



Distinguishing German Residential and Commercial Tenancy Law: Are Tenant and Landlord in an Equal Position?

Christin Eissing*

Faculty of Management, Social Work, and Construction,
University of Applied Science and Art, Holzminden, Germany

Abstract

The German housing market, particularly in major cities, is very tight. This situation makes Tenancy Law the issue that has attracted the most attention in local and federal elections. This article presents and illustrates various methods of protecting the individual parties to a lease contract. Besides, it highlights the differences between Residential Tenancy Law and Commercial Tenancy Law and explains why legislation distinguishes between these two types of tenancies. This research establishes arguments and interpretations from relevant laws and regulations, including the German Civil Code and German General Equal Treatment Act, and judicial decisions that clarified the legal relations between tenants and landlords. This article concludes that Tenancy Law in Germany distinguishes in different ways between Residential Tenancy Law and Commercial Tenancy Law from legal, social, and economic perspectives. It also infers that the provisions stipulated in German Tenancy Law protect the tenant's right while remaining attractive for landlords to offer the house(s) for rent.

Keywords: *Tenant; Landlord; Contractual Protection; German Legal System; Social Justice.*

1. INTRODUCTION

The German Basic Law determines the Federal Republic of Germany as a Democratic and Social Federal State.¹ It entails that the government and the legislation are concerned with ensuring that social justice and social security for the population in various sectors. The housing sector is one of the government's concerns in formulating regulations and policies that provide maximum benefits for people's prosperity, in line with the high demand for people to gain access to housing. In this context, the Tenancy Law becomes having a strong relevance.

In Germany, more than 70 percent of single-person households do not live in their own house or apartment but in rented accommodations. At around 58 percent, this also applies to the majority of the German population as a whole.² This percentage is very high compared to other European Union (EU) member states. In 2020, just under 25 percent of the

*Email/Corresponding Author: christin.eissing@stud.hawk.de

¹ German Basic Law, Art. 20.

² Federal Statistical Office (ed.) (2022). "Distribution of the population in Italy from 2004 to 2020 by tenant and owner;" <https://de.statista.com/statistik/daten/studie/370713/umfrage/bevoelkerung-in-italien-nach-mieter-und-eigentuemer/>

population of Spain lived in rented accommodation and around 75 percent lived in owner-occupied housing.³ Another example is Italy where some 24.9 percent of its population lived in rental accommodation and 75.1 percent lived in their own houses or apartments.⁴

Germany has a large private rental sector where landlords are typically institutions or private persons, housing is allocated based on the market and there are typically no subsidies.⁵ Germany is a country in Europe that established a rent regulation system and is classified as a third-generation rent control system where rent increases are controlled within a tenancy but are unrestricted between tenancies.⁶

This fact emphasizes the importance of Tenancy Law and tenant protection, especially in Germany, because the State is obliged to ensure social justice and social security. The state is responsible for preventing people from becoming homeless due to losing their rented apartment or paying enormously high rents so that they cannot afford other necessities.

Currently, single-person households in Germany have to spend an average of just over a quarter of their net income on rent payments. The additional costs for electricity, waste disposal, property tax, water supply and disposal, street cleaning, heating, and some other costs that are regulated by German Operating Costs Regulation⁷ are their extra regular spending.⁸ Rising gas prices due to the Russia-Ukraine conflict are also an additional financial burden for tenants that pushes up the total amount of the rent, including the utilities and heating costs, which requires the State to intervene on that issue. For example, the gas price brake or additional financial support for low-income earners or students.

It is generally understood that the relationship between landlord and tenant usually puts the latter in a weaker position that needs special protection from the government. The German Civil Code (*Bürgerliches Gesetzbuch/BGB*) regulates the rights and obligations of tenants and landlords in sections 535 – 580a. These sections describe how to ensure the

³ *Ibid.*

⁴ *Ibid.*

⁵ Hanna Kettunen and Hannu Ruonavaara, "Rent regulation in 21st century Europe. Comparative perspectives," *Housing Studies* 36. no.9 (2020):1448, 1454.

⁶ *Ibid.*, 1448, 1450, 1453.

⁷ Operating expenses as a legal standard regulation: Regulation on the establishment of operating costs. See Thomas Harborth, "Housing in Germany - A Case Study in the Light of Government Guidelines," *Ekonomika a Management, Prague University of Economics and Business* 2 (2012): 8.

⁸ German Operating Costs Regulation (BetrKV), Section 2. See analysis regarding this issue in Julia Cornelius and Joanna Rzeznik, "Tenlaw: Tenancy Law and Housing Policy in Multi-level Europe," National Report for Germany. Deliverable no. 3.2, Brussels, European Commission, 2014, 63,135-138; Rolf Müller, "Tenancy law and energy renovation in European comparison," BBSR-Online-Publikation Nr. 14/2016, Federal Institute for Research on Building, Urban Affairs and Spatial Development (BBSR) within the Federal Office for Building and Regional Planning (BBR), Bonn, 84; and Rödl & Partner, "Landlord-to-tenant electricity generated from PV power plants: Are you still supplying or already," 20 May 2021, <https://www.roedl.com/insights/renewable-energy/2021/may/landlord-to-tenant-electricity-pv-power-plants>

safety of the tenant and the landlord when they conclude a lease agreement. Nevertheless, the laws also ensure that the landlord is protected from the misbehavior of his or her tenants. It is particularly worth mentioning that the BGB also distinguishes between private and business tenants. This article assumes that business tenants are not as inferior to the landlord as private tenants so there is greater contractual freedom and much fewer restrictions for commercial leases. This seems to indicate where the State is required to provide a guarantee of liberty for businesses against barriers stemming from private property.⁹

When it comes to the BGB and Tenancy Law, it can get a little confusing, because different rules apply to business tenancy agreements than to a residential tenancy agreement for a private individual. The original German Civil Code was drafted in 1900¹⁰ and a lot of new regulations have been added over the last 122 years, so a significant overhaul of the Tenancy Law would be helpful.

