

THE FUNCTION OF SECURITY DEPOSIT IN AREA OF THE CZECH TENANCY LAW AND SOME PROBLEMS ASSOCIATED WITH IT

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Abstract

Security deposit is a special form of securing the landlord's claim against the tenant. This institute is regulated by Section 2254 of Act No. 89/2012 Coll., The Civil Code. Although the rules on certainty may seem to be sufficient and clear to the first impression, after closer examination it is clear that this is not so and that there are a large number of unanswered questions which are mentioned in this paper, for example: Is the statutory maximum amount of security deposit sufficient? Is it possible to count on the security deposit given to the landlord and to supplement the security deposit during the tenancy relationship, if such an arrangement is included in the lease contract? And what about the return of the security deposit? The aim of the paper is to find a solution to the above-mentioned shortcomings of the Czech legislation on the basis of a comparison with the legislation of the Slovak Republic, which for historical reasons is very similar to the Czech legislation.

Keywords: tenant; landlord; Civil Code; security deposit; interest.

JEL Classification: K12, K15, K25

1. Introduction

The security deposit serves the landlord as a financial guarantee that the tenant will fulfill the obligations arising from the tenancy relationship. The security deposit is regulated by Act No. 89/2012 Coll., The Civil Code. According to the author, the legal regulation of the security deposit in the Civil Code is too brief, and therefore there are many unresolved issues, especially payment of the debt from security deposit and usage of the security deposit during the tenancy relationship.² Due to the fact that security deposit is the institute used in Czech and Slovak legislation, where the tenant is perceived as a weaker party, and which are for historical reasons very close, the author tries to use the comparison method to solve some problems or answer questions concerning the security deposit in the Czech legislation.

2. Where is the security deposit regulated?

Lease of the flat incl. security deposit is regulated in the legal order of the Czech Republic by Act No. 89/2012 Coll., the Civil Code (hereinafter "Czech civil code" or "CCC").

In the Slovak legal system, there is double-tracking of legislation, when the lease of a flat is regulated by Act No. 40/1964 Coll., The Civil Code (hereinafter "Slovak civil code" or "SCC") and by Act No. 98/2014 Coll., on short-term rent of an apartment (hereinafter "ZKNB"). Both regulations are in a relationship of subsidiarity (*Lex specialis derogat legi generali*), which arise from the ZKNB, according to which the provisions of the SCC apply to the lease, unless the ZKNB provides otherwise.³ The security deposit is not regulated by SCC in any way, so ZKNB which is newer fills this shortcoming and regulates the security deposit.

The author states that the double-tracking of legislation, which is in Slovakia, is not a suitable solution and causes disorder in the legal regulation of lease of the flat.

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² § 2254 zákona č. 89/2012 Sb., občanský zákoník.

³ DULAKOVÁ JAKÚBEKOVÁ, Denisa. *Zabezpečenie dlhu pri krátkodobom nájme bytu*. In Markéta Selucká, Michal Janoušek, Jiří Valdhans. DNY PRÁVA 2019 – DAYS OF LAW. Část VIII. – Zajištění dluhu [online]. Brno: Masarykova univerzita, 2020. p. 29. ISBN 978-80-210-9804-6. Available: <http://dnyprava.law.muni.cz/dokumenty/54327>, consulted on 1.10.2021.

3. What may be the security deposit used for?

The legal regulation of the security deposit in the Czech legal system is really brief, because it is regulated only by one provision. According to § 2254 CCC the security deposit may be used to secure financial claim that the landlord has from the tenant from the tenancy relationship.⁴ However, the law does not specify what claims. The legal practice has shown that it means mainly unpaid rent or service fees, or compensation for damage to the subject of the lease (flat, furniture etc.). However, it should be emphasized that this is only the landlord's right to require security deposit, which must be agreed in the lease contract or during the lease in the form of an agreement or amendment to the lease contract. If this is not agreed, the landlord has no right to demand security deposit from the tenant.

