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Residential rental price indexation clauses
analysis of judgements by the Amsterdam District Court

Introduction

1. August 2023 the Amsterdam District Court handed down an eighth judgment in which the Subdistrict Court ruled that the much-applied (ROZ) rent indexation clause for liberalised rental housing (being: CPI + a maximum 5% surcharge) is unfair within the meaning of European Directive 93/13/EEC on unfair terms in consumer contracts (**Directive**) and should therefore be annulled.[1] The landlord in this eighth judgment is Bouwinvest Dutch Institutional Residential Fund N.V. (**Bouwinvest**), and we will refer to this judgment hereinafter as the Bouwinvest judgment or Bouwinvest case. The Bouwinvest judgment has the effect that in said tenancy relationship: (i) the rent reverts to the initial rent; (ii) there is no possibility of annual indexation of the rent in the future and (iii) the tenant becomes entitled to a reimbursement by the landlord of excess paid rent.

2. The financial consequences of this case law for landlords - if it were to be upheld on appeal or cassation - are potentially enormous, as a simple calculation example below based on the Bouwinvest case shows. The value of a rental house is - simplified - determined by the rent times GIY (gross initial yield). In the Bouwinvest case, the rent at the time of the 2023 proceedings was approximately EUR 1,500 per month, i.e. EUR 18,000 per year. Assuming a GIY of 4%, that means a house value of EUR 450,000 in 2023. In this case, the initial rent (in 2005!) was around EUR 865 per month, so EUR 10,380 per year.[2] Thus, assuming the same GIY, the value of the house after the rendering of this judgment becomes EUR 259,500. A loss of value for the landlord of no less than EUR 190,500. Moreover, because the rent may no longer be increased, the actual loss of value will only increase over future years.

3. Of course, this is a somewhat simplified version of the circumstances, as it can be argued that a rent in line with market can once again be charged upon tenant turnover, but given the fact that the rent is so low (and furthermore, according to the Subdistrict Court, the tenant will, given the 'credit balance', be able to pay the rent in the coming period by means of set-off), the likelihood that this tenant will give notice anytime soon and/or the lease agreement can be terminated is low.[3] While quantifying the financial impact of this case law on landlords who own liberalised housing is obviously much more complex, this simple example does show that the impact will be huge.

4. It seems as if certain judges at the Amsterdam Subdistrict Court wanted to take the initiative to counter high indexations (in their eyes, too high).[4] In this regard it should be noted that any acute societal need to address this issue seems to be lacking, given that since 2021 there is legislation in place which restricts the increase of liberalised rental levels. In 2021 a temporary law was introduced limiting the rents increases for liberalised residential lease agreements up to a maximum percentage set by government at the lower of either CPI plus 1% or the average wage increase level plus 1%. Simultaneous with its introduction, this legislation also included that it would end as per 1 May 2024. The most important argument for introducing this piece of legislation was that the government wished, in the transition period until the entry into force of the Affordable Rent Act, to ensure that the rent levels of existing lease agreement of such (then future) midrent segment homes would not increase significantly. In the meantime, this legislation has been extended by another five years (until 1 May 2029). In short, the rent

1 ECLI:NL:RBAMS:2023:4800 (Bouwinvest/x). The seven earlier judgments were: ECLI:NL:RBAMS:2023:189 (Rochdale/x) (solely because it refers to Jongeneel's article mentioned in footnote 4 below and states that "it is known ex officio that rent alteration clauses must sometimes be regarded as unfair"); ECLI:NL:RBAMS:2023:2420 (x/x); ECLI: NL:RBAMS:2023:2489 (Amvest/x); ECLI:NL:RBAMS:2023:3124 (Bouwinvest/x); ECLI:NL:RBAMS:2023:3229 (CBRE/x); ECLI:NL:RBAMS:2023:3967 (Altera/x); ECLI:NL:RBAMS:2023:4216 (ASR/x). The Amvest and ASR judgements concern preliminary rulings with regard to the unfairness of the term, in respect of which the parties have been granted an additional opportunity to submit written statements. As per today there are more court cases than only the aforementioned (also by other courts than the Amsterdam court), so this list is no longer exhaustive.

2 Thus, the average annual rent increase was about 3.25% total (over 18 years), which is the CPI plus the surcharge applied by Bouwinvest.

3 Furthermore, we then also leave aside (among other things) the limitation period of the claim to set aside the clause, which the landlord is expected to argue on appeal.

4 See, for example, the following article by the Amsterdam Subdistrict Court judge (with input from his fellow Subdistrict Court judges in Amsterdam): R.H.C. Jongeneel, "Er zijn twee soorten wijzigingsbedingen" NJB 2022, p. 802.

level of the regulated and midrent sector has the attention of the government, who is able to provide a far more bespoke solution than the Amsterdam judges who have annulled the rental price increase clauses on the basis of the Directive.

5. We fear that this case law will damage the already precarious Dutch rental housing market, for instance because investors will be more reluctant to invest or continue investing in rental housing. You might think, *Sure, that may be the case, but it is good for all tenants so let the high earning landlords be the ones to pay for once.* The problem is that this line of reasoning at least loses sight of the fact that:
   a. a significant portion of these liberalised rental houses are owned by institutional investors, namely insurers and pension funds. Again, taking Bouwinvest as an example: for years, the sole or main investor in Bouwinvest Dutch Institutional Residential Fund N.V. has been the pension fund for people working in construction. So, all these pension participants are effectively the landlord of this property, from which the rental income is now cut in half and will - during the set off period of the 'credit balance' - be reduced to zero. This case law therefore affects the income of many people, not so much as tenants, but as (indirect) *landlords*; and
   b. it is in everyone's interest to have a healthy liberalised rental housing market of sufficient size, if only to act as an 'overflow' for the, largely stagnant, regulated rental housing market and the owner-occupied housing market.

6. The above should hopefully make it clear that (the outcome of) this case law is undesirable. There are, of course, appeals pending against these judgments. On appeal (and possibly subsequent cassation), several arguments can be put forward against the reasoning of the Subdistrict Court. We will address what we consider to be the most important arguments in this memorandum.

