

# CENTER FOODSERVICE AND LEASE LAW: AVOIDING CONFLICT THROUGH PROPER CONTRACT DESIGN

What landlords and tenants should consider regarding foodservice space. Rainer Burbulla, partner at the law firm Grooterhorst & Partner Rechtsanwälte, analyzes the legal situation in Germany.

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## INTRODUCTION

Foodservice is indispensable in shopping centers. The synergistic benefits of supplementing retail areas with foodservice areas are obvious. Therefore every major shopping center has individual foodservice outlets or separate food courts. Some even have with their own entertainment facilities. Foodservice areas are therefore particularly important. For center owners and operators, it is equally important that the foodservice space “works.” The lease agreement has special weight in this situation and there are some other (foodservice-specific) features to note.

## OBTAINING PERMITS, LIQUOR LICENSE, ETC.

Problems often arise for lessees of foodservice space at the early stage of obtaining permits. A foodservice license is generally required to operate a foodservice establishment. It is true that this permission is granted to individuals rather than places, but it may also be dependent on the structural condition of the rented space. The landlord is generally responsible for such issues. If the lease imposes on the tenant the obligation to obtain a foodservice or liquor license and meet

all the requirements involved, this obligation is insufficient if, for example, fire safety-related complaints cause the authorities to refuse to issue a license (see OLG Düsseldorf, judgment of 19.03.2002 - 24 U 124/01). In this case, an explicit contractual agreement is required between the contracting partners.

## DELINEATION OF RENTAL AREAS AND ASSOCIATED AREAS (OUTDOOR SEATING, ETC.)

An express agreement between the parties is also important with regard to the precise delineation of the rental space. Mistakes in this area can lead to the lease failing to maintain the legal written form (§550 BGB). In order to preserve the written form, rental spaces must be described as precisely as possible in the lease. The written form requirement also applies to associated areas. For example, if a landlord grants a tenant space within a mall next to his shop for “outdoor seating” this area should be described in detail in the rental space plan. If this is not the case and the associated spaces are not otherwise clearly defined, both parties may cancel the lease prematurely because the written form has not been maintained. (See ruling by Higher Regional Court Düsseldorf, 29.11.2012 - 10 U 34/12.)



IMAGE: GROOTERHORST & PARTNER

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IMAGE: THINKSTOCK



### OPERATING DUTY

Another special feature of the design of the lease applies with regard to the operation of the rental space. Under German rental law, the tenant is not required to operate his leased space. If a center operator wishes to ensure that the food court is operated by its restaurateurs, he must impose clauses relating to operating duties in the lease. However, the landlord must make sure that tenants are allowed some interruptions (such as for performing inventories, cosmetic repairs, etc.). This is because operating duties without exceptions may be legally invalid, at least in form-type leases (GTC) (cf. High Court of Berlin, ruling of 05.03.2009 - 8 U 177/08).

### COMPETITION PROTECTION

The issue of competition protection is a sensitive one. In practice, landlords have often overlooked the fact that a tenant is entitled to so-called contract-inherent protection against competition – even when no explicit protection from competition is agreed in the lease. This extends to the agreed rental usage. The landlord should exclude any competition protection on principle. If this is impossible, he should ensure that there is no overlap between individual tenants via careful wording in the lease. According to recent case law, a violation of competition protection constitutes injury to a rental object, which entitles the tenant to a rent reduction without further conditions (cf. BGH, judgment of 10/10/2012 - XII ZR 117/10).

### CONDITION UPON RETURN OF THE RENTAL SPACE

The parties should also pay particular attention when designing the contract to the state in which the tenant must return his rental space. The landlord should be clear about whether he wants to continue to rent a foodservice space as a foodservice space after contract completion. If he does, questions regarding the initial conversion of the space and the later transfer of foodservice equipment must be addressed. If not, it is necessary to determine who is responsible for dismantling the equipment and converting the space back for other uses.

### CONTRACTS AS A MEANS OF CONFLICT PREVENTION

When drafting leases for foodservice spaces in shopping centers, certain foodservice-specific features are essential. In practice, this often means that contracts regarding foodservice rental spaces are even more extensive than conventional center leases; a consequence that is of mutual interest. As always, it is better to “cover” possible areas for conflict in the lease than to fight over such issues afterward (in court).

#### ABOUT GROOTERHORST

*Grooterhorst is a law firm focusing on property law that practices throughout Germany. It is highly specialized in planning law for shopping centers and other large retail schemes. The firm is known nationwide for its competence in this field. The firm's services also comprise real estate transactions, commercial lease law, construction law, and banking law. It acts for German and international investors, developers, funds, and asset managers.*