Especially in major German cities, the real estate market is very tight, leading to some property owners taking advantage of the plight of the population and charging exorbitantly high rents because of the high demand. For this case, there are, for example, instruments such as a rent brake¹¹ or strict regulations on rent increases.¹² But if tenants do not have enough knowledge about their rights, they cannot fight for their rights properly.

However, to gain benefit from the legal measures and the rights and restrictions through a lease agreement, both parties need a good overview of the relevant laws. This article critically examines the security measures for tenants and landlords that the law seeks to implement and discusses in particular, the differences between leases with private individuals and companies as contracting parties.

This article presents and illustrates various methods of protecting the individual parties to a lease agreement and highlights the differences between Residential Tenancy Law and Commercial Tenancy Law. Besides, it analyzes the reasons why German legislation distinguishes between these two types of tenants. The legal argumentation and interpretation are developed based on BGB, German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz/AGG*), and some relevant laws and regulations. In addition, it refers to case law settled before the German

⁹ See Simon Deakin, "Private Law and the New Social Question," *German Law Journal* 23 (2022): 862.

¹⁰ Johannes W. Flume, "Strict Liability in Austrian and German Law: On the Concept of Strict Liability in the Age of Technological Advancement," *Journal of European Tort Law* 12, no. 3 (2021): 210.

¹¹ Berliner-Mieterverein, "Rent Control/Rent Brake in Germany, for example Berlin, Part I Berlin," 9 January 2018, 1. <https://www.berliner-mieterverein.de/uploads/2018/01/Rent-Control-Rent-Brake-in-Germany-IUT-1-2018.pdf>

¹² German Civil Code, Section 558 See also Sergio Nasarre-Aznar, "Leases as an Alternative to Homeownership in Europe. Some Key Legal Aspects," *European Review of Private Law* 22, no. 6 (2014): 815-846; and Moritz Rinn, Jan Wehrheim, and Lena Wiese "How Tenants' Reactions to Rent Increases Affect Displacement: An Interactionist Approach to Gentrification," *Urban Studies* 59, no.15 (2022): 3064.

Federal Court of Justice (BGH), as they provide a framework for the current starting position for tenants and landlords.

Some previous academic works have discussed the issue of contractual relations between tenants and landlords in Germany. Cornelius and Rzeznik (2014) composed a national report on tenancy law for Germany that explores various aspects of tenancy contracts, including preparation and negotiation stages, conclusion, contents, implementation, termination, and enforcement.¹³ Braeuer, Kleinebrahm, and Naber (2019) analyze the techno-economic effects of the German Tenants Electricity Law 2016 on the energy system layout of multifamily buildings that can create a symbiotic relationship between landlords and tenants because the landlord acts as the local electricity provider who sells proper price of electricity to the tenants efficiently.¹⁴ Kettunen and Ruonavaara (2020) conducted a comparative study of 33 European countries, including Germany, to analyze the correspondence between the welfare state regime and the rent regulation system.¹⁵ Some papers have discussed thematic issues related to, or covered by, the BGB, such as the limitation of claims,¹⁶ development of private law,¹⁷ historical development,¹⁸ interpretation of a contract,¹⁹ and its impact on the foreign legal system.²⁰ Differing from the topic of those studies, this article, however, focuses on the elaboration of relevant provisions of the BGB, which regulate contractual relations between tenants and landlords in Germany.

2. RESULT AND ANALYSIS

2.1. Freedom of Contract and Prohibition of Discrimination

Before dealing specifically with the German Tenancy Law, it is worth mentioning that the prohibition of discrimination to protect tenants is related to the principle of freedom of contract. In general, freedom of

¹³ Cornelius and Rzeznik, *op.cit.*, 103-183.

¹⁴ F Braeuer, M Kleinebrahm and E Naber, "Effects of the tenants electricity law on energy system layout and landlord-tenant relationship in a multi-family building in Germany," *IOP Conf. Series: Earth and Environmental Science* 323 (2019): 1-9.

¹⁵ Kettunen and Ruonavaara, *op.cit.*, 1446.

¹⁶ Sibilla Buletsa and Piotr Zakrzewski, "Limitation of Claims in Polish and Ukrainian Civil Code against the Background of the Principles of European Contract Law and the German Civil Code," *Journal of Legal Studies* 24, no.38 (2019): 63-67.

¹⁷ See Reinhard Zimmermann, "The German Civil Code and the Development of Private Law in Germany" Oxford University Comparative Law Forum, 2006, <https://ouclf.law.ox.ac.uk/the-german-civil-code-and-the-development-of-private-law-in-germany>

¹⁸ See Hannes Rösler, "Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution--The Luth Revolution 50 Years Ago in Comparative Perspective," *Tulane European and Civil Law Forum* 23 (2008): 1-36.

¹⁹ Magdalena Bławat, "The Court's Interference with Contracts by Supplying and Converting the Contractual Terms," *Utrecht Law Review* 18, no. 1 (2022): 78-90.

