The new tenancy law 2013

On May 1, 2013 the law on the energy-efficient modernisation of rented-out residential property and on the simplified enforcement of an eviction title (Tenancy Law Reform Act) became effective (German Civil Code (BGB) I, p. 434). Basically four areas of tenancy law are involved. First, the implementation of maintenance and modernisation measures; second heat contracting, third the (procedural) enforcement of rental and eviction claims as well as fourth, creating protection against unwarranted eviction against the "Munich Model". The Tenancy Law Reform Act mainly affects residential tenancies. However, the Tenancy Law Reform Act has an impact on commercial lease agreements, too.

1. Implementation of maintenance and modernisation measures

Residential as well as commercial tenancy law are affected by the revisions regulating maintenance and modernisation measures (§§ 555 a to 555 f German Civil Code (BGB)). In doing so, two objectives are aimed at: On the one hand, the law concerning maintenance and modernisation measures is intended to be made clearer by revising it. On the other hand, enforcing maintenance and modernisation measures is designed to be facilitated.

The most controversial regulation in the legislative procedure in connection with the implementation of maintenance and modernisation measures is the limited exclusion of reduction (§ 536 Sec. 1 a German Civil Code (BGB)). According to this, the reduction for reasons of energy-saving modernisation remains excluded for a period of three months. The landlord is, therefore, bound to swiftly implement modernisation (comp. official statement, Bundestag official paper 17/10485, p. 18). On the other hand, he should not suffer a "cashflow" loss.

In future, questions of doubt might arise in case of interruptions of work, such as, for example, breaks in which the tenant does not suffer any impairment. Given the spirit and purpose of this regulation such interruptions should (probably) not be made an integral part of the three-month period. In fact, the "interconnected" duration of the impairment will have to be determined. In this context it might also be open to debate whether the three-month exclusion of reduction applies, if the landlord carried out several successive energetic modernisation measures. It is then questionable, whether the period of three months applies successively to each individual measure. In this case, the limit might (well) be the abusive behaviour of the landlord, for example, if - against the principles of a proper building owner - the landlord "stretches" the work in the project for no good reason. Further practical difficulties might occur, if the landlord in addition to the energy-saving modernisation also carries out (normal) maintenance measures. Then those impairments occurring under the respective individual works have to be specified and to be estimated, if necessary (§287 Code of Civil Procedure (ZPO)). The latter is probably only possible to be accomplished by experts.

A further objective of the Tenancy Law Reform Act is the actual facilitation of implementing modernisation measures. Under the previous law tenants were able to assert economic hardship resulting from rent increases to be expected subsequent to the modernisation already at the point when the modernisation measure was announced, and thus preventing modernisation. Now economic hardship has principally only to be considered at the point of a rent increase (§ 555 d Sec. 2 Sent. 2 German Civil Code (BGB)). Consequently, the landlord is able to implement the modernisation as intended. Whether he can then obtain an increased rent (559 German Civil Code (BGB)) remains

reserved to the demand for rent increase (the possibility to increase the rent subsequent to modernisation measures only exists in residential tenancy law).

Already the announced modernisation entitles the tenant to exceptional termination (§ 555 e German Civil Code (BGB)). A commercial tenant, too, has this exceptional right of termination (§ 578 Sec. 2 in connection with § 555 e German Civil Code (BGB)). Especially landlords of commercial premises are well advised to take care in future rental agreements to exclude the exceptional right of termination in order not to risk the premature termination of a long-term commercial rental agreement in case of potential modernisation work, if modernisation measures are scheduled.

2. Revision for heat contracting

The second key area of the Tenancy Law Reform 2013 covers the so-called heat contracting (§ 556 c German Civil Code (BGB)). The revision of § 556 c German Civil Code (BGB) shall enable the facilitated cost allocation of commercial heat supply (contracting) within an existing rental relationship. Technical details will be regulated in an ordinance to be newly created (§ 556 c Sec. 3 German Civil Code (BGB)).