Objective of memorandum / updates and additions / disclaimer

7. This memorandum concerns our analysis based on currently known judgments and other relevant information. However, we consider it a 'living document' that we will update from time to time on the basis of further thoughts and/or new case law. Moreover, we invite anyone interested in this topic to engage on this topic with us and to provide input and suggestions.

8. Each subsequent version of this memorandum will be posted on the Loyens & Loeff website and will be recognisable by the fact that its date and version number are updated on the first page.

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Directive and relevant European case law

10. Of particular relevance to this topic are the articles of the Directive below. The Directive also includes an annex, often referred to as the **Blue List**.

3.1 A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
3.3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.
4.1 Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
5. In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. (...)

Annex
terms referred to in article 3 (3):
1. Terms which have the object or effect of:
(…) j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
(...) l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
(...)
2. Scope of subparagraphs (…) j) and l):
(...)
b) (…) Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
(...)
d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

11. The most important rulings of the Court of Justice of the European Union (**ECJ**) in this regard are Invitel and RWE Vertrieb as both deal with price increases or the total costs the consumer has to pay under the contract. We will therefore briefly explain these rulings.

12. Invitel[5]: Invitel is a provider of telecommunications services. In contracts with consumers, it has reserved the right to update the applicable general terms and conditions. This resulted in new general terms and conditions being declared applicable during the term of certain contracts. These new general terms and conditions contained a clause - which was not in the old general terms and conditions - that extra costs could be charged in case of payment by giro collection form. However, this clause did not specify what kind of charges these were, how high they are or how they would be calculated.

13. The ECJ states that:

in assessing the unfair nature of a term such as that at issue in the main proceedings, the question whether the reasons for, or the method of, the variation of the fees connected with the service provided were specified and whether the consumer had the right to terminate the contract is particularly relevant.[6]

14. RWE Vertrieb[7]: RWE Vertrieb is a gas supplier. Customers could choose between a fixed-rate supply agreement (where a certain national regulation applied, which provided for supply at fixed rates with a right for the supplier to change prices) or an 'individual agreement'. The latter were popular, because they were often offered at more favourable rates, but were not covered by the aforementioned national regime. Nevertheless, the corresponding general conditions of these individual agreements referred to the text of the aforementioned national regulation. This national regulation allowed RWE Vertrieb to unilaterally change prices without specifying (i) the reason, (ii) the conditions or (iii) the extent of the change, albeit RWE Vertrieb was obliged to inform customers of the change. Furthermore, customers then had the option to terminate the agreement if they objected to the price increase. Subsequently, in less than three years (January 2003 to October 2005), RWE Vertrieb increased gas prices up to four times. It was also established that during this period the relevant customers could not actually change energy suppliers, as the deregulation of the energy market was not sufficiently advanced during the period in question and therefore it was not possible to find an alternative supplier that could have supplied gas. RWE Vertrieb therefore had a monopoly on gas supply in the area in question.

15. The ECJ states - after a repetition of the clauses from the Invitel case - that:

(…) it is of fundamental importance, (…) that the right of termination given to the consumer is not purely formal but can actually be exercised. That would not be the case if, for reasons connected with the method of exercise of the right of termination or the

5 ECJ EU 26 April 2012, ECLI:EU:C:2012:242 (*Invitel*).
6 ECJ 26 April 2012, ECLI:EU:C:2012:242 (*Invitel*), par. 26.
7 ECJ 21 March 2013, ECLI:EU:C:2013:180 (*RWE Vertrieb*).

conditions of the market concerned, the consumer has no real possibility of changing supplier, or if he has not been informed suitably in good time of the forthcoming change, thus depriving him of the possibility of checking how it is calculated and, if appropriate, of changing supplier. Account must be taken in particular of whether the market concerned is competitive, the possible cost to the consumer of terminating the contract, the time between the notification and the coming into force of the new tariffs, the information provided at the time of that communication, and the cost to be borne and the time taken to change supplier.[8]

16. What is important to realise about the case law of the ECJ is that it only provides explanations and guidance on how to apply the Directive, but does not decide whether a particular term is unfair within the meaning of the Directive. That is the task of the relevant national court. See[9]:

    It should be noted, in this regard, that the jurisdiction of the Court of Justice extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of the Directive and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case (…). It is thus clear that the Court of Justice must limit itself, in its response, to providing the referring court with the indications which the latter must take into account in order to assess whether the term at issue is unfair.

17. Of further significance is that the Blue List contains only a non-exhaustive and indicative list of types of terms that can be deemed unfair. In other words, even if it is not on the Blue List, it may be unfair under circumstances. And vice versa: if something is on the Blue List, it nevertheless may - depending on further circumstances - not be unfair.[10]

Dutch practice

18. In the Netherlands, the ROZ model lease agreement is most often used. The most recent version (from 2017) contains the following clause, where the number 5 is usually included on the second dotted line:

    5.2 If the leased space is self-contained accommodation subject to liberalised rent, that stated under 5.1 does not apply. In that case, the rent shall be adjusted for the first time as of ..... and annually thereafter in accordance with that stated in Article 16 of the general conditions. In addition to and simultaneously with the annual adjustment in accordance with Article 16 of the general conditions, the landlord shall be entitled to increase the rent by a maximum of ....%.[11]

19. Aforementioned Article 16 of the general conditions provides:

    Rent adjustment

    16. If the leased space is a self-contained living accommodation subject to liberalised rent:
    – indexation takes place on the basis of the change in the monthly price index figure according to the Consumer Price Index (CPI) series all households (2015=100), published by Statistics Netherlands (CBS);
    – the adjusted rent is calculated according to the formula: the adjusted rent is equal to the current rent on the date of change, multiplied by the index figure of the calendar month that lies 4 (four) calendar months before the calendar month in which the rent is adjusted, divided by the index figure of the calendar month that lies 16 (sixteen) calendar months before the calendar month in which the rent is adjusted;

8 ECJ 21 March 2013, ECLI:EU:C:2013:180 (*RWE Vertrieb*), par. 54.
9 ECJ 26 April 2012, ECLI:EU:C:2012:242 (*Invitel*), par. 22.
10 ECJ 7 May 2002, HvJ EG 07-05-2002, ECLI:EU:C:2002:281, *NJ* 2003/74, par. 20.
11 Following the case law discussed in this memorandum, a new article was published by the ROZ in 2023 regarding the indexation of rents of residences in the liberalised sector. The ROZ recommends including this article in the special provisions of the residential lease agreement. This article retains the text from the old article 5.2, but with the following addition: "*unless this is not permitted under the laws or regulations applicable in the year to which the rent adjustment relates, in which case the rent may be increased at most in line with what is permitted at most under those laws and regulations*". We have not yet seen any rulings regarding an indexation clause with this addition, so it is not clear whether this addition would make such a clause fair in the eyes of the courts (and if so, by what percentage of increase).