²⁰ Jacques Henri Herbots, "The Chinese new Civil Code and the Law of Contract," *China-EU Law Journal* 7 (2021): 40, 48.

contract is a basic principle of contract in the context of Private Law.²¹ However, the concept of the freedom of contract in a country may differ from the concept recognized or accepted in other jurisdictions that apply distinctive legal systems.²² It seems necessary to include a historical-conceptual perspective on how freedom of contract is rooted in Germany by citing Klaas Hendrik Eller's view as follows:

“In Germany, it was the realist tradition that introduced a thicker concept of “contract” compared to the rather marginal idea embodied in the German Civil Code of 1900. Not only was the codification under the influence of German idealism with its three freedoms of contract, property, and the freedom to make a will, but legal sociology was also still in its infancy and unable to call for a more contextualized assessment of contract. In fact, in the eyes of contemporary critics like Otto von Gierke, the codification paid insufficient reverence to the Germanicist tradition, which had developed independently of a nation-state for more than a century and thus incorporated collective effects of individual rights into the idea of freedom of contract.”²³

The conceptual restriction (and lack of restriction) of freedom of contract has been discussed academically from legal and economic perspectives.²⁴ The freedom of contract applies in Germany in accordance with Section 311 BGB, which means that everyone is free to choose their contractual partner and the contents of the contract, as long as it does not violate applicable laws.²⁵

On the one hand, the contract form is freely selectable for most contracts. An example of this would be a contract for a real estate purchase, which must be in writing and notarized to be valid.²⁶ On the other hand, a rental agreement is free of form, so the tenant and landlord are free to record the agreement e.g., orally or in writing. However, here, of course, the written form is recommended in order to avoid possible discrepancies.²⁷

The BGB also determines positive and negative obligations for tenants and landlords. On the one hand, tenants must use the rented premise as agreed upon, while on the other hand, landlords must keep the rented premise in the state as it is (contractually) agreed upon.²⁸

²¹ Steve Hedley, “Private Law Theory: The State of the Art,” *School of Law, Áras na Laoi, University College Cork* (2021): 4.

²² See for example, Wei Wen, “Formality, Freedom of Contract, and China's New Civil Code: A Legal Reform Recommendation for Land Sale Contracts,” *University of Pennsylvania Asian Law Review* 17 (2022): 334.

²³ Klaas Hendrik Eller, “Comparative Genealogies of “Contract and Society,” *German Law Journal* 21, no. 7 (2020): 1401.

²⁴ See for example Daniel Müller and Patrick W. Schmitz, “The Right to Quit Work: An Efficiency Rationale for Restricting the Freedom of Contract,” *Journal of Economic Behavior & Organization* 184 (2021): 653-666.

²⁵ German Civil Code, Section 311.

²⁶ *Ibid.*, Section 311b. See also Roland Montfort, “EY Global Commercial Terms Handbook,” second edition, EY, October 2020, 106.

²⁷ German Civil Code, Section 550.

²⁸ Michel Vols and Marvin Kiehl, “Balancing Tenants’ Rights while Addressing Neighbour Nuisance in Switzerland, Germany and the Netherlands,” *European Property Law Journal* 4, no. 2 (2015): 98.

However, there is an essential restriction to the point of the free choice of the contracting parties. The AGG prohibits discrimination in particular to the search for housing and extends from the newspaper advertisement to the rental to the termination of the tenancy.

The individual reasons for discrimination according to Section 1 AGG are race, ethnic origin, gender, religion, disability, age, and sexual identity.²⁹ If a landlord violates this law, the disadvantaged person can demand, among other things, the removal of the impairment in the case of a violation of a discrimination prohibition. A contracting obligation is derived from the obligation to make *in rem* restitution. If the landlord is no longer in a position to conclude a contract because, for example, he or she has rented out the apartment in the meantime, a claim for damages under Section 826 BGB or Sections 280 and 283 BGB or a claim for reimbursement of expenses under Section 284 BGB may be considered. In addition, the disadvantaged party can sue for injunctive relief. The damage may, for example, consist of a more extended stay at a hotel or a delay in taking up a professional activity.³⁰

The Federal Anti-Discrimination Agency's current figures show that this law is necessary to protect tenants against discrimination. According to a representative survey conducted by the Federal Anti-Discrimination Agency in 2020, around 15 percent of all respondents who have searched for accommodation in the last ten years have experienced discrimination based on race because they belong to an ethnic group or come from a different country. People with immigrant backgrounds are particularly affected by this. According to the survey, one in three apartment seekers with a migrant background (35%) said they had experienced racial discrimination.³¹

2.2. The German Tenancy Law

The BGB, Book 1, Division 8 – “Particular types of obligations”, Title 5 – “Lease, usufructuary lease” defines the German Tenancy Law in Sections 535-580a.³² A rental agreement is a continuing obligation.³³ A tenancy is a legal relationship or interest in properties or land in which the tenant has exclusive possession of the facilities for a specified period and pays rent to the landlord. The difference between a lease agreement and a usufruct agreement is that in a usufruct agreement, in addition to the use of the land, the lessee may also keep the fruits of the land. That is, for example, the harvest of the fields or fishing.³⁴

²⁹ German General Equal Treatment Act, Section 1.

³⁰ German Civil Code, Sections 826, 280, 283, 284.

³¹ Federal Anti-Discrimination Agency (2020).

³² German Civil Code, Sections 535 - 580a.

³³ Volker Emmerich, *Mietrecht: Kommentar zu den mietrechtlichen Vorschriften des Bürgerlichen Gesetzbuches und zum Zweiten Wohnraumkündigungsschutzgesetz, Die Mieta als Schuldverhältnis* (Berlin, J. Schweizer Verlag, 1981), 10.

³⁴ German Civil Code, Section 581.

