

Transfer of Fixed-Term Lease Agreements in a Corporate Acquisition by Way of Asset Deal: Beware the Written Form!

When transferring fixed-term lease agreements by singular succession in an asset deal, parties should ensure the transfer complies with the written form requirement.

A recent judgment¹ from the German Federal Supreme Court confirmed established case-law² regarding compliance with the written form requirement (sections 550 sentence 1, 578 para. 1 BGB - *German Civil Code*) with respect to a change of tenant in connection with a corporate acquisition by way of asset deal. The assumption agreement between a prior tenant and new tenant must comply with the written form requirement, *i.e.* in particular the agreement must expressly refer in writing to the original lease agreement. If the assumption agreement lacks such sufficient reference and the landlord has implicitly given consent to the assumption agreement, the lease agreement is deemed to have been concluded for an indefinite period of time and the statutory notice period applies. In this situation the new tenant's (*i.e.* the buyer's) or the landlord's financing may suddenly be endangered, *e.g.* if the lease which now can be terminated prematurely relates to business premises important to the new tenant (buyer) or if the landlord's financing depends on the cash flow from this lease agreement. In case of a corporate acquisition by way of an asset deal the landlord is in most cases not party to the assumption agreement. The landlord should therefore take into account the written form risk at the latest when granting consent necessary to make the assumption of the lease agreement by the new tenant effective.

The court ruling in detail

In the facts of the German Federal Supreme Court case, the landlord had concluded a lease agreement with the previous tenant (later the seller) regarding a commercial property with a fixed term of 15 years. The previous tenant concluded an asset purchase agreement regarding its business with a buyer (later the new tenant). The asset purchase agreement provided for a provision according to which the buyer (new tenant) assumed any and all rights and obligations under the agreements listed in an exhibit to the asset purchase agreement. This exhibit contained a general header and a table listing leased properties according to locations, landlord's name and payable rent. The table did not contain any further information, *e.g.* neither was the respective property specified, nor both parties to the lease agreement, nor the date of the respective lease agreement. The landlord granted its consent to the assumption of the lease agreement by the new tenant. The new tenant then terminated the lease agreement prior to expiry of the fixed term.

In its judgment the German Federal Supreme Court decided that the new tenant's termination was effective because upon the assumption of the lease agreement by the new tenant becoming effective, the lease agreement did not comply with the written form requirement anymore and was therefore terminable at the statutory termination period. For a better understanding of the judgment, effectiveness of the assumption of the lease agreement and compliance with the written form requirement need to be considered separately.

Effectiveness of the transfer of the lease agreement

To make the transfer of the lease agreement from the prior tenant to the new tenant effective, the landlord's consent is required. However, there is no specific form requirement, neither for the transfer agreement between the prior tenant and the new tenant nor for the landlord's declaration of consent. In particular, the landlord's consent may be declared implicitly (pursuant to sections 182, 184 BGB), for example if the landlord accepts rent payments from the new tenant or addresses to the new tenant an ancillary cost statement or a request for rent increase. In this case the landlord had granted such implicit consent by accepting rent payments from the new tenant over a long period of time without objection.

Compliance with the written form requirement

If a lease agreement with a fixed term of more than one year is transferred to a new party, the transfer needs to comply with the written form requirement pursuant to sections 550 sentence 1, 578 para. 1 BGB. Otherwise, the lease is still valid, however it is deemed to have been concluded for an indefinite period of time and may be terminated at statutory notice periods. According to the Federal Supreme Court's established case law the transfer agreement between the prior and the new tenant needs to comply with the written form requirement, however, there is no form requirement for the landlord's consent which can therefore also be granted implicitly.

In this case the information in the exhibit to the asset purchase agreement was insufficient with respect to the written form requirement pursuant to section 550 BGB. The German Federal Supreme Court held that the exhibit lacked a sufficient, express reference to the original lease agreement.

Upon the landlord's implicit consent to the assumption of the lease agreement this assumption became effective, however the assumption of lease agreement "destroyed" the lease agreement's compliance with the written form requirement.

Tips and tricks to minimize/avoid risks

From the landlord's perspective it is advisable that the landlord already takes part in the assumption agreement between the prior tenant and the new tenant by concluding a three-sided agreement which itself complies with the written form requirement. The landlord can thereby ensure compliance with the written form requirement upon assumption of the lease.

However, as this will frequently not be possible (e.g. in most cases of corporate acquisitions which take place without the landlord's participation), the landlord is well-advised to avoid form risks when granting consent to the assumption of the lease by the new tenant. It is expedient for the landlord to predicate consent on concluding an amendment to the lease agreement between the prior tenant, the new tenant and the landlord in proper form in which the lease is transferred to the new tenant. Such a formal lease amendment is preferable also for other reasons, e.g. if the landlord wants to consent to the transfer only subject to certain conditions or if the new tenant is liable to grant a new rent security and the landlord wants to discharge the prior tenant from its liability only subject to the new tenant having actually granted the new rent security.

Particular caution should be exercised when the landlord's conduct could be interpreted as implicit consent to the lease assumption, in particular when the landlord accepts rent payments from the new tenant without objection or communicates with the new tenant on the lease agreement. The landlord is therefore well-advised to only accept payments from the new tenant under reserve and to, at least, request evidence for the lease agreement transfer in proper form as a condition for consent, if consent is not predicated on conclusion of a three-sided lease amendment in proper form as advised above.

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¹ BGH, judgement dated December 11, 2013 – XII ZR 137/12, BeckRS 2014, 01950.

² BGH, judgement dated January 30, 2013 – XII ZR 38/12, NJW 2013, page 1083.