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# Supreme Court strikes down five-year cancellation waiver in consumer leases

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The Supreme Court recently ruled that a clause in a consumer lease agreement was unenforceable, as it waived the tenant's right to terminate the lease during the first five years, and thereafter provided for a 12-month notice period.

### Background

With regard to duration, there are two types of rental agreements in Austria. There are fixed-term leases, which end on a certain date, and open-ended leases, which can be terminated by either party at any time.

The Rent Act contains rules for the termination of both types. In either case, the landlord may terminate the lease only for cause. In the case of fixed-term leases, the Rent Act grants the tenant a rolling right of termination after the first year.

In the case of open-ended leases, it is customary for the parties to waive their respective rights of termination for an initial period. This is not prohibited under tenancy law.

### Facts

The Supreme Court recently ruled on an open-ended lease in which the tenant's right to terminate the lease was restricted in the lease agreement.<sup>(1)</sup>

The case concerned a business-to-consumer contract in which the tenant's right of termination was restricted in two ways:

- The tenant could not terminate the contract during the first five years of the lease.
- Thereafter, the tenant could terminate the lease by giving 12 months' notice to the end of each calendar quarter.

### Decision

The Supreme Court found that this deviated from statutory law, which provided for a three-month notice period. Such a deviation is permissible in principle, but in the case of form contracts it must not put the other party (ie, the party that did not introduce the form contract, usually the tenant) at a gross disadvantage.

In this case, the landlord's interest in being able to plan investments in advance had to be weighed against the tenant's risk of possibly having to pay rent for an apartment that they could not use if their personal circumstances changed. Given the high cost of rent, the tenant's interest outweighed the landlord's interest.

Therefore, the Supreme Court ruled that the clause was not enforceable, and the tenant could terminate the lease with three months' notice even during the first five years.

### Comment

The decision is very interesting because it affects all tenancy agreements, especially those that do not fall within the scope of the Rent Act.

Long-term commitments of the tenant are not entirely prohibited. They may still be valid in the following cases:

- where the landlord makes substantial investments for the respective tenant that cannot be used for any other tenant. For example, if the tenant has special architectural design wishes that are not in line with the general social customs; and
- for non-consumer contracts (ie, where the landlord is not a professional or the tenant is not a consumer), where the lease is not a standard form lease or the standard form is introduced by the tenant.

For further information on this topic please contact [Martin Foerster](mailto:m.foerster@pitkowitz.com) at Pitkowitz & Partners by telephone (+43 1 413 01 0) or email ([m.foerster@pitkowitz.com](mailto:m.foerster@pitkowitz.com)). The Pitkowitz & Partners website can be accessed at [www.pitkowitz.com](http://www.pitkowitz.com).

### Endnotes

(1) Decision of 14 September 2021, 8 Ob 94/21p.