Sections 535-548a BGB regulate “general provisions for leases”. The further regulations refer to these general regulations and are specified in more detail. After the general provisions for leases there are the specified regulations for “provisions applicable to leases of residential space” in the Sections 549 - 577a. They refer to residential rental agreements with private tenants. For business tenants, the “leases of other things” apply, which is regulated in Sections 578 - 580a.³⁵

2.2.1. Regulations to Protect the Landlord

A landlord in Germany can be a private person, a housing cooperative, or a housing company that owns a building or an area of land and is paid by the tenant for its use of it. Especially when a landlord is a private person or a small real estate company, it is vital to protect them. The landlord's principal obligation is to hand over the leased property to the tenant at the agreed time in a condition suitable for its intended use and to maintain it in this condition. In return, he receives the rent payments.³⁶

a. Security Deposit and Extent of the Security Right of the Lessor

A rent security deposit is a crucial tool to protect the landlord from losing rent due to difficulty in getting a tenant out of the apartment, even though he or she does not pay the rent. It consists typically of three net cold rents,³⁷ which the landlord can keep in case of non-payment to cover his or her costs. If the tenancy is terminated smoothly, the tenant will receive his or her rent security deposit back after moving out of the apartment.

Suppose the tenant has damaged something in the apartment during the rental period. In that case, the landlord can retain a part of the rent security deposit to replace what has been damaged.³⁸ The landlord also has a lien on the tenant's belongings for its claims under the lease.³⁹

b. Cancellation of the Lease Contract

Under German law, a distinction can be made between two types of termination of rental agreements: ordinary termination and termination without notice. Section 573 (1) BGB sets out the rules for ordinary

³⁵ *Ibid.*, Book 1, Division 8, Title 5.

³⁶ *Ibid.*, Section 535.

³⁷ Cold rent means that the monthly payment of the basic rent for the apartment does not require additional costs while warm rent means that the monthly payment includes the basic rent for the apartment and additional costs - called apportionments or additional costs.

³⁸ *Ibid.*, Section 551.

³⁹ *Ibid.*, Section 562.

termination. The landlord is entitled to terminate the lease if he or she has a legitimate interest in the termination.⁴⁰

The landlord can terminate the contract without prior notice if the tenant significantly violates the rights of the landlord by endangering the rented property by neglecting the care incumbent upon him or by leaving it to a third party (a person other than the tenant and the landlord) without authorization. In addition, he may terminate the contract without prior notice if the tenant is in default of payment of the rent or a not insignificant part of the rent for two consecutive dates.⁴¹ Ordinary termination is very difficult to assert.

c. Notice of Termination for Own Use

The German legal system, primarily its BGB, recognizes three types of termination, namely ordinary notice of termination, termination for cause without notice, and the special rights of termination. The provisions relating to the termination of tenancies are mandatory for the landlord. Further, the landlord must explain the reason for the termination, otherwise it would be regarded as an unlawful termination.⁴²

The best-known and most frequent reason for landlords to terminate a lease is "own need". Pursuant to Section 573 (2) No. 2 BGB, own use exists if the landlord needs the entire tenant's apartment for himself or herself or a person belonging to his or her household (e.g. a caregiver), or for a family member for residential purposes. Family members for whose benefit the landlord can terminate the lease due to own needs are, for example, parents or children, grandchildren or siblings of the landlord. As a rule, more distant family members are not included.⁴³

The landlord must need the apartment. The bare desire to live within one's own four walls is insufficient. Own need is only present if the landlord can give reasonable and understandable reasons why he, she, or a beneficiary wants to move into the apartment. The reasons may be the plan to establish a retirement residence for himself or herself, or the urgent needs of his/her family member to use it. In this situation, the landlord must state in writing in the letter of termination for which person he or she needs the apartment and he or she must describe a concrete fact on which he or she bases the interest of this person in the apartment.⁴⁴

⁴⁰ Michel Vols, Marvin Kiehl, and Julian Sidoli del Ceno, "Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany," *European Journal of Comparative Law and Governance* 2, no.2 (2015): 177.

⁴¹ German Civil Code, Section 543 (2).

⁴² Cornelius and Rzeznik, *op.cit.*, 92.

⁴³ German Civil Code, Section 573 (2) No. 2.

⁴⁴ DMB Deutscher Mieterbund (2022). Eigenbedarf; available online at: <https://www.mieterbund.de/mietrecht/ueberblick/eigenbedarf.html>

d. Rent Increase as a Result of a Modernization Measure

Modernization measures are structural changes that affect the rented property. These changes are referred to as energy efficiency modernizations. They sustainably save non-renewable primary energy, protect the climate, or reduce water consumption. The utility value of the leased property is sustainably increased, the general living conditions are sustainably improved or new living space is created as a result.⁴⁵

Of course, these measures cost the landlord a lot of money. That is why it is permitted to increase the rent after these measures have been carried out. It is precisely specified by what percentage the rent may be increased so that the modernization pays for itself after a few years. Moreover, in this particular case, the tenant is not allowed to reduce the rent because of the construction noise or similar things.

The landlord must give the tenant a written modernization notice of the modernization measures at least three months before they are about to begin.⁴⁶ The tenant must then tolerate these modernization measures.⁴⁷ After receipt of the modernization notice, the tenant may give extraordinary notice of termination of the lease as of the end of the month after the next, if he or she does not want to tolerate the modernization measures, because this implies the right of extraordinary termination.⁴⁸

2.2.2. Regulations to Protect the Tenant

A tenant is a person who signs a lease contract. If more than one person signs the lease contract, more than one person is a tenant, i.e., they are both entitled to use the apartment. However, they are also jointly liable to the landlord for the payment of the rent. The tenant's primary obligation is to pay his or her rent and utilities - if agreed - regularly and on time. At the latest on, the third working day of a month, the tenant of a residential property must instruct his bank to make the transfer.⁴⁹

a. Rent Reduction in Case of Material Defects and Legal Defects

If the leased property has a defect at the time of handover to the tenant that renders it unsuitable for use in accordance with the contract, or if such a defect arises during the term of the lease, the tenant shall be released from payment of the rent for the period during which the leased property is rendered unsuitable. For the period in which the suitability is reduced, the tenant must pay only a reasonably reduced rent as stipulated in Section 536 BGB as a mandatory provision.⁵⁰ If the tenant knows the

⁴⁵ German Civil Code, Section 555b.