– the rent will not be changed if the adjustment results in a lower rent than the last applicable rent, but in that case the last applicable rent will remain unchanged until, at a subsequent indexation, the index figure for the calendar month which is four calendar months prior to the calendar month in which the rent is adjusted is higher than the index figure on the basis of which the rent was last adjusted;
(...)
– the adjusted rent will also apply if no separate notification of the adjustment is given to the tenant.

20. In practice, of course, there are several variations on this (as the Amsterdam judgments also show), but in essence - and for the remainder of this memorandum - we will refer to this clause as 'CPI + maximum 5%' or the 'ROZ provision'.

Amsterdam judgments

21. The Amsterdam judgments clearly show a similar line of reasoning, as reflected in the following grounds of the Bouwinvest judgment:

7. The Subdistrict Court must assess ex officio whether that clause is unfair within the meaning of the Directive on unfair terms in consumer contracts. When assessing the unfairness of a term, the issue is whether that term, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Article 3(1) of the Directive). This assessment must include all the circumstances surrounding the conclusion of the contract and take into account all the other terms of the contract, taking into account the nature of the goods or services covered by the contract. The date on which a contract was concluded will serve as reference date for the moment of assessment. Irrelevant for this assessment is therefore the actual application and performance of the terms, or an explanation given afterwards. Furthermore, the applicable rules of national law must be taken into account if the parties had not made an arrangement for such.
8. The term in the general conditions applicable to lease agreements quoted at 1.2 above is by its nature to be regarded as a clause intended to be used in multiple contracts. It does not qualify as a core term. It has neither been stated nor shown that the term was negotiated.
9. (...)
10. It follows from case law (inter alia ECLI:C:EU:2013:180 RWE Vertrieb and C-472/10, ECLI:EU:C:2012:242 Invitel) that the ECJ imposes far-reaching limitations on the validity of price change clauses. Such a clause must be drafted in clear and comprehensible language, or be objectively determinable. The clause must contain the grounds on the basis of which and the manner in which the rent may be adjusted and these grounds must constitute a valid reason for the rent change. The rent adjustment clause must be included in the lease agreement or the attached general conditions. Other circumstances that factor into the assessment of whether a term is unfair are the following: whether the lease agreement provides that the rent adjustment clause may or may not also lead to a rent reduction and whether the lease agreement provides that the tenant can terminate the lease agreement when the rent adjustment clause is exercised, as well as whether the tenant, after being informed about the rent increase, has a real possibility to actually terminate the lease agreement.
11. In principle, a clause regulating a change in the rent is fair if the change is based on the consumer price index and how the rent adjustment is calculated is explained, or if the clause refers to the statutory rules on rent adjustment. However, under the present clause, in addition to an adjustment for inflation, it is also possible to claim an additional 5% increase each year. This significantly upsets the balance contrary to the requirement of good faith to the detriment of the tenant as a consumer. Moreover, the clause also fails to meet the conditions set out above: the grounds on the basis of which and the manner in which the rent can be adjusted are missing from the clause, as well as a valid reason for the annual change in the rent by 5% above the adjustment for inflation, leaving the tenant at the mercy of the landlord on this point.
12. The Subdistrict Court therefore holds, contrary to what Bouwinvest asserted, that the rent adjustment clause is unfair.

22. In these grounds (especially in ground 10), the Subdistrict Court sets out all that, in its view, is required for a rent adjustment clause to be deemed unfair under, in particular, the RWE Vertrieb and Invitel rulings. We believe that the application of the Directive

and European case law by the Amsterdam Subdistrict Court is too strict and that too many and too high requirements are imposed on the ROZ provision. We furthermore believe that the Subdistrict Court is incorrect in concluding that this term is unfair within the meaning of the Directive and its subsequent decision to completely annul it.

23. We base this conclusion on the arguments set out below, which regard: (i) the transparency principle, (ii) the possibility to give notice of termination; (iii) the significant imbalance in parties' rights and obligations and (iv) the question what exactly the to be annulled term would be.[12]

24. In this respect, an important initial observation is that the Subdistrict Court creates the impression that all the criteria from European case law (as mentioned in ground 10) are mandatory conditions. That is not correct. These criteria are merely points of view, albeit important, to be taken into account in the overall assessment of the unfairness of the term. Still, it is not so black and white that this is a cumulative mandatory list and/or that if only one of them is missing, unfairness is then a given.[13] This means, for example, that the mere failure to mention a valid reason for applying the surcharge does not immediately lead to unfairness.[14]

Transparency and the extent of the rent increase

25. The principle of transparency as laid down in (article 4(2) and article 5 of) the Directive is to be interpreted, according to the ECJ, as[15]:

    (…) that transparency requirement must be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but that that consumer is also in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.

26. In both the Invitel ruling and the RWE Vertrieb ruling (in which the price had already been increased four times in less than three years), there was clearly a situation where consumers could not foresee the economic consequences of the term. In both cases, it was not clear to consumers when, how often or by what amount the price or costs would be increased. In effect, these terms concerned a black box.

27. The situation here is quite different. At issue is a very common term, namely, that the rent of rented housing is adjusted periodically. This happens at most once a year in the Netherlands. Furthermore, the first dotted line of Article 5.2 of the lease agreement also states when this is done for the first time and that it takes place annually thereafter.

