COVID-19: Force majeure in commercial and office leases

Following the state of emergency due to the COVID-19 crisis initially announced by the government on 18 March 2020, which was confirmed and extended for a period of three months by Parliament on 21 March 2020, more and more voices in the country are calling for a suspension of contractual obligations in commercial and office leases. This is despite the government having unveiled an unprecedented economic stabilisation programme.

Notably, the cities of Luxembourg, Esch-sur-Alzette, Ettelbruck and Dudelange have already announced that they are suspending for the duration of the health crisis the obligation to pay the rents of the premises which belong to them and are used for trade or catering activities.

The main argument put forward by advocates of the suspension of contractual obligations in leases or termination of leases contends that the pandemic, as well as governmental measures taken in this context such as, mainly, the closure of certain establishments and the limitation of commercial and artisanal activities, could be considered a case of *force majeure*.

The aim of this publication is to provide an update, in the current context and in the light of *force majeure*, on (1) the obligation for the lessee to pay the rent and charges; (2) the lessor's obligation to deliver leased premises; and (3) the issue of termination of leases in the event of destruction of the leased premises.

1. The obligation to pay the rent and charges and force majeure

The following situations should be distinguished here:

- The lease contains a *force majeure* clause: This is a clause whereby one or both of the parties is / are expressly authorised to suspend the performance of one or more of its / their obligations arising from the lease, or to request an extension of the execution period, following the occurrence of a specific event independent of its / their will. Depending on the impact of the event on the performance of the obligations under the lease, such a clause may also authorise the termination of the lease by one of the parties, generally if the event exceeds a duration agreed by the parties.

In this situation, the *force majeure* clause must be examined with the greatest attention and precision in order to identify the events which it covers, whether via a general definition, an exhaustive list or examples, and to decide if any of these events could include the Covid-19 pandemic.

Depending on the result of this examination, the *force majeure* clause could allow the suspension of one or more of the obligations of the lease, and in particular that of the payment of the rent and *charges*, or the termination of the contract.

- The lease contract does not contain any *force majeure* clause: In this case, the general principles of Luxembourgish law should be applied. In accordance with these principles, a lessee is normally required to fully and correctly fulfil his contractual obligations. Otherwise, he is required to compensate the creditor for the damage suffered by the latter for non-performance (partial or total), or poor performance.

However Articles 1147 and 1148 of the Civil Code authorise a lessee responsible for a breach of his contractual obligations to be relieved of his responsibility if he proves that such a breach arises as a result of "an external cause which cannot be attributed to him", more commonly called "*force majeure*".

In order to qualify as "force majeure" according to the Luxembourg Civil Code, an event must bear three cumulative characteristics, namely it must be (i) external to the party invoking it (that is to say beyond the invoking party’s control); (ii) unpredictable at the time of the signature of the contract; and (iii) insurmountable (i.e. the effects of the event could not have been avoided by appropriate measures). Note that judges carry out a case-by-case analysis of the situation and each of these three criteria.

- With regard to the external nature, we can reasonably say that this criterion is met, both with regard to the Covid-19 pandemic and the measures taken by the Luxembourg Government to fight it, these events being outside of a lessee’s sphere of influence. It will however be more delicate to rule on the external nature of a contamination of an individual lessee or his employees.

- Regarding unpredictability, this criterion must be assessed as at the date on which the lessee committed to the lease. It is therefore reasonable to assume that this criterion is met for all leases concluded before the spread of the virus to Europe from China. As for the subsequent period, and in particular after the introduction of government measures closing certain establishments and limiting commercial and artisanal activities, the answer is more complex since some countries, notably China, had already taken such measures in their territories.

- Regarding insurmountability, the Luxembourg courts consider, like French case law (Cass. Com. 31-5-1976, n ° 75-14.625: Bull. Civ. IV n ° 186), that this criterion is only established if the overwhelming event causes a total and permanent impossibility of execution of contractual obligations, which is distinguished from a simple difficulty of execution or even an execution made more expensive than expected. Lessees could therefore theoretically suspend payments during the health crisis period only if they manage to demonstrate their absolute incapacity to fulfil payment obligations, and prove

that they have taken all the necessary measures to prevent this situation.

In this regard, some could point out that the cause and effect link between the government measures to close certain establishments and limit commercial and artisanal activities, and the impossibility of paying the rent and charges, is not obvious if we take into account not only lessees' duty to manage their money and reserves as an advised man would do, but also their general obligation to mitigate damages in the event of a crisis.

This position is similar to that of French judges, who generally consider that "the debtor of an unfulfilled contractual obligation of payment cannot be exempted from this obligation by invoking a case of *force majeure*" (Cass. Com. 16 -9-2014 n ° 13-20.306 F-PB: RJDA 11/14 n ° 886). This position is explained by the fact that money can always be replaced, so therefore it is not impossible for a tenant to pay his rent, except perhaps in the event of a general breakdown of the banking system.