⁴⁶ *Ibid.*, Section 555c.

⁴⁷ *Ibid.*, Section 555d.

⁴⁸ German Civil Code, Sections 555d and 555e. See also Jan Bonhage and Thomas Lang, "The Real Estate Law Review: Germany," *The Law Reviews*, 23 February 2022, 6.

⁴⁹ Judgment of the VIII. Zivilsenat from 5.10.2016 - VIII ZR 222/15

⁵⁰ Cornelius and Rzeznik, *op.cit.*, 97. See also Tjachie Naudé, "The Principle of Reciprocity in Continuous Contracts Like Lease: What is and Should be the Role of the Exceptio Non Adimpleti Contractus (Defence of the Unfulfilled Contract)?," *Stellenbosch Law*

defect of the rental object at the time of the conclusion of the contract, he or she is not entitled to these rights.⁵¹

b. Protection against Termination and Opposition Right of Termination

Either contracting party may terminate the lease without notice for good cause. The termination of the lease agreement must always be in writing. The landlord must also inform the tenant of the possible time, form, and deadline of the objection, which the tenant always has.⁵² As mentioned above, the landlord can only terminate the lease contract for legitimate interest. The tenant can always terminate the lease with a notice period of three months if he or she wishes to do so.⁵³

The special protection in the right of termination is that the tenant can always object respectively contradict to the termination and demand the continuation of the lease. In the case of termination without notice and regular termination, this is possible if the termination would mean hardship for the tenant, his or her family or another member of his or her household.⁵⁴ Such hardship exists, for example, if adequate replacement housing cannot be obtained on reasonable terms. In other words, if the tenant cannot find a new apartment of comparable size at a comparable price in the same area, a hardship claim exists. This means that the tenant can remain in the apartment, even though the landlord has, for example, written a notice of termination due to personal need, until a new appropriate apartment has been found. Finding such a property is very difficult in the tight German housing market, especially in major cities.

The statutory provisions relating to the tenant's protection against termination are mandatory. The clause "The tenant waives his protection against termination" is therefore invalid, even if it was signed in the rental agreement.⁵⁵

Tenants are very well protected by law in Germany. They are safe from sudden evictions and protected by the statutory notice period of at least three months. The longer a tenant lives in the apartment, the notice period becomes longer as well. The landlord must give six months' notice if the tenant has lived in the apartment for five to eight years. If the tenant has lived there for longer, the notice period is nine months.⁵⁶

Review 27, no.2 (2016): 337; and Lea Crist, "Comment on Judgement no. XII ZR 8/21 of the German Federal Court of Justice on the Obligation to Pay Rent in the Event of a COVID-19 related Shop Closure," 24 January 2022, <https://dwfgroup.com/en/news-and-insights/insights/2022/1/german-federal-court-of-justice-on-the-obligation-to-pay-rent-in-the-event-of-a-corona-shop-closure>

⁵¹ German Civil Code, Section 536b.

⁵² *Ibid.*, Section 568.

⁵³ German Civil Code, Section 573c (1).

⁵⁴ Bill Davies et.al. "Lessons from Germany – Tenant Power in the Rental Market" Report, Institute for Public Policy Research, London, 2017, 15.

⁵⁵ Andreas Klaner. *Ratgeber Mietrecht: Mehr wissen - Recht bekommen* (Berlin, Humbolds: Verlag GmbH, 2006), 23.

⁵⁶ Marle, "You guide to German Rental Laws and Tenant Rights," Housing Anywhere, 2022. <https://housinganywhere.com/Germany/tenant-rights-in-germany>

They are safe from sudden evictions and protected by the statutory notice period of at least three months. The longer a tenant lives in the apartment, the longer the notice period. The landlord must give six months' notice if the tenant has lived in the apartment for five to eight years.

c. The Permissible Amount of Rent

In Germany, a rent index may not be exceeded by more than 10 percent to protect tenants in tight housing markets. If this is exceeded, the contract is invalid. A rent increase always requires the text form.⁵⁷ In addition, the tenant must agree to a rent increase. Otherwise, it cannot become legally effective.⁵⁸

The landlord may sue for granting the consent if the tenant does not consent to the rent increase by the end of the second calendar month. The court, in this case, may decide based on the legality of the increase. If it decides in favor of the landlord, the ruling replaces the tenant's consent to the new rent amount.⁵⁹

d. Purchase Subject to Existing Lease Contract

If the owner of the rented apartment changes because the residential property is sold, the new owner acquires the lease, and the tenant can continue to live in this apartment. The rent is paid to the new owner, who becomes the new landlord, as the purchase does not break the rent.⁶⁰

e. Right of Pre-emption of the Tenant

If rented residential premises are sold to a third party, the tenant is entitled to preemption. In this context, the third party is anyone other than the tenant and the landlord. The tenant, therefore, can buy the apartment in which he or she lives before someone else does so.⁶¹ After the Tenancy Law reform, tenants are entitled to the pre-emption right in case of selling the residential premises to a third party. This right can be exercised as long as the ownership of the apartment has been established, or, is to be established after the tenant is allowed to use the residential space.⁶²

f. Rent Brake or Rent Control

On June 1, 2015, *Mietrechtsänderungsgesetz* (Rent Law Amendment Act) came into force in Germany, authorizing the Federal State to designate by statutory order "tight housing markets" in which a rent brake will apply for the next five years. The rent brake prohibits landlords from charging

⁵⁷ The text form according to Section 126b German Civil Code allows the user - in distinction to the written form according to Section 126 German Civil Code and the electronic form according to Section 126a German Civil Code (qualified electronic signature) - to communicate electronically by means of a readable, signatureless declaration.