28. Moreover, it clearly and comprehensibly describes how the increase is determined. First, it is by increasing the rent by the CPI over a specified period (t-4/t-16). Admittedly, that wording is not the easiest to follow, but that is because a formula has to be described in words, which is never easy. But that does not make it incomprehensible or unclear. Moreover, before signing the lease agreement, the prospective tenant can of course even check what the average CPI has been over the past few years. Historically that has always hovered around 2%.[16] The landlord can decide to apply another increase to that - in our example, 5%. So, the 2% can be increased to a maximum of 7%. Again, this description or wording is sufficiently comprehensible and clear.[17]

29. The remaining question then is whether the wording of the clause stating that the rent increase is thus actually between 0% and 7% on average, allows the tenant to foresee the economic consequences based on comprehensible criteria. We believe it can be well argued that it does.

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12 Incidentally, we disregard specific arguments such as that, for example, the percentage of the surcharge was demonstrably negotiated between the parties and/or that the landlord demonstrably gave reasons for applying the surcharge, but these may of course be relevant in individual cases.

13 See amongst other ECJ 3 October 2019, ECLI:EU:C:2019:820 (*Kiss/CIB Bank*).

14 See also mr. R.H.C. Jongeneel, "Er zijn twee soorten wijzigingsbedingen" NJB 2022, par. 2.

15 ECJ 3 October 2019, ECLI:EU:C:2019:820 (*Kiss/CIB Bank*), par. 37 and ECJ 30 April 2014, ECLI:EU:C:2014:282 (*Kásler*), par. 75.

16 See further paragraph 48 and 58 of this memorandum.

17 Subdistrict Court judges criticise the failure to provide a calculation example. Again, the CBS website contains a calculation tool on which anyone (including a prospective tenant) can perform CPI calculations.

30. The Subdistrict Court particularly criticised the arbitrariness of applying the surcharge and the level of the maximum surcharge itself.[18]

31. Starting with the 5% maximum surcharge: it should be noted that in one of the eight cases before the court in Amsterdam, the maximum rate was not 5% but 3%.[19] This percentage shared exactly the same fate, with no further substantiation as to why this also significantly upset the balance. It is unclear what the Subdistrict Court would then still find acceptable as a surcharge percentage; is that maybe 1% or 2%?[20] This while (i) even in the regulated sector, up to recently, the legislator permitted indexations above CPI (for example CPI + 2,5% for lower incomes and CPI + 4% for higher incomes in 2020) and (ii) the legislator saw no need (up until 2021) to limit rents and indexations in the liberalised sector in any way at all. Moreover (see also further paragraph 58 of this memorandum): based on the house price value increase during the period 1990 to the present, a surcharge on the CPI was actually required in order to ensure a direct return at the same level from leasing out residential real estate. The costs of all forms of housing (be it owner occupied or leased housing) have increased far more than the inflation during the same period and an annual 5% surcharge was - particularly in Amsterdam - reasonable in that regard.

32. The arbitrariness relates to the fact that the lease agreement stipulates that the rent *can* be increased by 5%. In other words, it is not a given that this will happen and thus consumers had insufficient insight.

33. The important difference with Invitel and RWE Vertrieb is that in those cases consumers had no idea where they stood; there was nothing to calculate. With this clause, consumers can determine the average CPI based on key figures and then add 5%. After taking that outcome into account, things could turn out better than expected (because the entire 5% is almost never added[21]). In other words, the consumer can determine a worst, average and best case. Indeed: as far as the worst case is concerned, the percentage is capped at the maximum (in our example: at 5%) and the only uncertain factor is how high the CPI will be. But, that uncertainty (as regards exactly how high it will be) is actually regarded as normal by the ECJ and is something that normally should be accepted by consumers.

34. In this context, we would also like to explicitly refer to the article, as referred to in footnote 4, by Jongeneel, one of the Subdistrict Court judges of the Amsterdam District Court. It compares various possible types of rent increase clauses, including the present ROZ provision and a variation thereof, the only difference being that the 5% is not a maximum permitted percentage, but a fixed percentage. In other words, CPI+5% is *certainly* added every year. The author then concludes that - because of the certainty of application - this clause would be less unfair than the ROZ provision. Surely this seems to us to go completely against the ultimate, higher purpose of the Directive: to protect consumers. Surely, they are always better off with a 5% cap - where the percentage can only be less - than with a guaranteed increase of 5%.

35. A case that is somewhat similar to the ROZ provision is the Euribor case law.[22] It involved mortgages offered by ABN AMRO, for which the interest rate to be paid by the consumer was the sum of two components: (i) the 1-month Euribor rate and (ii) a surcharge determined by ABN AMRO itself. In the agreement, ABN AMRO had reserved the right to unilaterally change that surcharge. In some cases, it added "if developments in interest rates on the money and capital markets gave it reason to do so".

36. Particularly at issue in that case was the fact that ABN AMRO's authority to make changes was unlimited in three ways: (1) frequency, (2) amount/method of calculation and (3) reason. On point (2), it also

18 For instance District Court Amsterdam 4 July 2023, ECLI:NL:RBAMS:2023:4216 (*ASR/x*), par. 8 and District Court Amsterdam 25 April 2023, ECLI:NL:RBAMS:2023:2489, *WR* 2023/104 (*Amvest/x*), par. 10.

19 District Court Amsterdam 25 April 2023, ECLI:NL:RBAMS:2023:2489 (Amvest/x).

20 In this regard we refer to paragraph 69 and further of this memorandum.

21 In 2023 rents in the liberalized sector increased on a whole by 4.5% on average, which incidentally includes both annual increases of running leases and higher staring rents of new leases. See: FD, 9 September 2023, "Huren 11% hoger bij bewonerswissel, hoogste in bijna tien jaar", URL: https://fd.nl/samenleving/1488649/huren-11-hoger-bij-bewonerswissel-hoogste-in-bijna-tien-jaar.

22 By this we refer to the Supreme Court ruling of 22 November 2019 (ECLI:NL:HR:2019:1830) and the ruling (after referral) of The Hague Court of Appeal of 11 October 2022 (ECLI:NL:GHDHA:2022:1983).

mentioned that there was not even a bandwidth within which the change would stay. With consumers being left in the dark on all three of these aspects, the clause was deemed non-transparent. Incidentally, it was added that this aspect was not necessarily decisive in determining whether the clause should ultimately be deemed unfair (which it was not because of the possibility of termination by the consumer).

