



Constitutional Court confirms that tenants of "Pachtverträge" cannot claim lockdown-related rent reductions

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On 30 June 2022, the Constitutional Court held that the different treatment of *Mietverträge* (rent agreements) and *Pachtverträge* (lease agreements), when it comes to covid-19-related rent reductions, does not raise any constitutional concerns and therefore continues to apply.⁽¹⁾

Background

In Austria, there are two types of tenancy agreements:

rent agreements, in which the tenant rents certain premises and – in the case of a commercial tenancy – sets up their own business there; and

lease agreements. These were historically agricultural ground leases, where the farmer leases the land and derives fruit from the leased premises. The lease of an existing business, where the tenant generates revenue from the leased business (eg, a well-known existing restaurant), is now also considered as a lease agreement.

The distinction between these two types of agreements is crucial. Firstly, the Austrian Rent Act applies only to rent agreements, including commercial rent agreements, and not to lease agreements. Secondly, different rules on rent reductions apply to these agreements (sections 1104 et seq of the Austrian Civil Code). In case of a rent agreement, the rent is reduced by the same amount as the agreed use of the premises when the use is impaired. For example, if the premises are rented as a retail store and the tenant could only use 10% of the store for storage and office purposes during the lockdowns, then the rent had to be reduced by 90% during this period.

In the case of a lease agreement, the rules are more complex. If the tenant cannot make any use of the premises at all, the rent is reduced to zero. If, however, the tenant can make some use of the premises, and the lease duration is over one year, the tenant must pay the full rent. If the lease duration is below one year, the tenant is entitled to a rent reduction, which is calculated differently to the calculation for rent agreements.

Facts

The case concerned two lease agreements for catering businesses in an office building. The landlord requested payment of the full rent during the lockdown periods, arguing that the tenants could make some use of the leased premises and were therefore not entitled to any rent reduction.

The district court had concerns that the different treatment of lease and rent agreements in terms of rent reductions was unconstitutional for the following two reasons.

Firstly, the rent reduction regime for lease agreements was historically based on agricultural leases. The reasoning for the limited access to rent reductions is that, in such ground leases, good years and bad years balance each other out over time. This is not true for business leases, which will not generate more revenue in the following year.

Secondly, the distinction between lease and rent agreements is far from clear, as it is based on a number of criteria that are assessed by the respective courts. It may well be that very similar agreements are treated as a rent agreement in one case and a lease agreement in another.

Therefore, the court was of the opinion that the distinction violated the constitutional guaranteed rights of equal treatment and protection of property.

Decision

The Constitutional Court did not share the district court's constitutional concerns.

Although the reasoning for this distinction may have its origins in agricultural leases, the same applies to the lease of a business: there are good years and bad years. The tenant of a lease agreement – in contrast to the tenant of a rent agreement – bears the economic risk arising from the tenancy agreement. This is objectively justified because the tenant also benefits from increased income in good years.

Also, the fact that the two types of agreements may be difficult to distinguish from each other does not render the distinction unconstitutional. It is up to the courts to find an appropriate solution in individual cases.

Therefore, the Constitutional Court did not consider the provisions to be unconstitutional. The Austrian courts will have to examine carefully whether a tenancy agreement qualifies as a rent or lease agreement. If it is a lease agreement, and the premises are only partially unusable, the tenant is not entitled to a rent reduction where the tenancy agreement was concluded for a period of more than one year.

Comment

This decision is certainly helpful, as it sets a strong signal that the distinction between rent and lease agreements when it comes to covid-19-related rent reductions does not only exist on paper, and that the courts will have to apply this distinction.

In the past, this issue has come up frequently in the context of tenants who have received state aid. The Covid-19 Federal Financing Agency, the agency which governs state aid in connection with covid-19, had published guidelines that simply ignored this distinction and urged tenants to claim rent reductions from their respective landlords irrespective of the type of agreement. This can no longer be upheld.

If the Constitutional Court had ruled differently, then the distinction between rent and lease agreements would have been called into question in general, not only in connection with covid-19-related rent reductions. In particular, it could have led to discussions as to whether the Austrian Rent Act should also apply to lease agreements. As the Constitutional Court has upheld the distinction, this discussion is off the table.

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Endnotes

(1) Decision G 279/2021-15.