⁵⁸ German Civil Code, Section 559b.

⁵⁹ *Ibid.*, Section 558b.

⁶⁰ *Ibid.*, Section 566.

⁶¹ *Ibid.*, Section 577.

⁶² Cornelius and Rzeznik, *op.cit.*, 84.

more than 10 percent of the local average rent for new leases in an area designated as a tight housing market.⁶³

Tight housing markets are defined as "communities or parts of communities in which the adequate supply of affordable housing for the population is particularly at risk." However, a higher rent may be required if the previous rent exceeds the maximum allowable rent, the rooms were built after October 1, 2014, or the rooms were extensively modernized.⁶⁴

2.2.3. The Differences between the Regulations in Residential Tenancy Law and Commercial Tenancy Law

Both Residential Tenancy Law and Commercial Tenancy Law are regulated in the BGB. On the one hand, there is regularly a disparity in the balance of power in Residential Tenancy Law, as the landlord is in a stronger position than the tenant. In the commercial sector, on the other hand, landlords and business owners are usually on an equal footing.

a. Due Date of the Rent

In Residential Tenancy Law, the rent must always be paid by the third working day of the month. This regulation does not exist in Commercial Tenancy Law. Here, the BGB stipulates that the rent must be paid at the end of the rental period. In practice, however, this is often not applied and a monthly payment is nevertheless agreed to in the lease contract.⁶⁵

b. Amount of Rent

In the case of commercial real estate, rents are freely negotiable, but there are limits in the case of residential real estate. In principle, residential rents must be based on local custom or at least on comparable rents. If the landlord demands a significantly higher rent, this can lead to severe penalties as a "punishable rent overcharge" or even "rent usury".⁶⁶

c. Limitation of the Lease

One significant difference is, for example, the possibility of limiting the lease term. While this is only possible within the narrow limits of Section 575 BGB in the case of a residential lease, a commercial lease can be limited in time without further notice.⁶⁷

d. Security Deposit

The agreement of a deposit is also highly regulated for the residential tenancy. For example, the amount of the deposit is limited to a maximum of three rents in Section 551 BGB. A payment in installments is possible. In

⁶³ BVerfG paras. 1-4; German Civil Code, Section 556d.

⁶⁴ German Civil Code, Section 556e, 556f.

⁶⁵ *Ibid.*, Section 579.

⁶⁶ ImmoNürnberg Immobilienvertrieb (2020). Residential vs. Commercial Lease: the 5 Most Important Differences; available online at: <https://www.immonuernberg.de/unterschied-wohnraum-versus-gewerbemietvertrag>

⁶⁷ German Civil Code, Section 575.

the commercial tenancy, on the other hand, this can be largely freely arranged.

e. Passing on the Operating Costs

Another significant difference lies in the passing on of operating costs to the tenant. In a residential tenancy, only the costs listed in Section 2 of the Operating Costs Ordinance may be passed on to the tenant. In the context of a commercial tenancy, the operating costs can be extended considerably. However, these must be agreed upon at the conclusion of the contract in such a precise and transparent manner that the tenant has an exact picture of the costs incurred.⁶⁸

f. Transfer of Maintenance and Repair Measures

The transfer of maintenance and repair work on jointly used areas and facilities is excluded in residential leases. It is applicable in commercial leases as long as the arrangement is negotiated individually.⁶⁹

g. Local Place of Jurisdiction

The local place of jurisdiction for a residential rental agreement is always tied to the location of the dwelling. In the case of a commercial lease, on the other hand, the place of jurisdiction can be determined by the contracting parties.⁷⁰

h. Right of Termination and Periods of Notice

There are also considerable differences in the right of termination. A commercial lease, for example, can be terminated in due time without stating reasons. In the case of a residential lease, ordinary termination is only possible for certain reasons. In addition, the notice periods for residential leases extend in favor of the tenant based on the duration of the lease.

There is also a significant difference in the case of rent arrears. Whereas in the case of termination without notice due to rent arrears in residential leases, the termination without notice is cancelled by the timely payment of the rent arrears. In commercial leases, the termination is effective even if the rent arrears are eliminated.⁷¹

2.3. Reflection on German Residential and Commercial Tenancy Agreements

Generally, the purpose of the contract determines the type of contract. There are some significant differences between a commercial lease and a residential lease. While the initial part of the Tenancy Law contains general provisions, the last part contains specific provisions for Residential Tenancy Law. Tenancy Law in Germany can be viewed from at least three different

⁶⁸ *Ibid.*, Section 556.

⁶⁹ *Ibid.*, Section 580a.

⁷⁰ Code of Civil Procedure, Section 29a.

⁷¹ German Civil Code, Section 569.

perspectives: legal, social, and economical components that cannot be separated from each other. In principle, tenants must be protected while it must remain attractive for landlords to offer housing. The task of the judiciary is to combine these components. It is inferred that Germany had made proper law and regulations related to the amount of rent, security deposits, protection against termination, and land compensation for damages.

Nevertheless, changes in circumstances made Tenancy Law constantly evolving. During the Corona Virus pandemic, tenants who could no longer generate income to pay their rent needed special protection. Currently, rising gas prices are a new problem. These imply the relevance of Residential Tenancy Law that provides stringent rules to protect tenants.