37. In the ROZ provision, the right to make changes is far from unlimited:
    a. frequency: it is contractually (and legally) stipulated that the increase can only take place once a year, at the same time as the annual indexation; and
    b. amount/method of calculation: the increase is limited to 5%.[23]

38. It cannot be denied that the third component (the reason for change) is not addressed in the ROZ provision. However, from a tenant's perspective, this is, in our view, the least important of the three components. As long as you know, as a tenant, how often and within which bandwidth the increase will move, you can sufficiently foresee and oversee what the economic consequences will be for you in advance. Furthermore, the - valid - reasons for the increases are obvious. It is a fact of general knowledge that home values and market rents are increasing more quickly than inflation does and it is therefore also understandable that a landlord of residential real estate wishes that the rents remain in line therewith.[24] Moreover, a valid reason is not always required, see paragraph 24 above.

39. In summary, if the tenant knows how often, at what time and within what bandwidth the increase will be, his interest as a consumer is thus sufficiently safeguarded.

Notice of termination

40. An important aspect is the possibility for the consumer to terminate the relevant agreement by giving notice. This element is explicitly addressed in the RWE Vertrieb ruling. At issue in that case was the fact that the consumer could not actually terminate the energy supply contract: there was no other supplier who could have supplied energy to the property. Because the consumer was unable to pick up and relocate the house in question, they therefore had no choice but to continue to contract with this supplier.

41. Thus, in ground 54, the ECJ ruled as follows on this matter (see also paragraph 15):
    With respect, in the second place, to the consumer's right to terminate the supply contract he has concluded in the event of a unilateral alteration of the tariffs applied by the supplier, it is of fundamental importance, as the Advocate General says in substance in point 85 of her Opinion, that the right of termination given to the consumer is not purely formal but can actually be exercised. That would not be the case if, for reasons connected with the method of exercise of the right of termination or the conditions of the market concerned, the consumer has no real possibility of changing supplier, or if he has not been informed suitably in good time of the forthcoming change, thus depriving him of the possibility of checking how it is calculated and, if appropriate, of changing supplier. Account must be taken in particular of whether the market concerned is competitive, the possible cost to the consumer of terminating the contract, the time between the notification and the coming into force of the new tariffs, the information provided at the time of that communication, and the cost to be borne and the time taken to change supplier.

42. Applying the above factors to the leasing of residential real estate, we are of the opinion that consumers can effectively decide to terminate the lease agreement if they disagree with the rent increased based on the indexation clause. According to the law, the notice period for a tenant is at least 1 month and is no longer than three months in case a tenant wishes to give notice. Of course, it is true that moving house involves a lot of hassle and certain costs and is therefore - in summary - not always easy or desirable, but that is a very different situation to the situation where terminating (and therefore moving house) is actually

23 In this regard, see also ECJ 30 April 2014, ECLI:EU:C:2014:282 (*Kásler*), which speaks of an "*unlimited increase in the cost of the financial service*" for the consumer.

24 See also the example calculations of paragraph 58 below.

impossible and therefore it is only a formal right of termination.

43. Moreover: the recent judgments all involve Amsterdam housing tenants and the Subdistrict Court stresses that it is very difficult to find housing *in Amsterdam*. But at least the following observations can be made about this:
    a. the ROZ provision is applied in the same way throughout the Netherlands. Obviously, the pressure on the housing market is not the same everywhere in the Netherlands and in Amsterdam it is by far the greatest. It would be strange if the outcome of the judicial assessment was that the same term would be unfair to tenants in Amsterdam but not to a tenant in (say) Limburg. Then the tenant in Amsterdam would permanently revert to the initial rent, while the tenant in Limburg would simply continue to pay the current amount and be indexed annually. Although it may be understandable from the perspective of the court to only assess the individual case at hand, this result is unsatisfying. Moreover, there is no reason why the rental market for Amsterdam tenants would only consist of homes *in* Amsterdam. Why could they not be asked to also look *outside* or at least *around* Amsterdam for alternatives?
    b. All these cases concern *liberalised* rental housing. The Subdistrict Court ignores the fact that with respect to the tightness of the housing market in Amsterdam (and other cities), a distinction must be made between the regulated market and the liberalised market: for the liberalised market, there is always some availability of houses (as a simple check on Funda also shows). It is the regulated market in particular that is (for all sorts of reasons) fully gridlocked. In the liberalised rental sector, which acts as a kind of 'overflow' for the regulated rental sector and the owner-occupied sector, this is much less the case.
    c. Tenant churn, also in the in the liberalised market in Amsterdam, is an undeniable fact. The average term of a liberalised lease agreement is often shorter in duration than that of social rental housing.[25] In other words, tenants of liberalised Amsterdam rental housing move often and for all sorts of reasons.[26]

No obligation to give prior notification

44. Another aspect the Subdistrict Court take into account was the fact that the general conditions stipulate that the adjusted rent also applies if no separate notification of the adjustment is given to the tenant. Here again, the present case differs substantially from RWE Vertrieb. In RWE Vertrieb, it was not clear in advance at what time a possible price increase would take place nor was any 'rhythm' of possible subsequent price increases clear. If indeed it is not clear to the consumer upon signing of the agreement when and exactly how often any price increases will take place, the prior notification of each price increase is of course particularly relevant.

45. With the ROZ model (in combination with Dutch tenancy law), it is already clear to the consumer when the agreement is concluded <u>when</u> and <u>how often</u> indexation will take place. After all, the first dotted line of Article 5.2 of the ROZ model includes the date of the first indexation and then the article stipulates that it will be indexed again annually (on the same date). In that situation, it does not seem decisive to us that the general conditions indeed provide (for the benefit of the landlord) that even if the annual indexation letter was omitted (or did not demonstrably reach the tenant), the rent increase applies. Especially since the tenant would then have a real possibility to terminate the lease agreement.