Whether the revisions concerning heat contracting actually lead to a facilitation of allocating operating costs is rather doubtful. According to previous rulings of the Federal Supreme Court (BGH), the landlord was able "to charge the costs of the independent commercial supply" to the account of the tenants without any limitation, provided that in the rental agreement the version of attachment 3 of § 27 of the Second Calculation Regulation applicable since March 1, 1989 or the current Operating Costs Ordinance respectively – and if only by means of general reference – had been agreed (comp. Federal Supreme Court (BGH), judgement of July 16, 2003 – VIII ZR286/02). The cost neutrality now required by § 556 Sec. 1 No. 2 German Civil Code (BGB) is not likely to be practically achieved.

In this context (also) a further question is likely to come up in future. If the requirements of § 556 c German Civil Code (BGB) are not fulfilled, the landlord can only demand from the tenant the previous operating costs to be (fictitiously) calculated for the supply of heat and/or warm water, in particular the fuel and maintenance costs, however not other costs of the energy supplier. Still, § 556 c German Civil Code (BGB) does not provide how those fictitious sums are to be calculated.

3. Procedural facilitation when enforcing rental and eviction claims

The third key area of the Tenancy Law Reform Act extends to (procedural) amendments concerning the facilitated enforcement of rental and eviction claims. First of all, § 283 a Code of Civil Procedure (ZPO) provides the new possibility of an ordinance prompting securities in order to protect the landlord against (further) rental losses. In enforcement law the "Berlin Eviction" has now been regulated by law (§885 a Code of Civil Procedure (ZPO)). Accordingly, an enforcement order of the creditor is limited to the release of the rental areas. A lessor's lien does not have to be asserted (anymore); however the bailiff undertakes to document the items found. In order to meet the danger of complicating or frustrating enforcements of evictions, there is still the legal possibility of an interlocutory injunction against a third party (§940 a Code of Civil Procedure (ZPO)). Accordingly, the third party shall be expelled from the property by means of an interlocutory injunction, if it has possession of the rental areas, and without the knowledge of the landlord, and if an eviction title against the tenant already exists. Pursuant to § 940 a Sec. 3 Code of Civil Procedure (ZPO) the

creditor (the landlord) shall also be able to enforce the eviction of a tenant within an injunctive process, if the landlord terminated the rental agreement for reasons of default in payment and filed an action for eviction.

4. Limitations of termination in case of conversion into residential property ownership (so-called "Munich Model", § 577 a German Civil Code (BGB))

The fourth key area of the Tenancy Law Reform Act 2013 refers to the limitation to terminate a rental agreement when converting residential real estate (§ 577 a German Civil Code (BGB)). With the revision of § 577 a German Civil Code (BGB) the legislator intended to eliminate "arrangement possibilities" of "clever purchasers" who let the limitation to terminate a rental agreement pursuant to § 577 a German Civil Code (BGB) old version run idle (so-called "Munich Model"). In doing so, it was possible to circumvent the factual conditions of § 577 a Sec. 1 German Civil Code (BGB) old version by means of a construction under company law, in which in a first step the plot of land was sold to a partnership, which – directly afterwards – asserted personal need for their shareholders prior even to the division into residential property (comp. also Federal Supreme Court (BGH), judgement of July 16, 2007 – VIII ZR 231/08). As of now the limitation of terminating a rental agreement pursuant to § 577 a Se. 1 German Civil Code (BGB) applies to any sale of rented residential property to partnerships and majorities of purchasers. This wide extension of the limitation to terminate rental agreements is then limited again by the catalogue of exceptions in § 577 a Sec. 1 a Sent. 2 German Civil Code (BGB).

5. Perspective

Like any law reform the Tenancy Law Reform Act settles some issues in dispute from the past, at the same time, however, it raises new questions. Therefore it remains to be seen how practice reacts to it.

Dr. Rainer Burbulla

Dr. Rainer Burbulla
Grooterhorst & Partner Rechtsanwälte, Düsseldorf
www.grooterhorst.de