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Residential Tenancy Law in Germany

I. Introduction

Residential tenancy law has traditionally played a major role in Germany, where many people live for rent. After Switzerland, we rank second in Europe in this category. Approximately 54% of people in Germany live in rented apartments. In the major cities, this figure is even higher; in Berlin, for example, 84% of people rent their apartments. At the same time, the rent burden rate is also rising continuously in Germany. Whereas in the days of the "economic miracle" people spent 10% of their income on housing, by the 1980s this figure had risen to 20% - and is currently 30%.

Of course, this has a lot to do with the fact that after the great financial crisis of 2008, the real estate market has moved sharply into focus as a financial investment. At the same time, the public housing sector, which is traditionally large in Germany, shrank. Tax breaks for non-profit housing were abolished at the end of the 1980s and at the same time large stocks of municipal housing were sold. The number of social housing units, still at 4 million in West Germany at the end of the 1980s, has fallen to around 1 million nationwide today. For over 100 years, Germany has not had a liberalized housing market as it has today, and despite this, or precisely because of it, rents are rising. Unfortunately, tenancy law can no longer adequately protect tenants.

II. Regulatory Concept – An Overview

In Germany, since the 1920s and the early 1960s, there has been strong state regulation of rents and a high level of protection against termination. While the protection of tenants was part of the states DNA in the GDR until reunification, West Germany experimented with deregulation, the dismantling of protection against termination and the liberalization of rents since the 1960s. After rents rose rapidly as a result, the first social-liberal coalition drafted the German model of social tenancy law in West Germany in 1971. With

modifications, it is still in force today.

In principle, residential tenancies cannot be terminated by landlords, provided that tenants comply with their contracts. Termination of contract in order to enforce a higher rent is prohibited. Temporary tenancies are only possible within narrow limits.

As compensation, landlords are allowed to increase the rent in the current tenancy up to the so-called local comparative rent. In other words, they should be able to charge what other landlords receive for comparable housing. To protect tenants from excessive rent increases, however, the rent may only be increased by 20% or 15% within three years.

Not only rent can be increased. In tenancies that cannot be terminated, landlords can also change the equipment of the apartment against the tenant's will and modernize the apartment. Tenants must tolerate improvements in the equipment of the apartment, measures to save water and energy, and sustainable increases in the value of the apartment. Landlords can then pass on the construction costs to the tenants - currently 8% per year and for an unlimited period of time after the modernization. For a long time, this was one of the most important tools to displace tenants. However, this originally unlimited possibility of increasing rents has now lost some of its danger: since 2019, the modernization levy has been limited to three or two euros per square meter (depending on the initial rent) and for a period of six years in each case.

Over the past ten years, the legislature has attempted to respond to the development of different housing markets. For areas where the supply of housing to the population on reasonable terms is particularly at risk, the state government there can enact regulations to protect against terminations in the event of conversions to condominiums and to lower the limit for rent increases.

The so-called Mietpreisbremse (rent brake) has been in place in Germany for a good seven years: when re-letting, landlords are not allowed to charge a rent that exceeds the local comparative rent by more than 10%. However, in order not to hinder new construction, this regulation does not apply to first-time occupants. The rent brake also only applies in tight housing markets.

Legally, tenant protection is ensured by a system of semi-mandatory standards. In principle, the contracting parties are free to conclude a residential lease agreement. Contractual provisions that deviate from the legal regulations to the disadvantage of the tenants are invalid.

III. In Detail

1. Protection Against Termination

A residential lease agreement, which is in principle of unlimited duration, can be terminated by the tenant with three months' notice, and by the landlord - depending on the duration of the tenancy - with three, six

or nine months' notice. However, landlords can only terminate the lease if they can prove a legitimate interest. Essentially, there are only two reasons to terminate a tenant's lease: personal need or the prevention of a reasonable economic exploitation.

While terminations for commercial exploitation are of little, albeit increasing, practical significance, the number of terminations for personal need has increased dramatically in recent years, especially in metropolitan areas. Landlords can terminate the lease if they need the apartment for themselves, for family members or members of their household. The jurisdiction is very generous in favor of the landlords with regard to the eligible group of persons but also with regard to the use of the living space. It is sufficient that landlords need the apartment for occasional visits of the daughter in a foreign city or the niece, the nephew or even an au pair would like to move in.

Tenants do have the right to object to the ordinary termination if the eviction would represent a particular hardship for them or their family. Recognized as reasons for hardship are, above all, serious illnesses. However, if the court assumes a hardship which only occurs on rare cases, the living space is not yet secured. Only if the tenant's interest in the apartment outweighs the landlord's interest, which is to be fully considered by the court, the tenants can stay, and yet only for a limited time.

The notices of termination of the tenant's own need are often only pretended, but this can rarely be proven. In practice, the proceedings often end with settlements: The tenants vacate their flats and receive monetary compensation.

