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Leaseholder's Rights to Reduction of the Rent in Commercial Leases During COVID-19 in Luxembourg

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Introduction

Since the beginning of the pandemic in 2020, many commercial leaseholders have been facing financial difficulties, because of the general economic slowdown but also – more particularly – because of the measures taken by the Luxembourg authorities in order to try and limit the spread of the pandemic, such as the successive lockdowns and imposed temporary closures of retail stores.

In this context, some commercial leaseholders have requested, before Luxembourg courts, to be relieved (partially or completely) from their obligation to pay rent during pandemic-related lockdowns.

An analysis of all decisions rendered by Luxembourg courts since 2020 shows that leaseholders have been basing their requests on (one or more of) five different legal grounds.

This article highlights said five legal grounds and their varying degrees of success before Luxembourg courts so far.

An impossibility to perform the obligation to pay rent due to *force majeure*

Many leaseholders have argued that the COVID-19 pandemic and/or the pandemic-related measures taken by the Luxembourg authorities (such as the successive lockdowns) qualify as *force majeure* events, and that said *force majeure* events had made it impossible for leaseholders to pay their rent.

Indeed, Article 1148 of the Luxembourg Civil code provides that a failure to perform an obligation is to be excused when it was caused by a *force majeure* event, which is an event that has to be (at the same time):

- irresistible (i.e. an event whose adverse effects could not have been prevented by appropriate measures);
- unpredictable (i.e. an event that was unforeseeable at the time of the contract's conclusion);
- and external (i.e. an event that was outside the parties' control).

However, both Luxembourg courts and legal doctrine traditionally consider that *force majeure* events may not excuse non performances of purely monetary obligations, unless said events make it technically impossible to proceed with payments (such as in the hypothesis of a breakdown of the banking system, which would make it actually impossible to make a wire transfer).

In the context of COVID-19, Luxembourg courts have maintained their traditional position, and constantly stressed that a non performance of a leaseholder's obligation to pay rent may not be excused by the COVID-19 pandemic or by the pandemic-related measures taken by the Luxembourg authorities, based on *force majeure* (see, for example: Luxembourg Justice of the Peace, 14 January 2021, nr. 124/2021; Luxembourg District Court, 30 March 2021, nr. TAL-2020-09641).

Unforeseen changes of circumstances that would call for a rent reduction (*imprévision*)

In cases where lease agreements were concluded before the pandemic, certain leaseholders have argued that the COVID-19 pandemic and/or the pandemic-related measures taken by the Luxembourg authorities were to be seen as unforeseen changes in circumstances that should call for a reduction of the rent. Indeed, according to the so-called doctrine of hardship (*théorie de l'imprévision*), relief may be granted if the circumstances that existed at the time of the conclusion of a contract change in an unforeseen manner and in

such a way that the performance of the contract would become excessively burdensome for one party.

However, Luxembourg courts have always refused to apply the doctrine of hardship (in the absence of any hardship clause in a considered contract), and it was never made into Luxembourg law. This has not evolved in the context of the COVID-19 pandemic (see, for example: Luxembourg District Court, 28 June 2021, nr. TAL-2021-02457 and TAL-2021-02480).

Suspension of the performance of the obligation to pay rent based on the principle of lawful non-performance (*exception d'inexécution*)

Many leaseholders have based their request on the legal principle of lawful non-performance.

Indeed, Article 1134-2 of the Luxembourg Civil code provides the right for a party to a contract to suspend the performance of its contractual obligations if the other party to the contract fails to perform its own contractual obligations, and Article 1719 of the Luxembourg Civil code gives the landlord an obligation to ensure the leaseholder's peaceful enjoyment (*jouissance paisible*) of the leased premises throughout the duration of the lease agreement.

Relying on these provisions, leaseholders have argued that they have a right to suspend payment on the basis of the impossibility to use the leased premises (because of the pandemic-related measures taken by the Luxembourg authorities – especially during the successive lockdowns), as it constitutes, in their view a failure from the landlord to perform his obligation to ensure the leaseholder's peaceful enjoyment of the leased premises.

However, Luxembourg courts have constantly repeated that, in the context of the COVID-19 pandemic and of the pandemic-related measures taken by the Luxembourg authorities, the impossibility to use the leased premises was really caused by said measures, and that the landlord's obligation does not extend to preventing the peaceful enjoyment of the leased premises against such (public) measures.

Hence, the leaseholders could not base themselves on a failure by their landlord to perform his obligations and on the principle of lawful non-performance in order to validly refuse to pay the agreed rent to their landlord (see, for example: Luxembourg District Court, 28 June 2021, nr. TAL-2021-00994; Luxembourg District Court, 8 December 2021, nr. TAL-2021-03756).

Relief of the leaseholder's obligation to pay rent based on the theory of risks (*théorie des risques*)

Certain leaseholders have based their claims on the theory of risks (*théorie des risques*).

According to this theory, when a party to a contract is relieved from its obligation due to *force majeure*, the other party to the contract is also relieved from its own obligations.

In the specific context of lease agreements, Article 1722 applies the theory of risks by providing that if a leased good is completely destroyed pursuant to a *force majeure* event, the lease agreement is automatically terminated, and that if it is only partially destroyed, the leaseholder may request a reduction of the rent or the termination of the lease agreement, depending on the circumstances.

In two judgements rendered on 13 January and 14 January 2021 (nr. 94/21 and nr. 124/21), the Luxembourg Justice of the Peace (which is the first instance court for disputes related to the performance of lease agreements) ruled:

- that Article 1722 must not only be applied in cases of *material* destruction of a leased good, but also in cases of *legal* loss of the peaceful enjoyment of a leased good;
- that a temporary closure of leased premises, imposed by the authorities, constitutes a legal loss of the peaceful enjoyment of said premises within the meaning of Article 1722;
- and that, as a consequence, the leaseholders were indeed allowed to request a reduction of the rent for the period of closure.

