

Commercial Property - Austria

Supreme Court issues new case law on shopping centre agreements

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The Supreme Court recently handed down a decision concerning a lease agreement in a shopping centre. Although the court once again stressed that there is no general rule on the legal qualification of shopping centre agreements, for the fourth time since its landmark 2006 decision (for further details please see "[Supreme Court Raises More Questions over Shop Leases](#)"), the court held that the agreement must be qualified as the rent of retail space rather than the lease of a business. Contrary to previous case law, for the first time the court clearly stated that the tenant's contractual obligation to operate the business is of minor importance.

Background

Austrian tenancy law distinguishes between the rent of business space on the one hand and the lease of a business on the other (for further details please see "[Termination Clauses in Shopping Mall Agreements: Uncertainty Remains](#)"). This distinction is crucial, as the Rent Act applies only to the former. If the Rent Act applies, the landlord can terminate the agreement for good cause (eg, if the tenant defaults on rent payments). Moreover, in certain cases mandatory rent control applies and the respective maintenance and repair duties are regulated by law.

On the other hand, if the agreement is qualified as the lease of a business, high vacancy rates in the shopping centre may entitle the tenant to reduce the rent or prematurely terminate the lease agreement, and the landlord may be liable for the tenant's debts at the end of the lease.

Decision

The court decided that the agreement constituted a rent agreement on the following grounds:

- The shopping centre was not yet built when the agreement was concluded;
- The landlord had committed to handing over the unfinished carcass structure. The tenant had to provide all fittings and fixtures; and
- The tenant had committed to handing back empty premises (rather than an ongoing business) at the end of the agreement.

On the other hand, the court deemed the following criteria - which would normally qualify an agreement as a lease of a business - as less important: (i) the contractual duty to operate the business on the premises; and (ii) turnover-based rent.

The court held that the facts that the landlord also provided the infrastructure for the shopping mall, including parking spaces, and that the agreements between the contracting parties were legally qualified, should be considered "neutral".

Comment

Even though the court stressed that shopping centre agreements must be judged on a case-by-case basis, in four consecutive cases now the court has rendered a judgment in favour of a rent agreement. Therefore, in the absence of special circumstances, it is likely that the court will generally consider lease agreements in shopping centres to be rent agreements.

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