Hogan Lovells

§ 313 BGB and governmental Corona measures - “Course Correction” for commercial leases

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With our blog post of December 14, 2020, we had already pointed out the corresponding legislative initiative. In record time, two new provisions on commercial leases (excluding residential leases) were subsequently adopted on December 17 and 18, 2020. Article 240 § 7 of the Introductory Act to the German Civil Code (EGBGB) refers to the effects of the COVID-19 pandemic on lease agreements while § 44 of the Introductory Act to the German Code of Civil Procedure (EGZPO) stipulates an acceleration requirement for actions in connection with rent reductions. The new law entered into force on 31 December 2020. The provisions - and our comments below - apply equally to leasehold contracts.

However, the immediate consequences of the new regulations should not be overestimated. Basically, a detailed case-by-case investigation remains necessary and prohibits lump sum rent reductions.

More attention should be paid to the legislator's intention to eliminate uncertainties perceived in practice and to strengthen the negotiating position of commercial tenants. In the perception of the legislator, landlords sometimes lack any willingness to negotiate. Paradoxically, the cause is also seen in the previous Corona legislation (Art. 240 § 2 para. 1 sentence 1 EGBGB) of 27 March 2020 ("**COVID-19 Act**"). It protects tenants from termination if they were temporarily unable to pay their rent on time due to the Corona pandemic (see our blog post of 2 April 2020).

The explanatory memorandum of the COVID-19 Act was subsequently interpreted by the courts and in practice to mean that the risk of governmental measures must in principle be borne by the tenants in first instance. The legislator has now opposed this and corrects the interpretation of the COVID-19 Act's explanatory memorandum.

In detail:

1. **The factual rlement: severe change in the implicit basis of contract**

   Already before the new legislation there were already many arguments to suggest that COVID-19-related closures or operating restrictions were in principle likely to affect the basis *(* the so-called *Geschäftsgrundlage)* of tenancy and lease contracts.

For the future, it is now **rebuttably presumed** that such a severe change in the implicit basis of contract actually exists if a **governmental measure at least significantly restricts the usability of the leased property for the tenant's business**.

Governmental measures in this context are administrative regulations, general decrees or concrete-individual orders. As a typical example, the explanatory memorandum to the Act mentions closure orders or governmental requirements to use only a certain part of the leased space for public traffic or to limit the number of persons who are allowed to be present in a certain area.

However, the presumption does not apply to the other requirements of § 313 BGB. In the event of a dispute, the party invoking this provision still must explain and, if necessary, prove these (see below).

Furthermore, the presumption **does not apply to losses in revenue that are not directly caused by governmental measures but by a factual slump of customer frequency - even if caused as an indirect consequence of the COVID-19 pandemic**. An adjustment of the contract is not excluded in these cases, but the tenant must explain why this slump constitutes a severe change in the implicit basis of contract and, in particular, does not fall within his operating risk.

2. The hypothetical element - What if…?

Furthermore, a contract adjustment can only be demanded if the parties would not have concluded the contract or would have concluded it with a different content if they had foreseen this change. **The new law does not change this**. In fact, this requirement should usually be fulfilled, however, the legislator correctly points out that **specific contractual provisions on the allocation of risk** between the parties must be taken into account. Such a specific risk allocation can, for example, also be found in contractual grace periods for tenants' termination or adjustment claims. Thus, if the contract provides for periods during which other unexpected disruptions are to be endured by the tenant without complaint, this should also apply to the restrictions caused by the COVID-19 pandemic.

Since the outbreak of the pandemic in spring 2020, a large number of tenants and landlords have found amicable arrangements for dealing with the consequences of the governmental measures and the COVID-19 pandemic in general. The legislator does not intervene in these and they remain primarily applicable.

3. The normative Element - is the situation unacceptable for the tenant?

Furthermore, the new law does not give an answer to the question whether and to what extent the tenant (respectively the landlord) can reasonably be expected to adhere to the unchanged contract, taking into account all circumstances of the individual case, in particular the contractual or statutory distribution of risk. The tenant still has to prove that such adherence is unacceptable.

However, the explanatory memorandum provides at least two indications in this respect:

- In principle, the risk of governmental measures taken to combat the COVID-19 pandemic neither falls into the sphere of risk of the landlord nor the tenant.

- In the individual case, it will not be sufficient for the tenant to merely demonstrate a loss in revenue. All other relief such as public or other subsidies from third parties or saved expenses in connection with short-time work *(Kurzarbeit)* or the saved expenses due to orders of goods being cancelled must be taken into account.

What becomes clear is that even after the amendment of the law, a comprehensive weighing of the individual circumstances is required. It was reported in the press that commercial tenants now can reduce their rent. This is and remains a dangerous simplification.

4. Procedural acceleration

The legislator aims at bringing the parties at the table very quickly: § 44 EGZPO now instructs the courts to give priority and accelerated treatment to actions relating to rent adjustment and to set a first hearing date within one month of service of the statement of claim.

However, the course of proceedings can still take a considerable time, for example if an expert opinion has to be obtained.

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