The legal regulation of the security deposit is a bit more detailed in the Slovak legal system, when § 5 par. 1 ZKNB stipulates that the landlord may use the security deposit to pay the debt arising from non-payment of rent, or debt from provided services, to compensate the damage caused to the flat or equipment, or in connection with other financial claims related to the use of the flat.⁵ These financial claims may be, for example, a contractual penalty for failure to fulfill obligations arising from the tenancy relationship or reimbursement of costs paid by the landlord instead of the tenant. Even in Slovakia, it is only the right of the landlord to demand security deposit, which must be agreed, in the lease contract. If this is not agreed, the landlord has no right to demand security deposit from the tenant.⁶

It is clear that the financial claims, that may be paid by security deposit, are the same in both countries. However, it is not clear whether these states has the same regulation in the issue of payment of a contractual penalty from the security deposit, because the contractual penalty in the lease contract is in the Czech republic allowed from the amendment effective from July 1, 2020. The author states that the contractual penalty arising from failure to fulfill obligations arising from the tenancy relationship is according to § 2254 CCC financial claim from the tenancy relationship and may be paid from the security deposit.⁷

4. Amount of the security deposit

The amount of the security deposit depends on the agreement of the contractual parties, but CCC limits its amount to three times the amount of monthly rent. It means that the landlord who has registered services related to the use of the flat (water, electricity, gas) on himself cannot require a security deposit in the amount of three times the monthly rent plus advance payments for these services. From the amendment effective from 1 July 2020, which newly enabled the contractual penalty, there is another limit. In the case of a contractual penalty, the sum of the contractual penalty and the security deposit may not exceed three times the monthly rent.⁸

Slovak legislation is milder for the landlord, as it limits amount of the security deposit to three times the monthly rent, inclusive payments for services and does not limit it regarding to the contractual penalty.⁹

According to the author, the amount of security deposit under the Czech law is problematic. If the services are registered to a landlord who, as a landlord, would like to defend himself against non-payers by security deposit equal to three times the rent, the obstacle is that the law does not allow

⁴ § 2254 zákona č. 89/2012 Sb., občanský zákoník.

⁵ § 5 odst. 1 zákona č. 98/2014 Z.z., o krátkodobom nájme bytu.

⁶ DULAKOVÁ JAKÚBEKOVÁ, Denisa. *Zabezpečenie dlhu pri krátkodobom nájme bytu*. In Markéta Selucká, Michal Janoušek, Jiří Valdhans. DNY PRÁVA 2019 – DAYS OF LAW. Část VIII. – Zajištění dluhu [online]. Brno: Masarykova univerzita, 2020. p. 34. ISBN 978-80-210-9804-6. Available: <http://dnyprava.law.muni.cz/dokumenty/54327>, consulted on 1.10.2021.

⁷ § 2254 zákona č. 89/2012 Sb., občanský zákoník.

⁸ § 2254 zákona č. 89/2012 Sb., občanský zákoník.

⁹ DULAKOVÁ JAKÚBEKOVÁ, Denisa. *Zabezpečenie dlhu pri krátkodobom nájme bytu*. In Markéta Selucká, Michal Janoušek, Jiří Valdhans. DNY PRÁVA 2019 – DAYS OF LAW. Část VIII. – Zajištění dluhu [online]. Brno: Masarykova univerzita, 2020. p. 34. ISBN 978-80-210-9804-6. Available: <http://dnyprava.law.muni.cz/dokumenty/54327>, consulted on 1.10.2021.

the advance payments for the services to be added to the three times rent security deposit. The problem then arises when the lease of the flat is terminated by the termination notice given by the landlord without notice period according to the provisions of § 2291 CCC for non-payment of rent and services for at least 3 months. It may happen that the tenant owes rent and services payments for 4 months, because according to § 2291 par. 1 CCC, the landlord may require the tenant to leave the flat and return the flat to the landlord without undue delay, at the latest within one month of the end of the tenancy relationship.¹⁰ Of course, if he does not move out within the one-month period, the debt may continue to grow and even exceed the security deposit many times. The landlord's chances of recovering the amount owed by the tenants in such a case are not high. The author states that in cases where the landlord has services registered on himself, the landlord should be able to demand three times the rent, incl. services and that the amount should not be limited by a contractual penalty. The author agrees with Slovak law.

It is obvious that even the maximum amount of security may be insufficient, but on the other hand, it is impossible for many tenants to give security deposit in the maximum height, and even more so in one payment, and therefore landlords in most cases require a lower security. According to the author, a solution to achieve a compromise may be security deposit installments, which the Czech Civil Code does not mention, but does not exclude as well, because it will be an agreement that needs to be perceived as an agreement in favor of the tenant. In Germany, for example, the law stipulates that the landlord must accept payment of the security in installments if the tenant asks for it.¹¹ Another way is to negotiate a favorable interest rate for both contractual parties on the security deposit and the interim payment of interest to the tenant, so that the tenant's security deposit also brings something significant for the tenant. Interest may be set as an inflation rate.

