

Commercial property management across borders

Netherlands



What can a landlord do when its tenant doesn't pay the rent?

Landlord remedy for failure to pay rent	Covid-19 measure	What can the landlord do now?
<p>Termination of the lease agreement</p> <p>Most of the commercial lease agreements governed by Dutch law are based on the ROZ model lease agreement (including its general conditions) as issued by the Dutch Real Estate Council (“Raad voor Onroerende Zaken” or “ROZ”).</p> <p>The ROZ precludes a tenant from reducing, settling and suspending the rental payments. Under normal circumstances, the landlord may request the court to terminate the lease agreement in case of non-payment of the rent by the tenant for at least three consecutive months. However, this may be different in case of government intervention.</p>	<p>Lockdown</p> <p>The Dutch government has implemented a (total) lockdown and has closed all non-essential shops as of mid-December 2020 until March 2021 (except for click and collect orders). This period may be subject to adjustment depending on the current Covid-19 pandemic developments.</p> <p>Support measures</p> <p>The Dutch government has arranged for support measures to entrepreneurs who are affected by the Covid-19 pandemic. This includes for example governmental subsidies for fixed costs or sustaining employment opportunities in case of significant reductions of turnover (>20 – 30%). In addition, some retailers are eligible to receive support for stock that cannot be sold anymore.</p>	<p>We are not familiar with many cases whereby the landlord has requested the court to terminate a lease agreement due to a payment default of the tenant during the Covid-19 pandemic.</p> <p>However, we deem it likely that if the tenant can demonstrate that the failure to pay the rent is due to Covid-19 or related circumstances, a landlord may be required to enter into renegotiations of certain obligations under the lease agreement for a temporary period, including the rental payment obligation, based on the Dutch principle of reasonableness and fairness.</p>
<p>Enforcement of rental security</p> <p>The ROZ model lease agreement includes an obligation of the tenant to provide security to the landlord (by either a security deposit or bank guarantee), in order to secure the due fulfilment of its payment obligations under the lease agreement (including the obligation to pay rent). Such security obligation generally covers three monthly rental payments including VAT and service charges.</p> <p>Additionally, the landlord may request for a parent company guarantee to be provided by the parent of the tenant (acting as guarantor) in order to guarantee the rental payments by the tenant.</p>	<p>No specific Covid-19 restrictions.</p>	<p>In the event of significant rent arrears, the landlord should consider using the rental security provided under the respective lease agreement. Such rental securities are generally in the form of an unconditional and irrevocable bank guarantee or a cash deposit and may be used without any possibility for the tenant to oppose the calling in of the guarantee.</p> <p>In the event that the landlord has made use of its bank guarantee the tenant is in principle obliged to refill the bank guarantee and to compensate the guarantor under the issued counter guarantee.</p> <p>In the event that a parent company guarantee is provided by the parent of the tenant in favour of the landlord, the landlord can take recourse on the guarantor for the full amount of its losses if the tenant does not meet its payment obligations under the lease agreement.</p>

Landlord remedy for failure to pay rent

The landlord may sue the tenant for payment of the rent by filing a claim for performance in a civil court. However, the tenant may argue that it is not possible to fulfil its obligations under the lease agreement on the basis of the following grounds:

Force majeure (Overmacht)

The scope and definition of force majeure depends on what parties have agreed upon contractually. If the lease agreement does not contain any force majeure provisions, then it should be assessed whether a force majeure is present within the meaning of article 6:75 Dutch Civil Code (DCC).

Unforeseen circumstances (Onvoorziene omstandigheden)

The tenant may state (i) the Covid-19 pandemic is unforeseen (ie not explicitly or implicitly accounted for within the meaning of article 6:258 DCC) in the lease agreement and (ii) these circumstances are of such a nature that it cannot be expected given the standards of reasonableness and fairness of the tenant to continue performing in accordance with the agreement.

Defect (Gebrek)

Under article 7:204 DCC, a defect (*gebrek*) qualifies as a condition or feature of the leased premises or any other circumstance that cannot be attributed to the tenant (ie due to the Covid-19 pandemic and/or governmental measures taken in relation thereto) and as a result of which the tenant cannot enjoy the leased premises in the manner that the tenant was entitled to expect upon the commencement date of the lease agreement.

Covid-19 measures

Courts generally have ruled that the Covid-19 pandemic, or any governmental measure taken due to the Covid-19 pandemic (ie a lockdown as described above), may qualify as an unforeseen circumstance (*onvoorziene omstandigheid*) or defect (*gebrek*).

In most cases, the court has granted the tenant (i) a rental reduction or (ii) a suspension of the rental payment on the basis ($\leq 50\%$) taking into account the following:

- the social position and relationship between involved; and
- the nature and seriousness of the interests of both parties involved;
- the extent to which the parties have been affected by the government measures (ie the financial consequences, allocation of damages and governmental support).

Case law so far is based on preliminary relief proceedings (*kort geding procedures*). However, this understanding has recently been confirmed in a substantive proceeding.

What can the landlord do now?

In order to avoid legal proceedings, landlords may consider accommodating tenants by granting:

- rent free periods (ie rent holidays) of up to three months;
- rent deferrals (ie where the rent is deferred for a specified period but will ultimately still be paid to the landlord); or
- rental discounts.

We are seeing many landlords negotiating on (i) rent deferrals or (ii) rent discounts of up to 50% subject to certain conditions, such as an extension of the applicable lease term.

Key Contacts

For further information please do not hesitate to get in touch with any of the A&O contacts listed below if you have any questions on any of the matters discussed in this note

Belgium



Rudy Dupont
Partner, Brussels
Tel +32 2 780 2266
rudy.dupont@allenoverly.com

France



Jean-Dominique Casalta
Partner, Paris
Tel +33 140 065 373
jean-dominique.casalta@allenoverly.com



Julien Sébastien
Partner, Paris
Tel +33 1 40 06 53 51
julien.sebastien@allenoverly.com

Germany



Dr Jochen Scheel
Partner, Frankfurt
Tel +49 69 2648 5551
jochen.scheel@allenoverly.com



Christian Hilmes
Partner, Hamburg
Tel +49 40 82221 2187
christian.hilmes@allenoverly.com

Italy



Paolo Nastasi
Partner, Milan
Tel +39 02 2904 9415
paolo.nastasi@allenoverly.com

Luxembourg



Jacques Graas
Partner, Luxembourg
Tel +352 44 44 55 415
jacques.graas@allenoverly.com



Serge Hoffmann
Counsel, Luxembourg
Tel +352 44 44 55 331
serge.hoffmann@allenoverly.com

The Netherlands



Leon Hoppenbrouwers
Partner, Amsterdam
Tel +31 20 674 1266
leon.hoppenbrouwers@allenoverly.com

Poland



Michał Matera
Partner, Warsaw
Tel +48 22 820 6213
michal.matera@allenoverly.com

Spain



Santiago de Vicente
Partner, Madrid
Tel +34 91 782 9858
santiago.devicente@allenoverly.com

UK



Christopher Woolf
Partner, London
Tel +44 20 3088 3866
christopher.woolf@allenoverly.com



Jane Fox-Edwards
Consultant, London
Tel +44 20 3088 6819
jane.fox-edwards@allenoverly.com



Aemelia Allen
Senior PSL, London
Tel +44 20 3088 3683
aemelia.allen@allenoverly.com

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