46. Moreover, the question is whether this term in Article 16 of the general conditions also applies to the application of the surcharge under Article 5.2 of the lease agreement itself. After all: article 5.2 of the lease agreement refers in the second sentence to article 16 of the general conditions for determining the annual indexation in accordance with the CPI. Subsequently, article 16 of the general conditions also only mentions the CPI indexation and explains how

25 See for instance "Wonen langs de meetlat. Resultaten van het WoonOnderzoek Nederland 2021," via https://www.woononderzoek.nl/style/custom/citavista/pdf/Kernpublicatie_WoON_2021_INTERACTIEF.pdf.

26 For the aforementioned reasons, we therefore also disagree with the opinion of The Hague Court of Appeal in the ruling included in footnote 22, which also makes a comparison with termination by a housing tenant in this context and states: "a tenant will often be unable and unwilling to switch to another landlord". That a tenant *cannot* switch is untrue and far too general. That the tenant does not *want* to switch seems irrelevant to us. After all, a tenant will also not want to pay a higher interest rate for a loan or switch to get out from under that higher interest rate.

it is calculated and adding in the final dash that the adjusted rent also applies if no notification is given. Adjusted rent thus means the rent indexed according to the CPI based on the preceding dashes of article 16 general conditions. The clause on the additional surcharge begins with the words "*In addition to and simultaneously with the annual adjustment in accordance with article 16 of the general conditions, the landlord shall be entitled (...)*". This also shows that article 16 of the general conditions does not concern the surcharge under the third sentence of article 5.2 itself.

No downward indexation

47. Another circumstance considered relevant by the Subdistrict Court is whether downward indexation is excluded in the lease agreement (which is the case in the ROZ model). As far as we are concerned, however, this is a purely theoretical, very understandable and ultimately irrelevant circumstance.

48. DNB writes the following on its website about inflation and deflation:

    2% is the target
    The ECB sees ensuring stable prices as the greatest contribution central banks can make to people's welfare in Europe. This includes a 2% inflation rate across the euro area. In the medium term. That makes price developments clear and predictable for everyone.

    0% is too low
    Why does the bank not aim for 0%? That 2% provides a safety margin in case prices fall. It reduces the risk that we will then end up in a situation of deflation. And deflation, a fall in the general level of prices, is something that the ECB wants to avoid because that is potentially even more damaging to our economy. With falling prices, people and businesses hold off on making purchases in the hope that everything will become even cheaper at a later date. As a result, demand falls, and the economy can slow down sharply.

49. The ECB has also been successful in fighting deflation. Since 1963 deflation only occurred once, in 1987. After that, there has been no situation of deflation.[27]

50. Thus, excluding downward indexation is merely a "paper tiger", as it is very unlikely to occur anyway.

51. Furthermore, there is also a very understandable reason for excluding downward indexation of the rent. As a general rule, most parties exclude downward indexation in all types of agreements. Thus, the relevant landlord of the property will also not have lower costs even in case of deflation, and will thus have a reasonable interest in not adjusting the rental income downwards.

52. Also, from the standpoint of the tenant, it should be noted that - barring exceptions - the tenant will pay its rent from his/her salary or other income (notably pension). These incomes are often also linked to inflation, but it is unusual for an employer to have the option of decreasing an individual employee's salary in case of deflation. In other words, on the income side, the employee also does not take a hit in case of deflation, so he/she is also no worse off if in the situation that the rent remains at the same level as well.

53. In this respect we refer to a recent ruling by the District Court Noord-Holland (location Haarlem).[28] This case concerned a liberalized rental agreement dating from 2017. The ROZ 2003 general conditions applied. Those general conditions state (as do the most recent 2017 version thereof) that: (1) downward indexation is excluded and (2) the amended rental price also applies if no separate notification has been sent to the tenant. The rent was indexed annually in accordance with clause 18 of the general conditions, but there was no contractual possibility for any additional surcharge. That clause was also assessed by the Haarlem cantonal court against the Directive and found not to be unfair. We can obviously not rule out that other judges will, in different circumstances, rule differently on this point, but we feel strengthened in our belief that these two circumstances are thus not decisive when assessing the unfairness of a term.

27 https://www.cbs.nl/nl-nl/cijfers/detail/70936ned?q=cpi%20jaarmutatie.
28 District Court Noord-Holland (location Haarlem) 4 October 2023, ECLI:NL:RBNHO:2023:9827.

Significant imbalance / contrary to the requirement of good faith

54. In the Bouwinvest judgment, among others, the Subdistrict Court indicates that when answering the question of whether a term creates a significant imbalance in the parties' rights and obligations arising under the contract, the national law that would be applicable if the parties had not made an arrangement for such should be taken into account. That method of comparison is drawn from the ECJ's Aziz ruling.[29] However, it is questionable whether national law provides a useful frame of reference in this case.

55. Dutch law applicable to residential rent distinguishes between regulated rental housing and liberalised rental housing. Regulated rental housing is subject to strong price regulation; for liberalised rental housing, the legal starting point is that parties are free to determine the level of the rent. The main rule is laid down in Article 7:246 Dutch Civil Code: "*with regard to rent, the rents agreed on by the parties apply, insofar as not otherwise arising from this subsection*". Article 7:247 Dutch Civil Code then stipulates that by far the majority of statutory clauses governing rent only apply to regulated rental housing. Traditionally, for liberalised rental housing, the legislator does regulate the frequency of rent increases (they may not occur more often than once a year (article 7:251 Dutch Civil Code)), but not the amount of the increases. In 2021 this changed however. For the period 2021-2029, the law provides for a statutory regulation with regard to the amount of the increases. In that period, rents of liberalised rental housing may also not increase beyond a maximum set by the legislator of CPI plus 1% or the wage increase level plus 1%. However, this statutory regulation has a temporary character: at the time of its introduction, it was also arranged that it would end three years later (which end date has since been postponed by five years, to April 2029). This was to take into account that article 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that any infringement of the right of ownership should not be longer than necessary.[30] The current regulation therefore does not fundamentally alter the starting point that the statutory system is essentially intended to leave parties free to make arrangements regarding the extent of the annual rent adjustment.

56. Against this background, we consider it incorrect that the assessment of the significance of the imbalance should take into account the national law that would apply if the parties had not made any arrangement. Such a comparison would be appropriate if the national legislator itself had created supplementary law providing for a balanced regulation; however, as regards the tenancy law applicable to liberalised housing, it is instead considered 'balanced' to leave the level of rent and its adjustments entirely to the parties to the lease agreement themselves. So, what the legislator itself would consider a balanced regulation in a material sense cannot be inferred from the law.

