

Enforceability of lease term options



Commercial leases to rent business premises often incorporate lease term options. The Slovak Supreme Court has affirmed that these lease term options are indeed enforceable. However, to ensure enforceability these clauses need to be drafted very carefully.

The lease term options in commercial leases include an option allowing a tenant to terminate a lease (a break option) and an option allowing a tenant to extend a lease (an extension option).

Break Options

Under Slovak law, lease agreements can be for definite or indefinite terms. Either party may terminate (in Slovak: *vypovedat'*) an indefinite term lease upon a three month written notice without stating a reason, unless agreed otherwise.

On the other hand, it is more difficult to terminate definite term lease agreements. A list of permissible reasons for terminating a definite lease is set out in the Slovak Act on Lease and Sublease. For example, the landlord may terminate the lease if the tenant has not paid past due rent or service charges for more than one month. The tenant may, for example, terminate the lease if the landlord grossly violates its obligation to maintain the premises in a satisfactory condition for the agreed use.

A majority of Slovak lower courts have held that this statutory list is exhaustive and the parties cannot agree to terminate a definite term lease for any other reason. However, the statutory list does not include typical commercial termination reasons, such as the landlord's right to terminate the lease if a more appropriate tenant is interested in leasing the premises, or the tenant's right

to terminate the lease if it fails to reach certain revenue from its commercial activities performed in the leased premises during a calendar year. Thus, until recently, a common viewpoint was that a break option based on commercial reasons was difficult to enforce.

However, by its decision dated November 28, 2012, the Slovak Supreme Court clarified that parties are free to agree on additional reasons outside the scope of the statutory list to terminate definite term lease agreements. In the case at hand, the landlord was permitted to withdraw from (in Slovak: *odstúpiť od*) the lease if the tenant had failed to pay past due rent within 60 days of receipt of the landlord's written notice. The Slovak Supreme Court held that the landlord could terminate the lease both by law (for tenant's failure to pay rent that was more than one month overdue, as set forth in the Slovak Act on Lease and Sublease) and by contract (for tenant's failure to pay rent within 60 days of written notice, as stipulated in the lease). Based on the Supreme Court's holding, the break option should be drafted as a reason for withdrawal (in Slovak: *dôvod pre odstúpenie*) and not as an additional termination reason (in Slovak: *výpovedný dôvod*).

Extension Options

Slovak law does not explicitly provide for extension options. Therefore, these options must be drafted very carefully to ensure

that they are enforceable.

The most secure method is to draft the extension option as an agreement on a future agreement. In relationships governed by the Commercial Code, this requires (i) the landlord's obligation to enter into an amendment to extend the term of the lease and (ii) the time period in which the tenant is entitled to request the landlord to extend the lease.

If the landlord fails to extend the lease, the tenant may ask the court either to extend the lease on the landlord's behalf or grant damages. To make the action more effective, the tenant may also ask the court for an enjoining order to prevent the landlord from leasing the premises to any third party. In addition, if the landlord fails to negotiate the lease extension, the tenant may ask the court to both extend the lease and grant damages.

Even if it is not drafted as an agreement on a future agreement, an extension option may still be enforceable as a non-defined contract. To qualify as a non-defined contract, the parties' obligations must be sufficiently specific. Unlike an agreement on a future agreement, the Commercial Code does not require the time period in which the tenant is entitled to request the landlord to extend the lease to be included in the non-defined contract.

There are, however, differences of opinion on the scope of tenant's claims if the extension option is drafted as a non-defined contract. If this is the case and the landlord fails to extend the lease, the tenant may certainly ask the court to grant damages. Some commentators have questioned whether the tenant may also ask the court to extend the lease on the landlord's behalf because there is no express statutory provision as in case of a future agreement. However, the Supreme Court has weighed in on a very similar question in its decision dated July 30, 2009, where it held that a party to a non-defined contract can bring an action to cause the court take actions on the other party's behalf. Thus, it is reasonable to assume that a tenant in a non-defined lease would be entitled to ask the court to extend the lease on the landlord's behalf. Nonetheless, this question seems to be still open for further discussions.

Conclusion

In general, break options and extension options are enforceable under Slovak law. However, the way they are drafted can be the most decisive element in determining a party's success in a dispute. Therefore, parties to a commercial lease should never underestimate the negative consequences of failure to draft lease term options correctly.



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