However, the Luxembourg District Court (which is the second instance court for disputes related to the performance of lease agreements, and – thus – has a higher authority than the Justice of the Peace) has since showed its disagreement with the Justice of the Peace's analysis.

In a judgment rendered on March 30th, 2021 (nr. TAL-2020-09641), the Luxembourg District Court ruled that the pandemic-related measures taken by the Luxembourg authorities did not directly impose a closure of leased premises, but – rather – prohibited the exercise of certain commercial activities in said premises.

Because of this nuance, the District Court considered that it is really not the use of the premises as such, but the exercise of certain specific activities that was hindered due to a *force majeure* event, and came to the conclusion that leaseholders could – thus – not rely on Article 1722 to be granted a reduction of rent.

The Luxembourg District Court has maintained this position since (see, for example: Luxembourg District Court, 28 June 2021, nr. TAL-2021-00994, TAL-2021-02457 and TAL-2021-02480; Luxembourg District Court, 12 July 2021, nr. TAL-2021-02935, TAL-2021-03029 and TAL-2021-04656; Luxembourg District Court, 8 December 2021, nr. TAL-2021-03756).

Obligation of the landlord to accept a reduction of the rent based on his obligation to perform the lease agreement in good faith (*exécution de bonne foi*)

Certain leaseholders have argued that their landlord should be forced to accept reductions of rent, because refusing reductions of rent could be considered as a breach of the landlord's obligation to perform the lease agreement in good faith, given the circumstances.

Indeed, Article 1134 of the Luxembourg Civil code provides that the parties to a contract must perform the contract in good faith.

First, the Luxembourg Justice of the Peace rejected this legal ground, taking the position that the parties' obligation to perform a contract in good faith could not allow the judge to go as far as imposing a modification of the terms of the contract (see Luxembourg Justice of the Peace, 14 January 2021, nr. 124/2021; Luxembourg Justice of the Peace, 21 January 2021, nr. 204/21).

However, the Luxembourg District Court soon took the opposite stance (see: Luxembourg District Court, 28 June 2021, nr. TAL-2021-00994).

Relying on longstanding French case law (French Court of Cassation, 3 November 1992, nr. 90-18.547), the District Court ruled that the obligation to perform a contract in good faith could impose that a party exercises its contractual rights with moderation or restraint.

Therefore, a party who stubbornly refuses to amend a contract that has clearly become imbalanced (due to external circumstances) can be considered as breaching its obligation to act in good faith, and – thus – the judge may remedy said breach by granting a reduction of the rent.

It is to be noted that in the case judged by the French Court of Cassation, the imbalance did not result from an external event, but from one of the contractors, whose commercial practices with third parties prevented its co-contractor from charging competitive prices.

Also, the District Court went further than the French Court of Cassation, as the Court modified the contract, or at least imposed a reduction of the rent due to exceptional circumstances caused by an external event.

The District Court's stance was confirmed in later judgements (see, for example: Luxembourg District Court, 12 July 2021, nr. TAL-2021-02935 and TAL-2021-03029; Luxembourg District Court, 8 December 2021, nr. TAL-2021-03756).

It has to be noted that the obligation of good faith applies to both parties : in a decision dated from 22 December 2021 (nr. TAL-2021-04661), the District Court ruled that the obligation to execute the contract in good faith is assessed in the light of the other party's attitude and its impact on the contract.

In the considered case, the refusal of the landlord to negotiate did not warrant for a reduction of the rent as the leaseholder had actually never exploited the Premises, except for a few weeks, and had never paid any rent since the conclusion of the contract, which was signed before the pandemic.

Other decisions from the same court applied the same reasoning. In one decision dated from 16 March 2022 (nr. TAL 2021-07717), the court refuses to pronounce any reduction of the rent, noting that the landlord made several proposals to the leaseholder, including a one-year report of the rents due or a 50% reduction. The leaseholder having refused these proposals without making any reasonable counter-proposal, the court concluded that the landlords were not acting in bad faith by asking the payment of the rent from may 2020.

Conversely, in a decision dated from 16 February 2022 (nr. TAL-2021-06917), the court grants a 25% reduction to the leaseholder during the period during which his restaurant was closed to the public, by noting that the leaseholder tried to pay the rent regularly and as soon as he could despite his financial difficulties.

In a similar situation, in a decision dated from 13 July 2022 (nr. TAL-2022-02219), the court granted a reduction, calculated according to the restrictions the leaseholder was facing, noting that the leaseholder tried to negotiate in good faith with the landlord and tried to pay the rent every time his financial situation permitted it.

Consequently, the behaviour of the leaseholder – and especially the leaseholder's good or bad faith during the performance of the contract – may also be scrutinized by the judge in assessing the possibility to impose a reduction of the rent.

The Court of Cassation has not pronounced itself at the moment. The French Court of Cassation, on the other hand, has ruled in three decisions dated 30 June 2022 against any relief for the leaseholder. Considering that the general and temporary restrictive measures did not

lead to the loss of the rented property, and did not constitute a failure by the landlord to perform his obligation to deliver, a leaseholder is not entitled to rely on these to escape payment of his rent. Furthermore, the French Court of Cassation refused to consider that the landlord should have accepted a reduction of the rent based on his obligation to perform the lease agreement in good faith.

Whether the Luxembourg courts' positions may still evolve and if they will follow the French Court of Cassation – which relied on texts present in the Luxembourgish Civil Code – remains to be seen.

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