In addition, terminations of contract due to breaches are of great practical importance, be it notices of termination due to late payment (a deficit of more than one month's rent is sufficient), due to unauthorized subletting or due to disturbance of domestic peace. Of course, this can also be used to justify terminations without notice.

There are some peculiarities regarding the eviction process: Eviction of an apartment is only possible on the basis of a court judgment. Exceptions are only possible in very narrowly defined cases by way of interim legal protection. Eviction proceedings are to be accelerated. One instance usually takes four to six months. If tenants are ordered to vacate, they are usually granted a certain period of time to do so. This can be up to one year, is intended to give them the opportunity to find new living space and prohibits landlords from evicting them until the deadline expires.

In terms of legal policy, there is a demand to limit the possibilities of terminating tenants' own needs as well as the now much easier terminations due to late payments and other breaches of contract.

2. Protection Against Conversion Into Residential Property

In Germany as a whole, land ownership and building ownership are not separate. The owners of the building

also own the land. However, it is possible to divide the land and the buildings and to establish ownership of the individual apartments. These are then marketable and can be sold individually. This represents a lucrative business field, since the sum of the revenues to be realized in the sale of individual apartments exceeds the original value of the total property several times over. If people buy these apartments, the people living in the apartments are acutely threatened by so-called terminations due to personal needs. For this reason, there is a freeze period for these terminations. The purchasers are prohibited from giving notice of termination to the tenants already living in the apartment at the time of conversion for a period of three years. In areas with tight housing markets, this period can be extended to 10 years. In addition, the tenants must be offered to buy the apartment when it is sold for the first time.

3. Rent Prices

In existing tenancies, landlords may increase the rent up to the so-called local comparative rent. New rents in tight housing markets may not exceed this comparable rent by more than 10 percent. The local comparative rent is central to German law of rent increase. It used to refer to the local average rent but the point of reference has been heavily modified since the 1980s.

a. Local Comparative Rent

The local comparative rent is formed from the average rents that have been agreed on or changed in the respective municipality or in comparable municipalities for residential spaces of comparable type, size, equipment, condition and location, including energy-related equipment and condition, in the last six years. Rents that have not been increased for more than six years are not taken into account when determining the comparative rent. Generally, these are the lowest rents. Structurally, this system enables a permanent increase in rents. In fact, the comparative rent is regularly higher than the average rent, which is collected via the micro census, for example.

Whether it is in the context of an increase in rent or in that of the rent brake - the comparative rent for the respective apartment must always be determined in the specific case.

The comparative rents are primarily presented in rent indices. If these are so-called qualified rent indices, it is presumed that the values listed here represent the local comparative rent. The rent indices are compiled by the municipalities. In order for them to be considered qualified, they must be drawn up in accordance with recognized scientific principles. This work is usually carried out by institutions specializing in this field, which determine the rent level by means of random surveys of landlords and tenants, differentiated according to the legal criteria such as location, equipment and age class of the building. In addition to the establishment of scientific criteria, recognition by the municipalities or the representatives of landlords' and

tenants' interests is also required.

Since there have been repeated disputes in the past about the quality and thus the binding nature of the rent indexes, the legislature has recently standardized the criteria for their preparation in more detail and obliged municipalities with a population of 100,000 or more to draw up qualified rent indexes. The rent indexes are publicly accessible and can be obtained free of charge.

If there is no rent index in the municipality or if it is not applicable - for whatever reason - the local comparative rent is determined by expert opinions, the costs of which are often disproportionate to the rent charged and the results of which are usually unfavorable for the tenants.

Legal policy calls for the inclusion of all rents in the determination of the local comparative rent.

b. Basic Rent Increase

Landlords are allowed to increase the rent every 15 months, subject to a double limit. First, the newly charged rent may not exceed the local comparative rent. In addition, the rent increase is limited to 20% in three years. In tight housing markets, this cap can be lowered to 15% by the state government. In legal terms, this is an amendment to the contract. If tenants do not agree, landlords can file a complaint with the district court three months after the date of the increase. Otherwise, the old rent will continue to apply. The coalition agreement of the current government coalition provides for a reduction of the cap to 12%. In terms of legal policy, a rent freeze is called for in particularly strained areas with housing shortages.

c. Rent Brake (“Mietpreisbremse”)

In areas with tight housing markets, the respective state government can put the rent brake into effect. According to this, only rents that do not exceed the local comparative rent by more than 10% are permitted. However, there are numerous exceptions and restrictions. For example, the rent brake does not apply to new construction or to first-time occupancy after extensive modernization. But even if landlords have not modernized extensively, they can still pass on the costs of modernization carried out before tenants move in. Landlords who charged excessive rents before the regulation came into force may continue to claim this higher previous rent.

The Mietpreisbremse was introduced by the grand coalition in 2015 and was controversial among the governing parties. Thus, numerous hurdles were built in that made it very difficult to handle. In the meantime, the rent brake has been reformed and improved twice. After the Federal Constitutional Court upheld the law in 2019, the proportion of proceedings surrounding the rent brake in our law firms is growing.