The author fully understands the fact that the tenant is a weaker party that needs to be protected, but in the author's opinion it is not acceptable for the landlord to pay for the fact that some tenants are unable to fulfill their financial obligations properly and the question of social housing in the Czech Republic is not resolved. The state cannot pass on its duty of care to citizens to landlords and require them to help the tenants in a bad financial situation.

The author states that it would be appropriate to resolve the issue of social housing in the Czech Republic. The author also considers necessary to amend the legal framework in the field of security deposit so that the contractual parties can see all the possibilities offered by law and can find a suitable solution acceptable to both contractual parties. For this purpose, the author proposes to inspire in the Slovak legislation regarding to the amount of security. It means to allow landlords who have registered services on themselves, to demand security deposit corresponding to three times the monthly rent incl. services and not to limit the amount of security deposit by the amount of the agreed contractual penalty. At the same time, the author suggests to find an inspiration in the German legislation, which stipulates that the landlord must accept the payment of security deposit in installments if the tenant asks for it. Furthermore, the author proposes to determine the interest rate of the security so that the annual interest rate of the security deposit will correspond to the rate of inflation and this will be paid annually to the tenant.

5. Payment of the debt from the security deposit and usage of the security deposit during the tenancy relationship

As follows from CCC, the landlord has the right to set off what the tenant owes him from the tenancy relationship. The provisions § 2254 CCC stipulates that the tenant gives the security deposit to the landlord and it secures that the tenant will pay the rent and fulfill other financial obligations arising from the tenancy relationship. It also stipulates that the landlord will return the security deposit to the tenant at the end of the tenancy relationship, taking into account what the tenant owes him from

¹⁰ § 2291 zákona č. 89/2012 Sb., občanský zákoník.

¹¹ KŘEČEK, Stanislav. In: KŘEČEK, Stanislav; TUČKOVÁ, Barbora. *Nájemní a družstevní bydlení podle nového občanského zákoníku a zákona o obchodních korporacích*. 2.pub. Praha: Leges, 2016, p. 54. ISBN 978-80-7502-135-9.

the tenancy relationship.¹²

The return of the security deposit is therefore linked to the termination of the tenancy relationship, not to the eviction of the flat. At the end of the tenancy relationship, the tenant has a claim against the landlord that is enforceable on the day following the last day of the lease. The landlord has the right to set off what the tenant owes him under the tenancy relationship. The law therefore only defines in a general way what the security can be used for. According to the wording "*what he owes him from the rent*" it follows that it is not possible to set off any other mutual claims. However, the question is what about the costs associated with maintaining the account on which the security deposit is lodged. Due to the fact that the law does not stipulate how and where the landlord has to keep the security deposit and also the law does not stipulate who is obliged to bear the costs associated with maintaining the account on which the security deposit is lodged, these costs cannot be claimed from the tenant and use the security deposit to pay them, even though it was in the lease contract because it would be an agreement that shortens the tenant's rights.¹³ Regarding to the legal certainty of the contractual parties, it is recommended to specify in the lease contract what the security can be used for, and what is meant by "*other obligations arising from the lease*".¹⁴

As stated above, the return of the security deposit is linked to the termination of the tenancy relationship, not to the eviction of the flat. Here, the author sees the problem, that the landlord sets off what the tenant owes to him at this time, but does not have the opportunity to satisfy claims arising later, for example, if the tenant does not vacate the flat and does not pay rent during this period or the flat is not returned to the landlord on time and the landlord will find out after the security has been returned that the flat is in bad condition and an investment will be required to return the flat to its original condition. In such a case, the landlord will have a claim against the tenant, which, if the tenant is reluctant to pay everything, will be probably enforced in a much more demanding way, in court proceeding and possibly also by execution. The author believes that returning the security deposit against returning the flat would be a kind of appeal to the tenant to fulfill his obligations properly and on time, and considers that the change of the previous legislation, which required the landlord to return unspent funds from security deposit after the tenancy relationship within one month from the day the tenant vacated and handed over the flat, is not a good solution. According to the author, an obligation arrangement in the lease contract in the sense of the wording of the previous legal regulation would be probably considered as a prohibited arrangement due to the shortening of the tenant's rights.

