

#### a) Moratorium on Continuous Obligations in B2C Contracts

According to Art. 240 s 1(1) EGBGB, consumers may refuse performance of a claim in connection with a contract establishing an essential continuous obligation if they are not able to render performance without endangering their own decent livelihood or that of their dependants.<sup>36</sup>

The law defines continuous obligations as “essential” if they are necessary to ensure an adequate supply of services of general interest for consumers.<sup>37</sup> This threshold is subject to an objective standard.<sup>38</sup> The drafting materials indicate that the legislation considers in particular contracts for electricity, gas, water and telecommunications to be essential.<sup>39</sup> The consumer further may only refuse performance if performance would endanger his or his dependants’ decent livelihood. Arguably, consumers need to first exhaust any financial reserves to satisfy this threshold.<sup>40</sup> Finally, the provision mandates that the inability to perform has to be attributable to the multiplications of infections caused by Covid-19. To be attributable, an indirect nexus suffices.<sup>41</sup>

#### b) Moratorium on Continuous Obligations of Microenterprises

Similarly, Art. 240 s 1(2) EGBGB allows microenterprises to refuse performance under a contract for “essential” continuous obligations. Yet, there are several differences. The term “microenterprise” is defined as an enterprise which employs fewer than 10 persons and

<sup>34</sup> See Art. 240 s 1(1) EGBGB and Art. 240 s 1(2) EGBGB.

<sup>35</sup> Notably, Art. 240 s 4(1) No 1 EGBGB authorises the Federal Government to extend the application until no later than 30 September 2020. However, the Federal Government did not resort to an extension, see Holger Wendtland, ‘Art. 240 § 1 EGBGB’ in Christine Budzikiewicz et al, *Beck-Online Grosskommentar EGBGB* (CH Beck, Munich 2020) para 4. Cf also Lorenz Llyod Fischer, ‘Mit heißer Nadel gestrickt? Vertragsrechtliche Fragen des neuen Covid-19-Gesetzes’ (2020) 35 *Verbraucher und Recht* 203, 205 who rightfully notes that in each individual case, the moratorium might have ceased to apply earlier if one of its requirements was no longer satisfied.

<sup>36</sup> For the legal definition of a consumer, see s 13 BGB; for a businessperson s 14 BGB. The personal scope of the moratorium is limited accordingly, on this, see Martin Schmidt-Kessel and Christina Möllnitz, ‘Coronavtragsrecht – Sonderregeln für Verbraucher und Kleinstunternehmen’ (2020) 73 *Neue Juristische Wochenschrift* 1103, 1104.

<sup>37</sup> See Art. 240 s 1(1) EGBGB.

<sup>38</sup> Llyod Fischer (n 35) 204; Schmidt-Kessel and Möllnitz (n 36) 1104.

<sup>39</sup> German Bundestag, ‘Parliamentary Documentation (BT-Drucksache) No. 19/18110’ 4. See also Ann-Marie Kaulbach and Bernd Scholl, ‘Die vertragsrechtlichen Regelungen in Art. 240 EGBGB: Voraussetzungen, Rechtsfolgen, offene Fragen’ in Daniel Effer-Uhe and Alica Mohnert (eds), *Vertragsrecht in der Coronakrise* (Nomos, Baden Baden 2020) 99 who emphasise that this enumeration is not conclusive and may well extend to further “essential” contracts.

<sup>40</sup> Schmidt-Kessel and Möllnitz (n 36) 1104; Bernd Scholl, ‘Die vertragsrechtlichen Regelungen in Art. 240 EGBGB aus Anlass der COVID-19-Pandemie’ (2020) 74 *WM Zeitschrift für Wirtschafts- und Bankrecht* 765, 766.

<sup>41</sup> Kaulbach and Scholl (n 39) 103; Schmidt-Kessel and Möllnitz (n 36) 1104; Scholl (n 40) 766.



whose annual turnover or annual balance sheet total does not exceed EUR 2,0 million.<sup>42</sup> Besides, for microenterprises, continuous obligations are “essential” if they are necessary to ensure a supply of services that is adequate to continue the business. According to the drafting materials, the practical cases, nonetheless, should be mainly the same as described above.<sup>43</sup> Scholarly literature, however, suggests that this definition extends to a broader variety of contracts.<sup>44</sup>

### c) Shared Legal Consequences of Both Moratoriums

Turning to the legal consequences: Art. 240 s 1 EGBGB does not exempt the debtor *ipso iure*.<sup>45</sup> Instead, it grants a contractual defence, allowing the debtor to refuse performance.<sup>46</sup> Notably, the consumer or microenterprise remains entitled to performance.<sup>47</sup> Still, Art. 240 s 1(3) EGBGB subjects the right to refuse performance to a reservation. Consumers cannot invoke this right if non-performance endangers the economic foundation of the obligee’s business. For microenterprises, this right does also not apply if non-performance endangers the obligee’s or its dependants’ decent livelihood. For consumers, however, scholars expect this caveat to be irrelevant in practice, given that suppliers of “services of general interest” are regularly financially robust enterprises.<sup>48</sup> If the right to refuse performance was excluded, the consumer or microenterprise is given a secondary right to terminate the contract.<sup>49</sup>

## II.2. Temporary Restrictions on the Termination of Lease Agreements, Art. 240 s 2 EGBGB

The second amendment addresses a range of lease agreements. According to Art. 240 s 2 EGBGB, lessors are not permitted to terminate leases for land or premises on the mere ground that the tenant defaulted on rental payments from 1 April to 30 June 2020. This restriction is in effect until 30 June 2022.<sup>50</sup>

<sup>42</sup> See European Commission, ‘Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises’ OJ L 123/36, to which Art. 240 s 1(2) EGBGB refers.