57. We consider it reasonable to assume - in the hypothetical case that the legislator had created directory law on the rent review of liberalised rental housing for the long term - that regulation would imply that the rent levels could evolve in line with the market, i.e. with the house price value. That approach is fitting for liberalised leases, where the initial rent also depends on market forces and development. This approach also promotes a healthy rental market with flowthrough of tenants (*huurdersdoorstroom*), in which tenants are not discouraged from moving due to a relatively low rental price if for instance their income, work or changed domestic situation would otherwise dictate differently.

58. Recent research shows that that house price value increase over the past 30 years has on average been significantly higher than inflation. Whereas the average home was worth EUR 82,000 in 1993, the average home in 2023 is worth EUR 434,000.[31] That reflects an increase of 429%. The consumer price index (1900 = 100%) rose from 1,752.8 (1992) to 3,388.9 (2022) in about the same period.[32] An increase of

29 ECJ 14 March 2013, ECLI:EU:C:2013:164, *NJ* 2013/374 (*Aziz*).
30 *Kamerstukken II* 2020-2021, 35 488, nr. 9, p. 5.
31 Calcasa, 'The WOX Quarterly Q2 2023', p. 6 available for consultation at https://www.infinance.nl/wp-content/uploads/2023/08/CalcasaWOX2023K2.pdf.
32 https://opendata.cbs.nl/statline/#/CBS/nl/dataset/71905NED/table.

93%. So, where house prices have risen about 5.71% annually on average, the average annual inflation has been 2.216%. In Amsterdam, the average house value has increased even faster over the aforementioned period, rising from an average of EUR 81,000 in 1993 to an average of EUR 588,000 in 2023. That is an increase of 626%, implying an average annual increase of 6.83%.

59. Within that playing field, we believe that the right to increase the rent in liberalised lease agreements annually by inflation plus a maximum of 5% is balanced (even more so in the Amsterdam market).[33] An annual increase by inflation plus 5% leads in the long run to a rent increase that is almost equal to the market trend. However, what is favourable for the tenant about the calculation methodology in the ROZ model is that the annual increase amounts to a *maximum* of inflation plus 5%. In a year when house values rise relatively sharply, the landlord will not be able to pass on the full price increase, while in years when the increase is relatively limited the landlord has an *incentive* not to pass on the full inflation plus 5%; after all, in that situation the tenant will be able to rent more cheaply elsewhere in the market.

60. Further to the above, we would also like to point out the following characteristics of a liberalised residential lease agreement. A residential tenant enjoys a very substantial level of rental protection under Dutch tenancy law. In general this means that it is nearly impossible for a landlord to terminate a residential lease agreement, provided that the tenant pays its rent on time and doesn't cause any other kind of nuisance. A tenant can at any given moment give notice of termination (without any ground being required), whereas a landlord cannot. This means that in this continuing performance contract (*duurovereenkomst*) which cannot be unilaterally terminated such as this, the landlord has a reasonable interest in being able to maintain the price to be paid by the consumer for the services rendered (i.e. the rental price) at a market level. Market level in the sense of what any given consumer would be willing to pay for the service at such point in time. The more so as the specific service (i.e. the provision of this specific home) is unique and cannot be duplicated: the home can only be rented out to one tenant at a time. In the situation that the legislator has specifically chosen to regulate neither the commencement rent nor the annual rental price adjustment for this segment of the rental market, why would it be unreasonable or unfair for the consumer that the annual rental price adjustment can be such that the rent will keep up with more general rental price and/or house price value increase? A different conclusion would mean that the landlord would be obliged to render its services below the market price, whereby subsequently one consumer (i.e. the tenant) would be favoured over other consumers (i.e. other people willing to rent the home at the then prevailing market price).

What is the term to be annulled?

61. We have shown above that and why the ROZ provision is not unfair within the meaning of the Directive and should not be annulled. If it should nonetheless be concluded that the ROZ provision is unfair and should be annulled, the next question is what exactly is the term to be annulled. Is that:
    a. the entire text of article 5.2 of the ROZ model, i.e. the indexation of the rent based on the CPI as well as the additional discretionary increase of up to 5%; or
    b. only the additional discretionary increase of up to 5%?

62. By far most of the Subdistrict Courts opted for the former, based in particular on the deterrent effect intended by the Directive.[34] They reach the following conclusion[35]:

    The consequence of the unfairness is that the clause cited above [LL: referring to the entire text of Article 5.2], in view of the established case law of the ECJ, must be completely disapplied. Partial annulment or revision is not possible. The term cannot therefore be invoked. (...)

63. This choice does not seem right to us. The Subdistrict Court always refers to the entire Article 5.2 as the 'rent adjustment clause'. In fact, however, it consists

33 See also paragraph 38 above with regard to the valid reason for such rent increases.
34 In this regard we also refer to paragraph 73 and further.
35 See, for example, ground 13 of the Bouwinvest ruling (District Court Amsterdam) 3 August 2023, ECLI:NL:RBAMS:2023:4800 (*Bouwinvest/x*).

of a rent indexation clause and an additional rent increase clause (the surcharge). The indexation clause need not share the possible fate of the increase clause.

64. After all, it is undisputed that a pure indexation clause agreed beforehand by contract (i.e. based on an objective and external indexation methodology) is permissible. This especially applies in the case of a continuing performance contract, where the consumer's counterparty has a reasonable interest in being able to adjust the price to inflation during the term of the contract. Note that this possibility is explicitly named in the Blue List, provided the indexation is lawful and the method of indexation is explicitly described. Those conditions are met in the ROZ model agreement and general conditions.

65. The discussion in these court cases is therefore not on this indexation, but on the additional rent increase of up to 5%. The mere fact that both the indexation and the increase are in the same paragraph of the article does not necessarily make them one and the same term. That was only a drafting consideration by the ROZ and should not be decisive in determining what the term to be annulled is. That is an issue of substance, not form.