Similarly, some may also argue that a simple drop in turnover due to government measures taken to stem the pandemic would not be enough to justify a suspension of payment of rent and charges, unless the Luxembourg courts are reconsidering their position in the face of the exceptional situation suffered by the country.

2. The landlord's obligation to deliver and *force majeure*

The obligation on the lessee to pay the rent (article 1728 of the Civil Code) is in consideration of the obligation on the lessor to deliver the leased premises and to ensure peaceful enjoyment by the lessee for the duration of the lease (article 1719 of the Civil Code).

Case law provides that a lessee can temporarily refuse to pay the rent and charges by claiming a breach by the lessor of his obligation to deliver and / or guarantee peaceful enjoyment of the leased premises.

Can the administrative prohibitions generated by the COVID-19 health crisis be considered to cause a failure on the part of the lessor to make the rented premises available? In other words, is the use of premises prohibited, which would be the lessor's responsibility, or is the activity for which the leased premises is used prohibited or prevented by recent decrees, which would then fall in the lessees' sphere of risk?

A consultation of the applicable texts unfortunately does not give a clear answer to this question. The ministerial decree of 20 March 2020 enacting various measures in the fight against the spread of COVID-19 states: "Concerning establishments receiving the public, activities of a cultural, social, festive, sporting and recreational nature are suspended. Playing areas are closed. Establishments in the cultural, recreational, sporting and HORECA sectors are closed. "

It further states: "All commercial and artisanal activities receiving the public are prohibited. "

In addition: "Shops providing mixed activities can remain open when their main activity is listed in paragraph 2. Activities carried out in a private practice under the 29 April 1983 Law concerning the practice of the professions of doctor, doctor-dentist and doctor-veterinarian as well as those falling under the 26 March 1992 Law on the exercise and revalorisation of certain health professions are reduced to the most severe and / or urgent health problems."

The decree thus mixes in its terminology "establishments" and "activities".

At this stage, it nevertheless seems possible to say that, with regard to the lessees of an office lease, as long as the confinement has not been extended to their activities, such lessees can still enjoy the premises, and therefore no breach by the lessor of his obligations under article 1719 of the Civil Code would be characterised.

The situation for lessees of commercial leases is much more uncertain.

Should it be considered that access to the premises is altogether forbidden, which means the lessor fails to deliver premises in which the lessee can exercise his activity, or, on the contrary, that the premises are free of all constraints but that it is the activity of the lessee which temporarily cannot be exercised? If one chooses the first option, the lessee could not only refuse to pay rent but also demand damages from the lessor because he cannot exercise his activity. In this case, the lessor should then himself invoke *force majeure* which would be a justification for his failure to deliver the premises, such *force majeure* being the administrative prohibitions which, in our opinion, can be considered as a legitimate reason preventing the lessor's liability to the lessee for damages due to closure of the leased premises.

3. The termination of commercial or office leases due to destruction of the leased premises

In the absence of a specific contractual provision authorising the termination of a lease by one of the parties due to an event similar to the current health crisis, the lessees of commercial and office leases could theoretically invoke article 1722 of the Civil Code.

Pursuant to this article, a lease is automatically terminated if "the leased premises are totally destroyed because of a fortuitous event during the term of the lease".

According to most authors, the total destruction of leased premises does not only encompass the physical destruction of a building / premises but also the absolute and definitive impossibility for the lessee to enjoy the leased premises, even when this is the result of a legal impediment.

In the present case, the governmental measures closing certain establishments and limiting commercial and artisanal activities being essentially temporary since they are based on the confinement period, it does not appear possible to invoke an automatic termination of leases impacted by these measures, even in the event of a strict administrative closure.

Article 1722 of the Civil Code further states that the lessee can request "depending on the circumstances a reduction in the price or even a termination of the lease if the leased premises

are only partially destroyed" which encompasses, apart from a partial physical destruction of the premises, the partial impossibility (temporary or definitive) to enjoy the leased premises.

In the current situation, partial destruction could apply to commercial lessees targeted by the partial closure of their activities and the ban on allowing the public to access certain parts of their premises, such as restaurants maintaining a delivery or take-out activity or various product stores selling mainly food and / or hygiene products. However, even in the case of a fortuitous event (a qualification that remains to be discussed), a destruction or partial destruction will not normally justify termination, but may lead to an adaptation of the amounts to be paid by the lessee.

In conclusion

- **The relationship between the lessor and the lessee is governed by contract, but leases rarely provide for a clause on how to manage a situation such as the one we are currently experiencing, the current health crisis being unprecedented in the recent history of Luxembourg.**
- **Urgent laws and regulations leave room for contradictory interpretations, therefore there is great uncertainty about future case law in this area.**
- **Economic agents, whether they are lessees or lessors, needing legal certainty to be able to manage their affairs, can restore it by negotiating and finding solutions adapted to their particular situation.**

Do not hesitate to contact us to ask for assistance in the analysis of your individual situation and to benefit from a negotiation strategy to be defined together.

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