SQUIRE PATTON BOGGS

UPDATE ON THE WRITTEN FORM REQUIREMENT FOR RENTAL AND LEASE AGREEMENTS: WHAT YOU NEED TO CONSIDER – AND WHAT IS NO LONGER RELEVANT

The German Federal Court of Justice (*Bundesgerichtshof*) has confirmed and adjusted its jurisprudence concerning the statutory written form requirement for rental and lease agreements in two new decisions (decision of 17 June 2015 – XII ZR 98/13 and of 22 April 2015 – XII ZR 55/14).

What Does the Written Form Requirement Stipulate?

According to Section 550 in connection with Section 578 (1) (Section 581 (2)) German Civil Code (BGB), rental and lease agreements concluded for a term of more than one year must fulfill the written form requirement:

- The agreement on all essential contractual terms, such as rental object, rent, term and parties, must be contained in a contractual document that has been signed by both parties.
- The written form requirement only does not apply for any agreements, which are only of secondary importance for the content of the contract.

Why is There a Written Form Requirement?

The written form requirement serves to protect any subsequent purchaser of the property, who enters into the lease as the landlord by law: The purchaser should be able to inspect the contractual terms of the written lease agreement and be protected against any unforeseeable terms.

What is the Consequence in the Case of Any Breaches Against the Written Form Requirement?

According to the concept of the law, the contract is not invalid if the written form requirement has not been observed but can instead be ordinarily terminated prematurely. If the parties are relying on the long-term existence of the contract (long-term secured rental yield or possibility to use the property) and do not want to rely on a so-called written form remedy clause (to the extent agreed, with a limited effect at least with respect to any purchaser of the property), the topic of the written form requirement gains importance that is not insignificant from an economic as well as a legal perspective. With regard to several current aspects, please see below.

What Needs to Be Observed With Regard to the Signatures of the Contracting Parties?

- If a **plurality of persons** exists on the side of one contracting party and the contract has not been signed by all of these persons, the existing signatures must clearly indicate that they have also been made on behalf of the persons that have not signed the contract. Any impression of incompleteness must be avoided.
- If a **corporation** (such as an "AG" or "GmbH") is a contracting party, the impression of incompleteness in breach of the written form can be given if the representatives mentioned in the recital of the contract have not all signed the contract and without a note on the representation. In contrast, if the representatives are not specified in detail in the recital of the contract, in order for the contract to comply with the written form requirement, it is sufficient if not all of the persons authorized to represent the company sign the contract without a note on the representation as long as a form of representation is selected which the law principally considers possible.
- The signatures do not have to fulfill the requirements, which are entered for the respective company in the **commercial register**. This is because the question of whether there is an impression of incompleteness solely depends on the external form of the contractual document. The regulations concerning representation found in the commercial register should, in contrast, not play any role in this regard. The actual existence of the power of representation (substantive law) is irrelevant for the written form (adjective law). Therefore, whether a contract has been effectively concluded upon being signed due to a legally valid power of attorney is irrelevant for the observance of the written form.
- The requirements for the written form under tenancy law (= question of the external form) may also not be equated with the requirements for the **written form under substantive law** (= question of the validity of the contract). A contractual document that has been signed by both parties also then fulfills the protective purpose of the written form requirement under tenancy law if the contract has not yet been effectively concluded on the basis of the written declarations but is first implied by the execution of the lease by mutual agreement.
- In the case of a **partnership under civil law** (GbR), if not all of the partners, who jointly represent the company by law, sign the contract, the written form is only observed if a sufficiently clear note on the representation is included. The note on the representation can, on the one hand, indicate that the undersigning partner also intends to represent the other partners, who are not signing the contract (signature as a member of a multi-member representative body). On the other hand, the note on the representation can indicate that the undersigning partner intends to exercise the right to conclude the contract alone. This is the case, for example, if the undersigning partner places a stamp that is authorized by the business owner next to his/her signature.

What Needs to Be Considered in the Case of Addendums and Annexes?

If essential contractual agreements are not recorded in writing in the contract but in separate annexes or addendums, the contracting parties must appropriately indicate without a doubt that these documents belong together in order to preserve the unity of the contractual documents.

- This does not require that the documents are physically bound together.
- A simple intellectual connection is sufficient, which must be expressed by way of an unequivocal reference.
- In order to observe the written form requirement for the entire contract, any addendums must make reference to the original contract and express that previous agreements made in a valid form should continue to apply together with the addendums.

How Can the Contractual Parties be Changed in Line with the Written Form Requirement?

If a party to the contract should be changed, this can take place:

- By way of a tripartite contract between all parties involved
- By way of a bilateral contract between the parties that are changing to which the remaining party separately consents.

In the latter case, the declaration of consent of the remaining party does not have to be made in writing. It can also be implied, for example, by rendering performance with respect to the new party.

Fundamental Limits of the Written Form Requirement

There are a number of cases in which the written form requirement cannot comprehensively fulfill its protective purpose of ensuring clarity on the terms of a long-term lease agreement for any subsequent purchaser of the property. In such cases, the certainty of the individual contractual terms is not required but instead "only" their determinability: It is sufficient if the decisive circumstances can be found in the contractual document in such a precise manner that the protected purchaser of the property can correspondingly inquire with the landlord or tenant.

- **Extension options:** Because the purchaser cannot determine from the contract whether agreed options have been exercised, the purchaser does not know the exact term of the lease. The option clause does, however, warn the purchaser and provides a reason to inquire about the details with the landlord or tenant. Such cause for one's own inquiries is sufficient for observing the written form requirement.
- This is likewise the case if the parties link the commencement of the contract to the date of **surrendering the contractual object:** The exact commencement date of the lease is not found in the contractual document itself, but the purchaser can inquire about the date of surrendering the contractual object due to the agreed provision. If the parties prepare a handover certificate that states this date, the written form requirement does not require that this certificate be attached to the contractual document.
- Any unilateral **adjustment of the advance payments for ancillary costs** by the landlord also cannot be part of the document required by the written form. The need of any subsequent purchaser of the property to be protected has been sufficiently taken into consideration if the respective clause clearly indicates that an adjustment may have been made.
- In the case of automatic **escalation clauses** to adjust the rent, there are principally no problems with respect to the written form: To the extent that the written notification of one party is required, this is usually of a purely declaratory nature.

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