If a rent proves to be too high and thus there is a violation of the rent brake, the tenants must complain to

the landlord. If necessary, they have to have the illegal overcharge established before the civil courts and can demand the return of overpaid rents. Violation of the rent brake does not result in any government sanctions.

In terms of legal policy, there is a call to remove the restrictions and exceptions and to abolish the obligation to complain to the landlord so that this instrument can be applied sensibly.

d. Rent Overcharge

The situation is different, at least in theory, in the case of a violation of Section 5 of the commercial criminal code (Wirtschaftsstrafgesetz). This provision prohibits landlords from agreeing on a rent that exceeds the local comparative rent by more than 20%. The violation can result in a fine. This norm also dates back to the 1970s and empowered housing authorities to determine rent overcharges themselves and to order landlords to repay excessive rents to tenants. In this way, the public administration was able to ensure a stable general rent level. This was a simple and inexpensive procedure for the tenants.

At the same time, the tenants themselves could demand the amount exceeding the so-called substantial limit from the landlords. In 2005, the Federal Court of Justice put a stop to this practice. In its view, tenants must be able to prove how they were taken advantage of their specific plight by the landlord when concluding the lease. Since this is hardly possible in practice, this actually sensible regulation has since then played practically no role.

Legal policy calls for the reactivation of Section 5 of the commercial criminal code. A reform would be conceivably simple. However, several initiatives to this effect by various state governments failed in the Bundesrat. In the meantime, the FDP in particular is opposing the reform.

e. Berlin Rent Cap

While Berlin was affordable for tenants for decades, rents have been rising at a far above-average rate for a good ten years. Despite a lower income level, rents are now almost as high as in Hamburg, Frankfurt and Munich. Against this background, Berlin decided in 2019 to introduce a so-called rent cap. Rents were to be frozen for five years and a maximum permissible rent standardized for reletting. This so-called index rent was based on rents from 2013. Six months after introducing the rent cap, existing rents were capped at 20% above this table rent. Rent overcharging was prohibited and attracted a fine. In addition, the state could also issue rent reduction orders. Since the index rent was far below the local comparative rent, rents were reduced, in some cases drastically. All tenants also had to be informed by their landlords about this maximum permissible rent. The issue of rent and the idea that it might be too high thus suddenly became known among the tenants. The freezing and lowering of rents gave Berliners - as intended - a break in the

everyday rent madness.

The regulation was issued by the federal state of Berlin for the entire city area. In order to justify the rent cap, which partially amended the federal rental law, reference was made to the legislative competence of the federal states in the area of housing. This legislative competence for the housing sector was transferred from the federal government to the states in 2006 in the course of a reform of the constitution. Nevertheless, in April 2021 the Federal Constitutional Court declared the Berlin law on the rent cap null and void. This was rent law, which was comprehensively regulated by the federal government. There is no room for regulation under state law. Regulations on rental price law must be made under federal law.

This hopeful project has thus failed, although it enjoyed the approval of over 70% of Berliners. In terms of legal policy, there is now a call for the introduction of a rent cap under federal law - with the possibility of this being enacted by the states or municipalities in the event of corresponding emergencies on the rental market.

f. Social Law and Housing Subsidies

The rent level in Germany is too high for many people. People without sufficient income can therefore demand that the state pay the rent. If the subsistence level, which is based on a standard living rate plus rent exceeds the income, the state pays the difference. This regulation, which sounds practicable at first, has a catch. Only rents that are adequate are taken care of. Reasonable rents are those paid in simple residential areas for simply equipped apartments. If the actual rent exceeds the adequate rent, this difference is not covered. If the rent exceeds the adequate limit, the tenants are asked to look for a new apartment within half a year. Especially in metropolitan areas, however, there is hardly any housing available at reasonable rents. as a result, poor tenants are displaced.

Beyond social security, people with somewhat higher incomes can apply for housing subsidies. But it is so low and so formalized that it cannot compensate for the inability to pay. Only 1,1% of tenants in Germany receive housing subsidies, and the share of total government benefits for housing is just 13%.

IV. Conclusion

The bottom line is that it has proven effective to prohibit the termination of contract in order to increase the rent obligation. It is precisely these regulatory concepts that are good for a stable rent level. However, the Federal Court of Justice repeatedly interprets standards to the detriment of tenants. Thus, in practice, the protection is insufficient. While it is difficult in Germany to reduce the rights of tenants through changes in the law, the conservative judiciary is taking care of this. Especially when the market is under pressure, as it is at present, the protective regulations prove to be inadequate. Tighter laws are required to better protect

those with lower incomes.

At the same time, the public housing sector needs to be strengthened. The new federal government finally wants to reintroduce the non-profit housing sector. We are curious to see whether and, if so, how this will be implemented. The prospect of socializing large housing companies, as demanded by Berliners in a referendum in 2021, also gives hope. Here, too, we are curious about its implementation. Until then and independently of this, it is important to strengthen tenants' rights, because housing is a human right.