

Commercial Property - Germany

Court of Justice to Permit 'Cold Eviction' from Commercial Properties

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In a surprising ruling, on May 6 2009 the Federal Court of Justice decided that under certain circumstances the landlord of a commercial lease agreement is not obliged to maintain the supply of heating and other utility services to the tenant following the expiry of the lease agreement.⁽¹⁾ Thus, in certain strictly defined scenarios, the court will now permit the use of so-called 'cold eviction'.

A landlord attempting to 'freeze out' a tenant must be very careful. Fundamentally, the landlord's obligation to provide the rented premises for the tenant's use ends when the lease agreement expires. This also applies to the provision of service supplies such as heating and water. However, this ruling clarifies that the landlord retains certain obligations after the expiry of a lease agreement based on the principle of good faith, and that these obligations may also include the obligation to provide heating and other utility services. The limit of this obligation is dictated by the extent to which it can be considered reasonable under the circumstances of the individual case.

Thus, interrupting the supply of utilities is never permissible for residential rented premises or where an impending health hazard for the tenant would result. The landlord is also obliged to continue the supply utilities in cases where the tenant has been set a deadline to clear the premises and continues to pay remuneration for the use of the premises. The landlord is further prohibited from shutting off the supply of heating and other utility services if the tenant has concluded a separate contract for this supply with a utility provider. This is because in such circumstances, the landlord suffers no damage or loss as a result of the continued supply of water, electricity and heating to the rented premises.

On the other hand, the landlord cannot reasonably be expected to continue the supply of services if the lease has been terminated because the tenant is in default of payment and, in the absence of any advance payments by the tenant, the landlord is having to pay for the premises's utilities at its own expense.

To summarize, landlords might consider shutting off electricity, heating and water supply to business premises in situations in which (i) the lease agreement on the premises has expired, and (ii) the tenant is significantly in default with rent payments and pre-payments of auxiliary costs.

If the landlord chooses to take this course of action, it must notify the tenant of its intentions in good time so as to allow the tenant to take any necessary steps to adapt to its new circumstances.

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Endnotes

(1) Decision XII ZR 137/07.

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