MOLITOR obtains one of the first court decisions in favour of a lessor amid the Covid-19 crisis: payment of commercial rents is due despite the mandatory measures taken by the government to limit the spread of the Covid-19

Since the proclamation of the state of crisis related to Covid-19 by a Grand-Ducal regulation of 18 March 2020[1], which prohibited a number of activities open to the public for several weeks, and thus forced the closure of establishments in question[2], a recurring issue has arisen concerning relationships between commercial lessees and their lessors: was rent during this period due? A key question requires consideration of the concept of *force majeure*: can the pandemic and/or its consequences constitute *force majeure*, which would exempt one or more parties to a contract from their obligations?

Unlike other countries, Luxembourg has not yet adopted any specific law on commercial rents to address this issue. Even though bill proposal no. 7551, which provides for a suspension of rents, is currently pending before the Chamber of Deputies, the text seems to have reached an impasse. As it stands, it is therefore court rulings on this subject matter that will provide guidance.

A decision dated 29 July 2020, which is to our knowledge one of the first to deal with the issue, by the Luxembourg Tribunal has made its contribution to case law, which will undoubtedly be followed by many others.

The case involved a commercial lessee who had not paid his rent for several months. The lessee did not contest his debt, with the exception of the rents due for the months of April and May 2020. In order to be exempted from payment, the lessee argued that he had not been able to enjoy the rented premises during this period because of the Covid-19 related crisis and the administrative closure that followed. He therefore considered himself able to successfully invoke *exceptio non adimpleti contractus*, or non-performance exception, *ie* the option for a party to stop fulfiling its contractual duty when the other party does not comply with their own obligations.

In its decision, the Tribunal stresses that the lessee is required to pay the rent under the agreed terms, in accordance with Article 1728 of the Civil Code. The Tribunal recalls further that the lessee cannot exempt himself from this obligation on the grounds that the lessor fails to ensure the enjoyment of the premises, except if said failure is *“undisputable and unquestionable” (Luxembourg Justice of Peace, 15 July 1993, ref 2809/93)*.

Case law traditionally considers that payment of rent on due time by a lessee is an essential obligation from which he can only be exempted when the premises are unusable *(Luxembourg District Court, 6 July 2016, no. 17478; Luxembourg District Court 20 June 2017, no. 178585 and 178711)*. Thus, a temporary or partial loss of enjoyment is in principle not sufficient to invoke the non-performance exception.

This reasoning originates from the lessor's obligation to deliver usable premises, in accordance with Article 1719 of the Civil Code. The Tribunal stresses that the lessor is obliged by this article to *"deliver the thing leased to the lessee so that he may peacefully enjoy the premises during the term of the lease"*.

This obligation consists not only in giving access to the premises, but also in ensuring that said premises can be used in accordance with the activity authorised under the lease, in return for which the lessee is obliged to pay rent. It therefore seems logical that when the lessor seriously fails to fulfil this obligation - assuming there is proof of this - the lessee may ask for authorisation to suspend the rental payments.

However the situation created by the Covid-19 crisis is different. Both the pandemic and the measures taken to contain it are not attributable to the lessor, nor to the lessee. In the case reviewed by the Tribunal which gave rise to the court decision of 29 July 2020, the lessor relied on his lack of liability regarding the administrative closure imposed on the lessee, and added that this measure should constitute *force majeure*, *i.e.* an external, unpredictable, and irresistible event which had prevented him from fulfilling his obligation under the contract.

The Tribunal considers that while there is no need to discuss the existence of the administrative closure and the impossibility of enjoying the premises resulting from it (which was not challenged by either party), it is necessary to examine whether or not this could be characterised as an event of *force majeure* which would allow the lessor to be exempted from non-delivery of the leased property during this period.

The answer given by the Tribunal is positive: the judge notes that ***"the administrative closure of the premises operated by the defendant following the Covid-19 pandemic meets the conditions of exteriority, irresistibility and unpredictability, and therefore constitutes* force majeure *which* is *not attributable to the lessor"***. The Tribunal thus concludes that **since the lessor is not responsible for the impossibility of enjoying the premises, the lessee** cannot successfully invoke the defence of *non adimplenti contractus* and **must fulfil his obligation to pay rents**. The lessee was therefore ordered to pay rent, including April and May 2020.

This decision is certainly worth to be noting in that it is (to the best of our knowledge) one of the first to rule on this issue, and it clearly **refuses to consider that the restrictive measures linked to the Covid-19 crisis can be successfully invoked by lessees to avoid paying their rent**.

However, because of the nature of the case, the ruling does not answer all potential questions relating to *force majeure* in the area of ??commercial leases.

Other cases may indeed provide the occasion for an analysis of the nature of the administrative ban, the type of activity carried out and the possibilities of enjoying the premises despite the measures taken by the government. Was the activity totally prohibited or could it still be carried out, at least in part? Even if the public could not access the shop, did the lessee not retain partial use of the premises, for example for storage or long-distance selling? Was the enjoyment of the premises totally impossible (in which case the lessor’s obligation to deliver would be questionable)? Or was it rather that the commercial activities could not be carried out normally (in which case the lessor is not responsible)? All of these questions may arise in future cases.

In conclusion, apart from the fact that the decision comes from a first-degree jurisdiction, this particular court decision will not end the debate. It will be necessary to carefully scrutinise future decisions, in particular from the higher courts, unless the parliament or the government finally decides to settle the question by adopting appropriate laws or regulations. Until then, cases regarding the definition and effects of *force majeure* will certainly continue to be heard by Luxembourg courts.

[1] The state of crisis was later prorogued by the 24 March 2020 Law and ended on 24 June 2020.

[2] Most activities open to the public were forbidden from 18 March 2020 (date of the entry into force of the regulation, until 11 May 2020, pertaining to a new Grand-Ducal regulation dated 6 May 2020, which amended the 18 March 2020 regulation.