

NJORD Estonia: Are Changes in Lease-Related Law Too Inclined in Favour of the Lessor?

On December 16, 2020 the Riigikogu passed amendments to the law changing the dwelling lease market and lease relations. The amendments to the law are planned to enter into force in 2021. On the one hand, the main goal of the amendments to law is very welcome, i.e. the intention is to bring more flexibility to the relatively rigid lease regulation and to give the lessor and lessee more freedom of agreement. The broader goal is to make investing in the lease market more attractive for lessors, whereby it is expected to also expand the lessees' opportunities to find the most suitable dwelling.



On the other hand, most of the adopted amendments favor the interests of lessors and impose more obligations on lessees. Therefore, the question rightly arises as to whether and how well the amendments ensure the protection of the interests of the lessee as the weaker party to the lease. Let us look at this problem with two specific examples.

The current Estonian Law of Obligations Act does not, as a rule, allow the lessor to agree with the lessee of the dwelling that the repair costs of the building, payments into the repair fund, or loans taken by the housing association must be paid by the lessee. Such agreements would be void under the current procedures in force. However, the adopted amendment to the law would validly allow agreeing in the future lease agreement that the corresponding expenses must be borne by the lessee.

According to the author, this is a problematic change, which tilts the current relationship between the lessee and the lessor too much to the detriment of the lessee. Given that the lessor is usually in a stronger position when entering into a residential lease contract, it is quite likely that such agreements, whereby the maintenance and improvement costs of the building will be borne entirely by the lessee, will become commonplace in the future lease contracts.

However, in order to protect the lessee, the amendment stipulates that the lessee must bear the costs of maintaining and improving the building only to a reasonable, proportionate, and foreseeable extent. However, it is clear that in practice such criteria cause a great deal of confusion and controversy, at least at the beginning. The lessee's and the lessor's views on the reasonable, proportionate, and foreseeable extent of the costs may differ diametrically.

In addition, the amendment to the law seeks to give the lessor of the dwelling an opportunity to agree with the lessee on the obligation to pay a contractual penalty to a limited extent. This would be the case if the lessee should breach any of his non-monetary obligations. Examples of non-monetary obligations are the obligation to use the rental space carefully and in accordance with the intended purpose and the obligation to consider the interests of the residents and neighbors. Under the law still in force, such a contractual penalty agreement would be void.

The fact that it is often very difficult for the lessor to determine and prove the actual damage caused by the breach of a non-monetary obligation speaks in favor of allowing the imposition of contractual penalty agreements. The contractual penalty simplifies the compensation for the damage to the lessor, as only the breach of contract (for example, the smoking ban on the rental premises or the ban on keeping pets) should be proved, and not the amount of the actual damage.

However, in order to protect the rights of the lessee, the amendment does not allow the imposition of a contractual penalty for the breach of the lessee's financial obligation. The term "financial obligation" includes, for example, rent, incidental expenses, and a deposit, the payment of which may theoretically be delayed by the lessee.

In order to protect the lessee, contractual penalties are also limited in amount. According to the adopted amendment to the law, the amount of the contractual penalty agreed for one violation may not exceed 10% of the agreed monthly rent and other amounts borne by the lessee. Despite the proposed restrictions on penalty agreements, in practice, possible abuses of the application of a penalty by lessors are not ruled out.

In the light of the above, it is questionable whether the objective set out in the amendment to ensure a reasonable balance between the rights of the lessee and the economic interests of the lessor is still achievable in practice. Time and practice will show.