Slovak legislation differs from Czech legislation and it is really close to the previous Czech legislation. In Slovakia, the landlord is obliged to return to the tenant the security deposit reduced by the amount used to satisfy the claims, within one month from the moment when the tenant vacated the flat and settled with the landlord all claims related to the tenancy relationship.¹⁵

Both countries do not take into account in their legislation the fact that landlords often have services registered on themselves and billing is usually done once a year. The landlord cannot settle all claims related to the lease with the tenant at the time of termination of the tenancy relationship. In Slovakia, this makes the security deposit irrevocable, as the one-month return period will start to run once the conditions for vacating the flat and settling claims have been cumulatively met. In the Czech Republic, on the other hand, the landlord must return the security deposit no later than on the day the tenancy relationship ends, regardless of the eviction of the flat. As a result, the landlord cannot satisfy the claims arising from the non-evacuation of the flat and determined on the basis of the billing of services. Furthermore, there is a problem that the landlord is not able to quantify the value of repairs

¹² § 2254 zákona č. 89/2012 Sb., občanský zákoník.

¹³ KŘEČEK, Stanislav. In: KŘEČEK, Stanislav; TUČKOVÁ, Barbora. *Nájemní a družstevní bydlení podle nového občanského zákoníku a zákona o obchodních korporacích*. 2. pub. Praha: Leges, 2016, p. 55. ISBN 978-80-7502-135-9.

¹⁴ KŘEČEK, Stanislav. In: PRAŽÁK, Zbyněk; FIALA, Josef; HANDLAR, Jiří a kol. *Závazky z právních jednání podle občanského zákoníku: komentář k § 1721-2893 OZ podle stavu k 1.4.2017 ve znění zákona č. 460/2016 Sb.* Praha: Leges, 2017, p. 898-899. Komentátor. ISBN 978-80-7502-158-8.

¹⁵ DULAKOVÁ JAKÚBEKOVÁ, Denisa. *Zabezpečenie dlhu pri krátkodobom nájme bytu*. In: Markéta Selucká, Michal Janoušek, Jiří Valdhans. *DNY PRÁVA 2019 – DAYS OF LAW. Část VIII. – Zajištění dluhu* [online]. Brno: Masarykova univerzita, 2020. p. 36. ISBN 978-80-210-9804-6. Available: <http://dnyprava.law.muni.cz/dokumenty/54327>, consulted on 1.10.2021.

to the flat when the flat is handed over damaged. The author does not perceive any of these two legal regulations as correct.

The author states that the legal regulation concerning the return of security deposit in CCC should be changed. The author considers as appropriate to set a reasonable period (for example 14 days) for the return of the security deposit and to link its start to the moment of evacuation of the flat. Regarding to the billing of services, the author states that the landlord should be allowed in certain cases to withhold part of the security deposit (for example in the amount of advance payments for services for one month) until the billing is made and return it to the tenant within 14 days of receiving the billing. Such cases could be the termination of the tenancy relationship due to non-payment of rent or if the tenant had arrears on services in the previous period. In such a case, there would be nothing to hinder the return of the security deposit to the tenants who returned the flat in an adequate condition and fulfilled their financial obligations.

Another problem discussed in the Czech Republic is the replenishment of the security deposit in the event of its using during the tenancy relationship. CCC does not regulate this area and it will only be up to the contractual parties whether or not they will regulate the rights and obligations concerning the using and replenishing of security during the duration of the tenancy relationship¹⁶. According to some experts, if an agreement is not concluded between the contractual parties on a possible set-off against the security deposit already during the duration of the tenancy relationship, this usage will be possible only after its termination.¹⁷ Other experts state that the usage of the security deposit during the lease is possible, but if the tenant constantly replenished the security deposit to the original amount and left the landlord to use security deposit for the rent payment regularly, it would be against to good morals and it would be the breach of obligation arising from the lease contract.¹⁸ However, it can be found that the agreement containing the possibility to use the security deposit during the tenancy relationship is an agreement prohibited in accordance with the provision of § 2239 CCC ("Arrangements imposing an obligation on the tenant which are manifestly disproportionate to the circumstances are not taken into account").¹⁹

