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Renewal option can render lease end date invalid

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Introduction

Most commercial leases in Austria are fixed-term leases, as commercial tenants, like residential tenants, are protected by the Rent Act. This Act provides, among other provisions, that a landlord can terminate a lease only for a good cause, such as in case the tenant does not pay the rent. Only fixed-term leases enable the landlord to renegotiate the rent or exchange tenants at certain times.

Therefore, it is important that the lease agreement contains a valid end date. There are certain rules on end dates that must be adhered to. If they are not, the lease is considered to be unlimited in time and the landlord can terminate for cause only.

In a recent decision, the Supreme Court considered the effect of a renewal option in this context.⁽¹⁾ The Court held that the option did not fulfil the prerequisites for a valid end date as it was drafted in such a way that the lease agreement was automatically renewed for three years, unless the landlord sent a "renewal notice" to the tenant six months before the expiry of the initial term or the renewal period.

Background

The Rent Act provides that end dates must be agreed in writing. This means that there must be a written document that states the end date and is signed by both parties. A confirmation email is not sufficient, unless the email is sent by certified signature. The end date must be specified in the document, either as a specific date or by reference to another date (eg, three years after the start date).

Facts

The parties agreed a three-year lease and added a clause stating that the lease would automatically renew for an additional three years unless the landlord declared six months before the end of the term that he did not wish to renew the lease. In the latter case, the lease would end.

Decision

The Court considered this clause to be invalid for two reasons. Firstly, the lease did not limit the number of renewals taking place: the lease could be renewed as many times as required until the landlord declared that he no longer wished to renew. Therefore, it was uncertain whether the lease would last for three years or for three decades. Secondly, the Court considered the "negative

condition" for the termination (namely, the condition that the lease would renew in the absence of the landlord's renewal notice) to be too vague.

Comment

Renewal options do not per se lead to an invalid end date. In order to be effective, they must contain an absolute end date, on which the lease definitely ends. Also, they must be structured in a positive way, which means the lease is renewed if the option is exercised.

When drafting renewal options, stamp duty must also be considered. The stamp duty must be paid for the entire period upon signing the lease, including any option periods. The stamp duty is not reimbursed in case the option is not exercised. The stamp duty is 1% of the gross annual rent payments for the entire term, up to a maximum of 18% of the gross annual payments.

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Endnotes

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