Tenant and landlord should always stay up to date and informed about the latest changes in the law, so that they can take maximum advantage of them and point out any mistakes to the other party, and possibly prevent the lease or parts of the lease from becoming invalid. Critically, the role of the landlord is always assumed to be that of a contractual party superior to the residential tenant. Many private individuals also use the ownership of the non-owner-occupied real estate and the rental income generated from it for their retirement provision. However, a private individual repays the real estate loan with the rental income for many years and cannot use it for private purposes. In cases when rent nomads destroy the apartment, do not pay rent or compensation for damages, and do not move out of the apartment, a private landlord can quickly get into financial difficulties because the tenants are overprotected.

3. CONCLUSION

There are various ways to protect the individual parties to a lease. Measures such as the protection against termination and the right of objection, the tenant's right of first refusal, the rent brake, or the rent cap protect the tenant in various ways against the arbitrariness of the landlord. In Germany, the practice of both commercial and residential leases is legitimate. German Tenancy Law distinguishes between commercial tenancy agreements and residential tenancy agreements. It implies that the regulations for residential leases predominate over those for commercial leases. On the one hand, residential tenancy agreements generally aim at the tenant's social protection from the landlord's arbitrariness. This kind of agreement includes a disproportion in the balance of power since the landlord regularly occupies a stronger position than the tenant. On the other hand, commercial tenancy agreements assume a balance of power between the parties, as landlords and business owners are usually more equal.

Author's Statement of Acknowledgment

This article is the personal work of the Author. The article's analysis and opinion reflect the Author's ideas and shall not be associated with the affiliation where the Author is studying at the Faculty of Management, Social Work, and Construction, University of Applied Science and Art, Holzminden, Germany.

BIBLIOGRAPHY

Book

- Emmerich, Volker. *Mietrecht: Kommentar zu den mietrechtlichen Vorschriften des Bürgerlichen Gesetzbuches und zum Zweitem Wohnraumkündigungsschutzgesetz Die Miete als Schuldverhältnis*. Berlin: J. Schweizer Verlag, 1981.
- Klaner, Andreas. *Ratgeber Mietrecht: Mehr wissen - Recht bekommen*. Berlin, Humbolds: Verlag GmbH, 2006.

Journal Article

- Braeuer F, Kleinebrahm M and Naber E. "Effects of the Tenants Electricity Law on Energy System Layout and Landlord-Tenant Relationship in a Multi-Family Building in Germany." *IOP Conf. Series: Earth and Environmental Science* 323 (2019): 1-9. <https://doi.org/10.1088/1755-1315/323/1/012168>
- Blawat, Magdalena. "The Court's Interference with Contracts by Supplying and Converting the Contractual Terms." *Utrecht Law Review* 18, no. 1 (2022): 76-92. <https://doi.org/10.36633/ulr.759>
- Buletsa, Sibilla and Piotr Zakrzewski. "Limitation of Claims in Polish and Ukrainian Civil Code against the Background of the Principles of European Contract Law and the German Civil Code." *Journal of Legal Studies* 24, no.38 (2019): 63-94. <https://doi.org/10.2478/jles-2019-0010>
- Deakin, Simon. "Private Law and the New Social Question." *German Law Journal* 23 (2022): 862-871 <https://doi.org/10.1017/glj.2022.50>
- Eller, Klaas Hendrik. "Comparative Genealogies of "Contract and Society." *German Law Journal* 21, no. 7 (2020): 1393-1410. <https://doi.org/10.1017/glj.2020.84>
- Flume, Johannes W. "Strict Liability in Austrian and German Law: On the Concept of Strict Liability in the Age of Technological Advancement." *Journal of European Tort Law* 12, no. 3 (2021): 205-220. <https://doi.org/10.1515/jetl-2021-0012>
- Hedley, Steve. "Private Law Theory: The State of the Art." *School of Law, Áras na Laoi, University College Cork* (2021): 1-27. <http://dx.doi.org/10.2139/ssrn.3917777>
- Harborth, Thomas. "Housing in Germany - A Case Study in the Light of Government Guidelines." *Ekonomika a Management, Prague University of Economics and Business* 2 (2012): 5-17.
- Herbots, Jacques Henri. "The Chinese New Civil Code and the Law of Contract." *China-EU Law Journal* 7 (2021): 39-49. <https://doi.org/10.1007/s12689-021-00090-6>

- Kettunen, Hanna and Hannu Ruonavaara. "Rent Regulation in 21st century Europe. Comparative Perspectives." *Housing Studies* 36. no.9 (2020): 1446-1468. <https://doi.org/10.1080/02673037.2020.1769564>
- Müller, Daniel & Patrick W. Schmitz. "The Right to Quit Work: An Efficiency Rationale for Restricting the Freedom of Contract." *Journal of Economic Behavior & Organization* 184 (2021): 653-669. <https://doi.org/10.1016/j.jebo.2021.02.004>
- Nasarre-Aznar, Sergio. "Leases as an Alternative to Homeownership in Europe. Some Key Legal Aspects." *European Review of Private Law* 22, no. 6 (2014): 815-846. <https://doi.org/10.54648/erpl2014064>
- Rinn, Moritz, Jan Wehrheim, and Lena Wiese. "How Tenants' Reactions to Rent Increases Affect Displacement: An Interactionist Approach to Gentrification." *Urban Studies* 59, no.15 (2022): 3060-3076. <https://doi.org/10.1177/00420980221078212>
- Naudé, Tjakie. "The Principle of Reciprocity in Continuous Contracts Like Lease: What is and Should be the Role of the Exceptio Non Adimpleti Contractus (Defence of the Unfulfilled Contract)?" *Stellenbosch Law Review* 27, no.2 (2016): 323-353
- Rösler, Hannes. "Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution--The Luth Revolution 50 Years Ago in Comparative Perspective." *Tulane European and Civil Law Forum* 23 (2008): 1-36.
- Vols, Michel and Marvin Kiehl. "Balancing Tenants' Rights while Addressing Neighbour Nuisance in Switzerland, Germany and the Netherlands." *European Property Law Journal* 4, no. 2 (2015): 85-114 <https://doi.org/10.1515/eplj-2015-0005>
- Vols, Michel, Marvin Kiehl, and Julian Sidoli del Ceno. "Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany." *European Journal of Comparative Law and Governance* 2, no.2 (2015): 156-181. <https://doi.org/10.1163/22134514-00202000>
- Wen, Wei. "Formality, Freedom of Contract, and China's New Civil Code: A Legal Reform Recommendation for Land Sale Contracts." *University of Pennsylvania Asian Law Review* 17 (2022): 332-367.