<sup>43</sup> German Bundestag (n 39) 4.

<sup>44</sup> See Scholl (n 40) 767 who names, eg, contracts for office supplies, service contracts with IT providers or warehousing contracts.

<sup>45</sup> Kaulbach and Scholl (n 39) 105, Llyod Fischer (n 35) 204; Schmidt-Kessel and Möllnitz (n 36) 1105.

<sup>46</sup> Notably, this contractual defence is mandatory and not subject to individual derogations, see Art. 240 s 1(5) EGBGB.

<sup>47</sup> Also allowing the other party to withhold performance of essential obligations would be incompatible with the moratorium’s rationale of protecting the consumer or microenterprise. On this, see Riehm (n 2) 18; Schmidt-Kessel and Möllnitz (n 36) 1105.

<sup>48</sup> Kaulbach and Scholl (n 39) 104f; Scholl (n 40) 767.

<sup>49</sup> See Art. 240 s 1(3) EGBGB.

<sup>50</sup> See Art. 240 s 2(4) EGBGB.

For this to apply, the default on payments must follow from the Covid-19 pandemic. Compared to Art. 240 s 1 EGBGB, this threshold is less strict.<sup>51</sup> It follows from the systematic comparison that the tenant does not need to demonstrate that his decent livelihood or his business' economic foundation is endangered.<sup>52</sup> The exact threshold, again, depends on a case-by-case analysis. So far, scholars argue that it requires a significant increase in costs or a significant decrease in income, resulting in a shortage of liquidity.<sup>53</sup> If the threshold was to be tried in court, the tenant would benefit from the reduced burden of proof under s 294 of the German Civil Code of Procedure when proving the causal nexus to Covid-19.<sup>54</sup> As its legal consequence, Art. 240 s 2(1) EGBGB *only* restricts the lessor's right to termination following the lessee's default on the rental payment.<sup>55</sup> Nonetheless, the rental payment remains due.<sup>56</sup> This means that, firstly, the lessor may in principle claim interests or damages for delay in payment.<sup>57</sup> Secondly, other rights of termination remain unaffected.

### II.3. Temporary Deferral of Payments in B2C Loan Agreements, Art. 240 s 3 EGBGB

The fourth amendment enacted by the Covid-19 Mitigation Act applies to consumer loan agreements in the meaning of s 491 BGB which were concluded before 15 March 2020. In this regard, Art. 240 s 3(1) EGBGB grants consumer a deferral of payment for three months for payments that were initially due from 1 April to 30 June 2020.

For this deferral of payment to apply, two preconditions must be met. Firstly, there has to be a loss of revenue on the side of the consumer due to "extraordinary circumstances" caused by the spread of Covid-19. Secondly, in view of this loss, expecting the consumer to perform the payment has to be considered unreasonable. The statute further specifies that the threshold for unreasonableness is met if, again, performance endangered the consumer's or his dependants' decent livelihood. By its plain letter, the threshold of Art. 240 s 3(1) EGBGB – demanding performance to appear unreasonable – seems less strict than the standard of Art. 240 s 1(1) EGBGB, *i.e.* (economical) inability to render performance.<sup>58</sup> As legal consequence, each monthly rate due from 1 April to 30 June 2020 is *ipso iure* deferred by three months. Besides, if the contractual interest rates apply to the period of

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<sup>51</sup> Schmidt-Kessel and Möllnitz (n 36) 1105; Scholl (n 40) 768.

<sup>52</sup> Scholl (n 40) 768; cf Schmidt-Kessel and Möllnitz (n 36) 1105.

<sup>53</sup> Schmidt-Kessel and Möllnitz (n 36) 1105f; Scholl (n 40) 768.

<sup>54</sup> Scholl (n 40) 768f; Silvio Sittner, 'Mietrechtspraxis unter Covid-19' (2020) 73 *Neue Juristische Wochenschrift* 1169, 1173.

<sup>55</sup> Schmidt-Kessel and Möllnitz (n 36) 1106; Scholl (n 40) 769.

<sup>56</sup> Schmidt-Kessel and Möllnitz (n 36) 1106; Scholl (n 40) 769.

<sup>57</sup> Schmidt-Kessel and Möllnitz (n 36) 1106; Sittner (n 54) 1173.

