

Real Estate - Austria

Asset deal – buyer not bound by preferential lease rights

Contributed by **Graf & Pitkowicz**

January 23 2015

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By law, the buyer of a property automatically enters into existing lease agreements on behalf of the seller. However, the Supreme Court recently rendered a judgment stating that this does not necessarily apply to all clauses contained in a lease agreement, thereby redefining the scope of this provision.

Facts

The claimant had rented premises to use as a medical practice. The lease agreement also contained a preferential lease right with regard to the adjoining apartment. Pursuant to the clause, the claimant was entitled to rent the adjoining apartment as an extension of the medical practice if the existing tenant moved out.

The landlord then sold the entire house to a new owner (the defendant) by way of an asset deal. Subsequently, the lease for the adjoining apartment was terminated and the claimant decided to exercise its preferential lease right. The defendant refused to rent out the apartment to the claimant. He claimed that the preferential lease right was granted by the previous owner and that he was not bound by it.

The claimant argued that the defendant had automatically entered into the lease agreement when he acquired the property. As the preferential lease right was contained in the lease agreement, the defendant was bound by this clause.

The defendant acknowledged that he was party to the existing lease agreement; however, he argued that the preferential lease right was not part of the lease agreement, because by law, the buyer of a property is not bound by side agreements containing unusual content of which he or she was not aware or could not have been aware.

Decision

The Supreme Court held that although the preferential lease right was contained in the lease agreement, it was entirely separate from the existing lease, as it pertained to a separate leasing object and the rent was entirely independent of the rent for the existing premises. As it was not considered a side agreement to the lease, the defendant did not automatically enter into the agreement and – in the absence of an agreement to the contrary – was not bound by it. Hence, the action was dismissed.

Comment

The obvious lesson of this decision is that not every clause contained in a lease agreement necessarily transfers to the new owner when a property is sold. Therefore, a prudent contract drafter should immediately call for a three-party agreement to ensure that each party will uphold the rights after the property is transferred.

However, a three-party agreement is not a universal guarantee. On one hand, a tenant may realise that it can block the transaction by refusing to consent and may use this information as leverage. On the other hand, three-party agreements raise fiscal concerns: under tax law, an automatic transfer of a lease agreement by way of law is exempt from stamp duty. By contrast, a lease agreement that is transferred by way of a contract (eg, a three-party agreement) triggers stamp duty. Therefore, contract drafters must carefully decide which parts of the lease agreement should automatically pass on to the buyer and which parts must be transferred by way of an agreement.

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