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## Commercial Property - Austria

### New case law on fixed-term leases creates pitfalls for landlords

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#### Introduction

In Austria, it is common practice to conclude lease agreements with a fixed end date, rather than indefinite leases. This is due to the restrictive statutory termination grounds within the Act on Tenancy Law. A landlord can terminate an indefinite lease only for good cause. Termination procedures can be time consuming.

The Act on Tenancy Law stipulates certain formal criteria for fixed-term leases. In particular, agreements must be in writing and must specify a definite end date. If these criteria are not met, the landlord cannot enforce the end date.

The Supreme Court recently handed down two decisions on these criteria.

#### Agreement in writing

A lease agreement is considered to be in writing where there is a drafted document that specifies the lease's end date and is signed by both parties. The rationale behind this rule is that both parties should easily be able to prove the end date in case of a dispute and tenants should be fully aware of the consequences of an agreement.

In a recent Supreme Court case, a tenant had repeatedly signed renewal agreements that specified a fixed end date. These agreements were sent to the landlord by mail. The landlord – presumably – countersigned the documents, but did not send them back to the tenant.

The Supreme Court considered that the document constituted an offer by the tenant to renew the lease agreement for a specified term. In order to become a binding agreement, the offer had to be accepted by the landlord in writing and brought to the attention of the tenant. This criterion was not met, as the tenant was never provided with a countersigned agreement. Therefore, the end date was not enforceable and the lease was considered to be indefinite.

The reasoning behind this judgment is entirely correct, but only partially in line with the rationale of the law. As the tenant had signed the renewal agreement, he was aware of the consequences of the agreement. The landlord held a document which was signed by both parties and specified the end date, and could therefore prove the end date. The tenant did not hold such a document; however, as he could freely terminate the lease without stating a reason, it was not important that the tenant be able to prove the end date.

This judgment creates pitfalls for real estate transactions. In the course of due diligence, a buyer will typically review whether the lease agreement was concluded in writing and whether it specifies a fixed end date. The buyer cannot verify whether or when the tenant was provided with a copy of the signed lease agreement. Thus, even though the formal criteria appear to be satisfied, the buyer may still be faced with a lease agreement containing an unenforceable end date.

#### Fixed end date

In another case, the Supreme Court had to rule on the requirement of a definite and unconditional end date.

The lease in question was initially concluded for a fixed term of three years. The agreement stated that the lease would be converted into an indefinite lease at the end of this term, subject to the tenant's "friction-free behaviour".

The Supreme Court considered this clause to be insufficiently clear. First, the condition itself was unclear, as it was left to the parties to interpret what constituted friction-free behaviour. Second, the legal consequences were insufficiently clear. The clause could be construed either as an option right for the tenant or as an automatic conversion into an indefinite lease. Hence, the Supreme Court held that the criteria for a fixed term were not met and the lease was considered indefinite.

### Comment

These judgments once again underline that parties need to agree whether they want to provide for a renewal option or a non-binding declaration of intent before signing a lease agreement. Any ambiguity in this regard will be to the landlord's detriment. A suitable compromise could be to agree on a renewal option on the condition of clear criteria, such as full payment of rent and ancillary costs.

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