

No violation of the writing form requirement in the case of unilateral adjustment of advance payment of utility and heating costs and an increase in rent as a result of a change in the index - Federal German Supreme Court, ruling handed down on 5 February 2014 (XII ZR 65/13)

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In a ruling handed down on 5 February 2014 (XII ZR 65/13), the Federal German Supreme Court addressed two very important (writing form) issues involving actual practice in the field of law governing the rent of commercial space. First of all, whether there can be a violation of the writing form requirement if advance payment of utility and heating costs is unilaterally adjusted (§ 550 of the German Civil Code). Secondly, whether an increase in rent as a result of a change in the index could lead to a violation of the writing form requirement if the parties for example do not document the increased rent, e.g. in an ancillary agreement to the rent agreement. The Federal German Supreme Court answered both questions in the negative.

1. The facts

There was a rent agreement for commercial space that was to apply until 2010 between the parties with an option for the tenant to renew the agreement. The amount of the net rent was fixed until 31 December 2008. After then, "the agreed-upon rent shall change on each respective 1 January in the same degree as the consumer price index for Germany as a whole determined by the German Federal Statistics Office increases or decreases. The adjustment of the respectively changed rent is to take place automatically on 1 January of each and every year by means of written notice by the lessor. The point in time when notice is provided does not have any influence on the increase in rent effectively going into force."

In addition to the rent, the tenant owed an advance net monthly payment on utility and heating costs that accrued. The amount of the advance payment of utility and heating costs was determined in accordance with § 5 (1) of the Rent Agreement: "Credited amounts or subsequent back amounts owed emanating from advance payments on heating and utility costs are to be paid by both parties without undue delay. In these cases as well as in the event of an increase or decrease in heating and utility costs, the lessor may set a new amount for the advance payment to be paid on a monthly basis".

Since the settlement of utility and heating costs in 2005 led to a subsequent net back payment sum of about € 5,200, the lessor notified the tenant in writing that it was necessary to adjust the advance payment and that the monthly advance payment on heating and utility costs would increase beginning in August 2007. The tenant paid the increased amount. In March 2009 the tenant gave notice to terminate the Rent Agreement, citing a violation of the writing form requirement as of 30 September 2009, inter alia because the notice of increase in the advance payment of the heating and utility costs was not provided in writing. In a letter dated 31 March 2009, the lessor calculated an increase in the net rent that had occurred on the basis of the rise in the consumer price index since the beginning of the rent and demanded subsequent back

payment for the past period. The tenant paid the increase in rent until September 2009 and then refused to effect any payment after October 2009.

2. Ruling handed down by the Federal German Supreme Court

The *Federal German Supreme Court* held that the tenant was not entitled to terminate the rent and accepted the action by the lessor to enforce payment. A violation of the writing requirement (§ 550 of the German Civil Code) entitling the tenant to (prematurely) terminate the rent agreement within the statutory periods of notice (§ 580 a of the German Civil Code), according to the High Court, did not emanate either from the adjustment of the advance payment on heating and utility costs or the increase in rent as a result of the change in the index.

The lessor, in the opinion of the Court, was entitled to raise the advance payment on heating and utility costs as a result of the adjustment clause in the Rent Agreement (§ 5 (1)). This Agreement was furthermore in line with § 560 (4) of the German Civil Code, which in its meaning only applies to dwelling space. Under this provision, the lessor can adjust advance payments by means of a unilateral statement in text form (§ 126 b of the German Civil Code) without any consent from the opposite party being necessary. Corresponding to this, § 5 (1) of the Rent Agreement stipulated that the lessor was allowed to adjust the advance payments by means of a unilateral statement. The parties to the Agreement also proceeded accordingly: The lessor notified the tenant of the increased amount to be paid for heating and utility costs beginning in August 2007, and the tenant met this request without issuing any additional statements or declarations.

The High Court did not have any misgivings from a legal standpoint if parties to an agreement agree in the general terms and conditions for the rent of commercial space that the lessor is allowed to adjust the amount of advance payment on heating and utility costs by means of a unilateral statement following annual settlement of the heating and utility costs. The protective purpose of § 550 of the German Civil Code did not stand in the way of this, according to the Court. It is intended to establish clarity over the conditions in a long-term rent agreement for a later purchaser of real property. There are also cases, however, in which comprehensive "provision of information" is not possible. This goes, for example, for extensions of rent agreements resulting from the exercise of options. Here the purchaser is sufficiently warned of this through the option to extend the agreement agreed upon in the rent agreement. The purchaser must if need be enquire with the lessor or the tenant as to any exercises of the option. Nor were things any different with regard to the adjustment clause in § 5 (1) of the Rent Agreement. Here as well, the needs of a purchaser of the real property for protection were respected, as the clause clearly notes the possibility of a change in the amount of advance payments compared to the amount stipulated in the contractual document.

Nor did the increase in rent trigger any right to terminate the Agreement. According to the value-protection clause effectively agreed upon in the rent agreement, the adjustment of the rent beginning in 2009 took place automatically at the beginning of every year. This contractual agreement was already contained in the original Rent Agreement and for this reason satisfied the

writing form requirement set out in § 550 (1) of the German Civil Code. To the extent that the clause provides for written notice by the lessor, held the High Court, this notice is of a purely declaratory nature. It therefore does not force the parties to the agreement to conclude an agreement on an increase in rent triggered by an index, i.e. an ancillary agreement to the rent agreement.

3. Consequences for the field of practice

With regard to increases in rent resulting from changes in the index, the *Federal Supreme Court* expressly confirmed the admissibility of common contractual practice, according to which such increases in rent generally take place "outside" the rent agreement by means of separate notices of an increase in rent. With regard to the possibility of adjusting advance payment on heating and utility costs, the *Federal Supreme Court* conformed that the requirements laid down in § 560 (4) of the German Civil Code do not apply in the area of law governing commercial space. In order to provide the lessor the possibility to make adjustments in advance payment on heating and utility costs, the lessor therefore has to agree upon an express adjustment clause with the tenant in the rent agreement. In the opinion of the *Federal Supreme Court*, this is also possible by means of a form.



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