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Landmark Decision of the Federal Court of Justice in Germany:
Is Your Hotel Lease Agreement Still Valid? Or Do Rights of Termination Already Exist Today?

The End of Remedying Breaches of the Written Form Requirement in Long-term Hotel Lease Agreements

- Do you have a hotel lease agreement in Germany? Either as the lessor or the lessee? If yes, you should read on.
- Will this hotel lease agreement still run for a longer term and are you relying on it being valid for a long term? If yes, you should check now whether this is still correct.
- Do you think that the clauses at the end of your lease agreement, which are usually written by lawyers and are not given a great deal of attention, will help you? If yes, you should review your hotel lease agreement again now in more detail.

I. Decision of the German Federal Court of Justice

On September 27, 2017, the German Federal Court of Justice (BGH, case no. XII, ZR 114/16) decided that all clauses on remedying breaches of the written form requirement are invalid in all hotel lease agreements in Germany. Such clauses violate mandatory statutory law laid down in Sections 550, 578 of the German Civil Code (BGB). Any pre-formulated contractual conditions that have been written by lawyers or the contracting parties are now deemed invalid, even if the remedying of breaches of the written form requirement has already been negotiated for individual contracts.

The direct consequence of the decision of the German Federal Court of Justice is especially difficult for foreign investors and/or hotel operators to comprehend: even if one agrees on the contract text for a hotel lease agreement after weeks of negotiations and decides on detailed contractual provisions, the Federal Court of Justice in Germany can declare an important contractual clause null and void with one ruling. This is because Sections 550, 578 of the German Civil Code represent mandatory statutory law and, therefore, cannot be modified even if both contracting parties agree.

II. What Does the Statutory Written Form Requirement Mean for Long-term Hotel Lease Agreements?

All hotel lease agreements in Germany that have been agreed for a contractual term of more than one year must be made in writing. The requirements for making an agreement in writing are found in Section 126(1) of the German Civil Code: The hotel lease agreement must be personally signed by the representatives of both parties on the same contractual document and all essential provisions of the hotel lease agreement must be contained in this document. Any annexes to the lease agreement must clearly reference the main contract and all annexes must be attached in paper form and correspondingly designated.

Even in the age of digitalization, it is not sufficient to sign on separate contractual documents or, for example, exchange PDFs containing a signature. The written form requirement that applies in Germany is only observed if the agreement on all essential contractual conditions required for entering into the hotel lease agreement – in particular concerning the leased object, the amount of rent, the term of the agreement and the parties to the agreement – is contained in the contractual document that has been signed by both parties.

Any subsequent amendments to the hotel lease agreement must also fulfill the written form requirement under Sections 550, 578 of the German Civil Code, unless they only concern minor changes. If the hotel lease agreement does not fulfill the written form requirement, this does not affect the validity of the agreement. However, either party may then terminate the hotel lease agreement prematurely in observance of the statutory notice period that applies in Germany, i.e., prior to the expiration of the contractually agreed fixed term.

III. Previous Practice

If either party decides to terminate the hotel lease agreement prematurely, there will be significant economic risk for both parties. In order to avoid this special right of termination, the legal practice in Germany has (up to now) used so-called remedying clauses as an aid to remedy any breach of formal requirements. Every hotel lease agreement existing today that has been agreed for a term of more than one year contains some version of this remedying clause. If the Federal Court of Justice clearly and unambiguously considers this remedying clause to be invalid, the resulting risks need to be assessed internally.

IV. Possible Solutions

In the event that a remedying clause is declared invalid and a hotel lessor or lessee decides to terminate the lease agreement, it is possible to object on the grounds that the other party is acting in bad faith. This is a German legal principle that is anchored in Section 242 of the German Civil Code, which prohibits a party from invoking any positive legal consequences if such party created the conditions for such legal consequences itself.

To avoid the risk that the other party may terminate the hotel lease agreement prematurely, it is important to meticulously adhere to the strict formal requirements under German law. Therefore, we recommend that you have all of your existing hotel lease agreements reviewed in terms of any written form deficits under German law in order to remedy any breaches, which may exist if contractual agreements have not been documented in writing, by way of a mutually agreed addendum to the lease agreement. This recommendation will not be helpful if you are dealing with a party that would like to distance itself from a hotel lease agreement that has become undesirable, but it will help to structure a hotel lease agreement if both parties wish to continue with it in the long term.

The decision of the Federal Court of Justice may even encourage both contracting parties to cooperate on any prior failures to record an agreement in writing. Such discussions can also be used as an opportunity to reach a mutual agreement on the extension of the hotel lease agreement.

If you have any questions relating to hotel lease agreements, please contact Dr. Axel Kunze.

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