<sup>58</sup> Notably, however, Scholl (n 40) 770 suggests that these differences might be the result of legislative time constraints rather than a deliberate decision. See also Tobias B Lühmann, 'Das Moratorium im Darlehensrecht anlässlich der Covid-19-Pandemie' (2020) 73 *Neue Juristische Wochenschrift* 1321, 1322 who suggests that the consumer needs to expend any (potential) financial reserves.

deferral remains to be clarified.<sup>59</sup> Other than the former sections, Art. 240 s 3(4) EGBGB allows for and even encourages individual agreements by stipulating a dialogue between the parties.<sup>60</sup> Absent an individual agreement on its status after 30 June 2020, the loan agreement is *ipso iure* extended by three months.<sup>61</sup>

Again, the deferral of payment does not apply if it appears unreasonable towards the lender after “giving due consideration to all the circumstances, including the changes of the general circumstances of life” brought about by Covid-19. Scholars doubt that changed circumstances on the part of a banking institution will meet the reasonability standard.<sup>62</sup> According to the drafting materials, however, it is also possible to include any prior misconduct by the consumer in the considerations on reasonability.<sup>63</sup>

#### II.4. Recreational Events and Package Travel Contracts: Vouchers Instead of Refunds, Art. 240 s 5 EGBGB and Art. 240 s 6 EGBGB

Finally, Art. 240 s 5 EGBGB addresses contracts for the attendance of cultural, sporting or other recreational events as well as recreational facilities. If an organiser is forced to cancel an event or close a facility for reasons caused by Covid-19, and if the ticket holder purchased the ticket before 8 March 2020, the organiser is not held to refund the admission price. Instead, the organiser may opt to issue a voucher for future attendance. The attendee may only insist on reimbursement if his personal living conditions render a voucher unreasonable<sup>64</sup> or if he has not redeemed it by 31 December 2021.<sup>65</sup> It is worth noting, however, that some early commentators doubt the provision’s compatibility with the constitutional guarantee of property.<sup>66</sup> In addition, Art. 240 s 6 EGBGB allows travel organisers of package travel contracts (cf s 651a BGB) to offer vouchers instead of refunds to their customers. In this case, however, the customer has the right to choose between the voucher or a refund. After the voucher's expiration, the customer may, again, request a refund.<sup>67</sup>

<sup>59</sup> See Scholl (n 40) 771 who affirms their applicability. For the opposing view, see Llyod Fischer (n 35) 208.

<sup>60</sup> According to Schmidt-Kessel and Möllnitz (n 36) 1107, the lender has a statutory duty to offer a meeting. For the opposing view, see Scholl (n 40) 771.

<sup>61</sup> See Art. 240 s 3(5) EGBGB.

<sup>62</sup> Scholl (n 40) 770.

<sup>63</sup> Lühmann (n 58) 1325f; Schmidt-Kessel and Möllnitz (n 36) 1107; Scholl (n 40) 770.

<sup>64</sup> For remarks on the standard of reasonability in this context, see Liebscher, Zeyher and Steinbrück (n 4) 856 who suggest that this threshold will be met if the attendance of the future event leads to significant additional costs for the attendee.

<sup>65</sup> See Art. 240 s 5(5) EGBGB.

<sup>66</sup> On this, see, eg, Henrik Eibenstein, 'Verfassungswidrigkeit der "Gutscheinlösung" im Veranstaltungsvertragsrecht' (2020) 1 *Covid-19 und Recht* 249, 253; Wolfgang Voit, 'Art. 240 § 5 EGBGB' in Wolfgang Hau and Roman Poseck (eds), *Beck'scher Online Kommentar BGB* (CH Beck, Munich 2020) para 2f; contra Alexander Bömer and Philip Nedelcu, 'Die Rückwirkung der Gutscheinlösung im Lichte des Verfassungs- und Intertemporalen Privatrechts' (2020) 20 *Neue Juristische-Online-Zeitschrift* 1217, 1220-1223.

<sup>67</sup> For a detailed analysis of Art. 240 s 6 EGBGB, see Klaus Tonner, 'COVID 19 und Reisegutscheine' (2020) 74 *Monatsschrift für Deutsches Recht* 1032-1037.

### III. Outlook

Covid-19 raises questions in all areas of life and German contract law is no exception. As it has been observed that force majeure clauses are not frequently incorporated in contracts subject to German law,<sup>68</sup> the answers will be found primarily in the statutes. Traditional contract law already offers several bases to suspend performance. Regarding damage claims, the debtor's responsibility for non-performance has to be carefully assessed with view to the exogenous interference by the pandemic. Besides, the legislator has swiftly responded, enacting the Covid-19 Mitigation Act. Indeed, as scholars have criticised, Art. 240 EGBGB contains a significant number of undefined legal terms.<sup>69</sup> Still, it may well be these undefined legal terms that allow courts to address the unprecedented challenges adequately. Of course, this comes at a price, namely an undeniable degree of legal uncertainty. In the end, when assessing the impact of Covid-19 on liability, much will depend on a case-by-case analysis. While a generalised assessment seems uncalled for, it shall be noted that exempting parties from liability in individual cases does not seem too far-fetched, given that German contract law does not provide for strict liability but considers the debtor's individual responsibility.

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<sup>68</sup> This was observed by Kröger (n 5) para 8.

<sup>69</sup> Kaulbach and Scholl (n 39) 99, 144; Scholl (n 40) 766.