Slovak legislation allows the usage of security during the tenancy relationship. In case that the landlord uses a security deposit for the payment of claims arising from the tenancy relationship, which he has against the tenant, the tenant is obliged to supplement the security to the original amount within 1 month of delivery of written request, which must be delivered to the tenant. If he fails to do so, the landlord is entitled to terminate the tenancy relationship by giving a notice.²⁰

The author is of the opinion that if the contractual parties in the Czech Republic agree on a usage of the security deposit during the tenancy relationship for paying rent and services and the associated continuous replenishment of the security deposit to the original amount by the tenant, this is not an agreement shortening the tenant's rights, but as some experts state, such an arrangement may be seen as an arrangement beneficial to the tenant because no interest on arrears are arising from the debt. The author states that the Czech legislation could be inspired by the Slovak legislation, where the landlord has the option to use security deposit during tenancy relationship and the tenant has the obligation to replenish the security deposit to the original amount within one month of its use.

6. Conclusion

As follows from the above mentioned, the maximum level of security deposit may be found

¹⁶ TARABA, Milan; VESELÁ, Lenka. *Rádce nájemníka bytu*. 8.pub. Praha: Grada, 2015, p 31-34. ISBN 978-80-247-5030-9.

¹⁷ JANOUŠKOVÁ, Michaela. In: PETROV, Jan a kol. *Občanský zákoník: komentář*. Praha: C.H. Beck, 2017, p. 2281. Beckova edice komentované zákony. ISBN 978-80-7400-653-1.

¹⁸ KŘEČEK, Stanislav. *Několik poznámek k ustanovením zvláštní části nového občanského zákoníku, týkajících se nájmu bytu*. Bulletin advokacie [online]. Česká advokátní komora, published 2. 6. 2014 [cit. 13. 11. 2021]. Available: <http://www.bulletin-advokacie.cz/několik-poznamek-k-ustanovenim-zvlastni-casti-noveho-obcanskeho-zakoniku-tykajících-se-najmu-bytu?browser=mobi>, consulted on 1.10.2021.

¹⁹ 2239 zákona č. 89/2012 Sb., občanský zákoník.

²⁰ DULAKOVÁ JAKÚBEKOVÁ, Denisa. *Zabezpečenie dlhu pri krátkodobom nájme bytu*. In Markéta Selucká, Michal Janoušek, Jiří Valdhans. *DNY PRÁVA 2019 – DAYS OF LAW. Část VIII. – Zajištění dluhu* [online]. Brno: Masarykova univerzita, 2020. p. 35. ISBN 978-80-210-9804-6. Available: <http://dnyprava.law.muni.cz/dokumenty/54327>, consulted on 1.10.2021.

to be insufficient in some cases. It is understandable that it is impossible for many tenants to give security deposit in the maximum height, and even more so in one payment, and therefore landlords in most cases require a lower security. According to the author, a solution to achieve a compromise for both contractual parties may be security deposit installments. The author proposes to inspire in the Slovak legislation regarding to the amount of security. It means to allow landlords who have registered services on themselves, to demand security deposit corresponding to three times the monthly rent incl. services and not to limit the amount of security deposit by the amount of the agreed contractual penalty. Furthermore, the author proposes to determine the interest rate of the security so that the annual interest rate of the security deposit will correspond to the rate of inflation and this will be paid annually to the tenant.

Regarding to the usage of security deposit during the tenancy relationship, the author states that if the contractual parties agree on using security deposit during the tenancy relationship for paying debts arising from tenancy relationship and replenishment of the security deposit to the original amount, it has to be seen as an arrangement from which can tenant take advantage, because no interest on arrears are arising from the debt.

As this paper shows, the legislation on certainty is very brief and completely insufficient, which raises a wide range of questions and discussions, during which new and new issues arise and in which there are completely conflicting views of the experts. The arguments have a certain logic and are often based on the established practices of neighboring states. Due to the fact that the legal regulation of security deposit has undergone relatively significant changes, it will not be possible to apply much of the Czech case law, and therefore, in the absence of current case law, no one knows how to properly resolve any disputes concerning security deposit. It will be interesting to monitor the development of case law in the Czech Republic and watch whether the case law is reflected somehow into Czech law.

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