Legal Documents

- Basic Law for the Federal Republic of Germany; in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I p. 2048).
- German Civil Code; in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I p. 3719)
- German Operating Costs Regulation (*Betriebskostenverordnung/BetrKV*); as amended by the announcement of November 25, 2003 (BGBl. I p. 2346, 2347), which was last amended by Article 15 of the Act of June 23, 2021 (BGBl. I p. 1858).

General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz/AGG*); as amended by the announcement on August 14, 2006 (BGBl. I p. 1897), which was last amended by Article 1 of the Act of May 23, 2022 (BGBl. I p. 768).

Code of Civil Procedure (*Zivilprozessordnung/ZPO*); in the version of the announcement from 05.12.2005 (BGBl. I p. 3202, ber. 2006 I p. 431, 2007 p. 1781); last changed by law from 07.11.2022 (BGBl. I p. 1982) with effect from 12.11.2022

Other Documents

Cornelius, Julia and Joanna Rzeznik. "TENLAW: Tenancy Law and Housing Policy in Multi-level Europe." National Report for Germany. Deliverable no. 3.2, Brussels, European Commission, 2014, pp.1-243.

Davies, Bill et.al. "Lessons from Germany – Tenant Power in the Rental Market" Report, Institute for Public Policy Research, London, 2017.

Montfort, Roland. "EY Global Commercial Terms Handbook." second edition, EY, October 2020.

Müller, Rolf. "Tenancy Law and Energy Renovation in European comparison." BBSR-Online-Publikation Nr. 14/2016, Federal Institute for Research on Building, Urban Affairs and Spatial Development (BBSR) within the Federal Office for Building and Regional Planning (BBR), Bonn

German Federal Court of Justice

Judgment of the VIII. Zivilsenat from 5.10.2016 - VIII ZR 222/15

Website Content

Berliner-Mieterverein, "Rent Control/Rent Brake in Germany, for example Berlin, Part I Berlin," 9 January 2018, 1. <https://www.berliner-mieterverein.de/uploads/2018/01/Rent-Control-Rent-Brake-in-Germany-IUT-1-2018.pdf>

Bonhage, Jan and Thomas Lang, "The Real Estate Law Review: Germany" *The Law Reviews*, 23 February 2022. <https://thelawreviews.co.uk/title/the-real-estate-law-review/germany>

Crist, Lea. "Comment on Judgement no. XII ZR 8/21 of the German Federal Court of Justice on the Obligation to Pay Rent in the Event of a COVID-19 related Shop Closure," 24 January 2022, <https://dwfgroup.com/en/news-and-insights/insights/2022/1/german-federal-court-of-justice-on-the-obligation-to-pay-rent-in-the-event-of-a-corona-shop-closure>

DMB Deutscher Mieterbund (2022). Eigenbedarf; available online at: <https://www.mieterbund.de/mietrecht/ueberblick/eigenbedarf.html>

Federal Statistical Office (ed.) (2022). Distribution of the Population in Italy from 2004 to 2020 by Tenant and Owner; available online at: <https://de.statista.com/statistik/daten/studie/370713/umfrage/bevoelkerung-in-italien-nach-mieter-und-eigentuemer/>

Federal Statistical Office (ed.) (2022). Distribution of the Population in Spain from 2007 to 2020 by Tenant and Owner; available online at:

- <https://de.statista.com/statistik/daten/studie/370711/umfrage/bevoelkerung-in-spanien-nach-mieter-und-eigentuemer/>
- Federal Statistical Office (ed.) (2022). Share of Rental and Owner-Occupied Apartments In Selected Cities in Germany in 2019; available online at: <https://de.statista.com/statistik/daten/studie/1245932/umfrage/anteil-der-miet-und-eigentumswohnungen-in-deutschen-staedten/>
- ImmoNürnberg Immobilienvertrieb (2020). Residential vs. commercial lease: the 5 Most Important Differences; available online at: <https://www.immonuernberg.de/unterschied-wohnraum-versus-gewerbemietvertrag>
- Marle. “You guide to German Rental Laws and Tenant Rights,” Housing Anywhere, 2022. <https://housinganywhere.com/Germany/tenant-rights-in-germany>
- Rödl & Partner, “Landlord-to-Tenant Electricity Generated from PV Power Plants: Are you Still Supplying or Already,” 20 May 2021, <https://www.roedl.com/insights/renewable-energy/2021/may/landlord-to-tenant-electricity-pv-power-plants>
- Zimmermann, Reinhard. “The German Civil Code and the Development of Private Law in Germany” Oxford University Comparative Law Forum, 2006, <https://ouclf.law.ox.ac.uk/the-german-civil-code-and-the-development-of-private-law-in-germany/>