Consumer protection now granted to tenants

Since 1917, governments and legislators have made repeated efforts to protect tenants (as well as occasional attempts to relax such protection), initially by way of (emergency) decrees, next by passing the tenancy act, more lately by introducing the Landlord-and-Tenant act and its numerous amendments, transition provisions and exceptions. Recently the Supreme Court, in passing judgment in a test case (*Verbandsklageverfahren*), invalidated 39 out of 40 clauses of a model lease, i.a. for infringements of the Consumer Protection Act (KSchG; OGH 7 Ob 78/06f), causing considerable bafflement amongst landlords as much as tenants as to the workings of the law.

A closer look at the judgment shows that the Supreme Court rejected and thus invalidated a number of clauses on purely formal grounds: thus, giving due regard to the KSchG, any change in the purpose of a lease must not be made contingent upon the landlord's written consent because the effectiveness of oral declarations (of consent) must not be excluded when consumers are involved. The confirmation that a tenant "has accepted the property in an as-new state" was considered by the Supreme Court to be an **unacceptable representation of fact** which shifts the burden of proof onto the consumer. Clauses that are too general or too expansive in their wording and thus make it impossible for tenants to calculate their future cost burden infringe upon the transparency rule of Section 6 (3) KSchG. For this reason, a clause according to which the tenant "bears any and all costs and fees, including but not limited to stamp duties, arising from and connected with the execution and tax office registration of the lease agreement" is ineffective. Similarly, the highly popular **severability clause** (i.e. an invalid provision is to be replaced by a valid clause of similar effect) also violates the transparency rule when used in a contract made with a consumer and is thus ineffective.

In future, when drafting standard leases with an entrepreneur as the landlord and a consumer as the tenant, provisions thus need to be worded with maximum clarity and completeness. Thus, a clause should be valid when it provides for the tenant to pay (only) the stamp duty for the lease, but not "any and all further costs in connection with the registration of the lease with the tax office". Any leeway granted under the law needs to be utilised with maximum precision. In future disputes, excessively vague clauses in model leases will no longer be

reduced to a level that "is only just acceptable". This must be kept in mind particularly by those landlords who let **more than five flats** because, according to current case law, they are considered to be entrepreneurs within the meaning of the KSchG.

However, the Supreme Court did not just call for a more careful wording of leases made with consumers, but it ruled clauses to be ineffective which, upon termination of the lease, obliged tenants to **paint the walls** or renew damaged fittings included in the lease. According to the Court's decision, the tenant can no longer be obliged to, e.g., replace a **faulty heater**. Under jus dispositivum, it is the landlord who bears the maintenance obligation – under the Austrian General Civil Code, natural wear and tear of the leased object are borne by the landlord; charging the tenant with the maintenance duty results in an exclusion of warranty rights, which is not permissible in contracts made with consumers when the defect is not known beforehand. This reasoning on the part of the Supreme Court once again affects only contracts made with consumers in their capacity as tenants. Nevertheless, a deviation in model contracts from the flexible law for which there is no objective reason may well be grossly disadvantageous, within the meaning of Section 879 (3) of the General Civil Code, to entrepreneurs as well and thus be ineffective. In the case of **extraordinary wear and tear**, however, the tenant can still be obliged to make a replacement.

Now that tenants can no longer be generally obliged to paint the walls and renew damaged equipment, the cost borne by the landlord will increase, thus further reducing the already low rate of return obtainable from letting flats.

However, the Supreme Court decision concerns only a **partial scope of application** of the Landlord-and-Tenant Act (MRG) under which landlords can achieve some compensation by asking for a higher rent when reletting a flat. Under the normal scope of application of the MRG, this option is not open to landlords because here the rent is mostly fixed by the law. For this reason, experts eagerly await a **second decision pending** from the Supreme Court in another case which involves, i.a., maintenance obligations and the normal scope of application.

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PIONEERING BOOK ON THE ACT GOVERNING INFORMATION RE-USE

Dr. Rainer Knyrim, one of our partners, has joined forces with Mag. Elisabeth Weissenböck from the Federal Ministry of Economics and Labour, to write the first treatise in Austria on the Act Governing Information Re-use (*Informationsweiter-verwendungsgesetz*).

The new law is designed to enable enterprises in particular to commercially use information (data) provided by public authorities.

The volume can be ordered online under www.verlagoesterreich.at. For further information please do not hesitate to contact Rainer Knyrim.

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