66. The fact that the wording of the contract is not decisive is also reasonable, because it should also not be possible to try to evade annulment of certain unfair terms by placing them together with other terms in one paragraph of the article. For example, by starting Article 5.2 by stating the rent and then including the current text.[36]

67. It is true that the indexation and the surcharge are somewhat more related to each other than the surcharge and the rent, but that does not alter the fact that they could very well be considered two separate terms and, if so, only the right to apply the surcharge could be annulled without affecting the indexation. After all, there is no indissoluble link between the indexation pursuant to article 16 ROZ model and on the other hand the possibility that article 5.2 of the ROZ model offers the landlord to increase the rent by a percentage not exceeding 5%. Both clauses can coexist, so that - in view of the provisions of Art. 3:41 Dutch civil code - it is reasonable that at most the surcharge clause is annulled. Such limited annulment is also allowed by the ECJ, provided that it does not amount to a revision of something that was intended as one clause.[37] Such a "de facto revision" does not apply to the mere nullification of the surcharge clause. Moreover, even such an annulment has the deterrent effect intended by the Directive. Annulling the right to apply the surcharge takes away the entire surcharge, even though it is not reasonable to assume that every surcharge on the CPI (and thus even the capped maximum surcharge that the legislator has explicitly permitted for the period 2021 - 2029) would be considered unfair.

Developments since December 2023

68. Our last version of this memorandum was dated December 2023. Since then, there have been a number of developments, which we highlight below.

'Rotterdam doctrine'

69. Since February 2024, several rulings by the Rotterdam District Court have been handed down in which the court gives some more guidance on the question of when a modification clause is unfair. These rulings seem to be a little more lenient towards the landlords.[38] The first ruling (from February 2024) concerned a rent adjustment clause of CPI + a maximum of 3%. The court ruled[39]

that a rent adjustment clause in liberalized lease is unfair if that provision allows the rent to be increased by more than was warranted based on a reasonable assessment of the market. This involves a reasonable

36 Article 6(1) of the Directive provides that, in principle, an unfair term must be annulled unless the agreement could not continue to exist without the term. If the entire paragraph, regardless of the fact that it actually contains two terms, is to be regarded one term, this would allow the increase term to escape review. This as the rent would fall outside the Directive's scrutiny by virtue of both Article 4(2) of the Directive and the fact that it will be a core term negotiated separately (article 3 of the Directive).

37 ECJ 26 March 2019, ECLI:EU:C:2019:250, *NJ* 2020/6 with annotation by C.M.D.S. Pavillon (*Abanca Corporación Bancaria*), par. 55.

38 See for this first: ECLI:NL:RBROT:2024:801, and subsequently: ECLI:NL:RBROT:2024:5750, ECLI:NL:RBROT:2024:801, ECLI:NL:RBROT:2024:4555 and ECLI:NL:RBROT:2024:5786 and ECLI:NL:RBROT:2024:5568.

39 ECLI:NL:RBROT:2024:801.

assessment of the market at the time the agreement was entered into for similar properties in the location where the property is located.

70. In the court's opinion, the landlord was allowed to let the rent move with the market, as this was in line with the legislator's intention to leave the rent in the liberalized sector largely free. However, the court ruled that it is not reasonable to allow the rent to rise by more than was justified by the market.

3.7 A provision that allows rents to be increased by more than a reasonable assessment of the market is particularly unfair because (in the Rotterdam District Court area) there has been a severe shortage of housing for years. Therefore, it will not always be possible for tenants to terminate the lease if the rent becomes too high for them. It is partly for this reason that landlords can be expected to include an arrangement for increasing the rent that also does justice to the tenant's interests. The court based this partly on a ruling by the Court of Justice of the EU, which shows that the question of whether the consumer actually has the possibility to terminate the contract in practice is an important point of view.
3.8 It follows from the case law of the Court of Justice of the EU that important points of view are also whether the consumer has been sufficiently informed about the reason for and means of changing the price and about his right to be able to terminate the contract. Both aspects are not explained in the provision on the annual rent increase in this case. However, that mere fact does not, in the judge's opinion, make the provision unfair because it is common knowledge that a tenant may terminate the lease, and the reason for an annual price increase will be obvious to the average consumer. After all, it is common knowledge that prices increase over the years.
3.9 The court's starting point is that a provision allowing rents to be increased by more than the consumer price index plus a surcharge of one percentage point is unfair. Figures from the Central Bureau of Statistics show that between 2000 and 2020 the consumer price index averaged 2.7% on an annual basis while rents increased by 3.2% on average. This makes anything above the consumer price index plus a one percentage point surcharge in principle beyond a reasonable market estimate.
3.10 A rent adjustment provision that goes beyond the consumer price index plus a one percentage point surcharge is not necessarily unfair, but it is up to the landlord to argue and, if necessary, prove that the rent adjustment provision was based on a reasonable estimate of the market. There may also be other circumstances that justify a higher change.

71. That particular court case involved a surcharge of up to 3%. Thus, although the court ruled that a surcharge option is not necessarily unfair, and a 1% surcharge percentage is acceptable, the court held that a 3% surcharge option was unfair because the landlord did not explain why a 3% surcharge percentage had been used.

72. The court further ruled held that it is not important whether the parties have actually implemented the provision, but that a *structural* deviation from the terms of the agreement may mean that an amended agreement has (tacitly) come into effect between parties. This may then in turn mean that the (unfair) rent modification provision has been replaced by a new agreement. The court also ruled that the rent modification provision cannot be split into two separate clauses.

'Haarlem doctrine'?

73. The District Court of North Holland seems to deviate from the prevailing judges' opinion that the indexation clause and the option of surcharge cannot be split into two separate clauses. In (so far two) instances, the court has ruled that the clause can indeed be split into two separate clauses (an indexation clause and a surcharge clause) and that only the option of a surcharge is voidable.[40] Two rulings is of course a bit early to speak of a 'Haarlem doctrine', but it is interesting to see that not every judge follows the prevailing judges' opinion that the rent modification clause is one clause that cannot be split into two.

40 ECLI:NL:RBNHO:2024:7841, r.o. 3.8 (interlocutory judgment, which was upheld in the final judgment ECLI:NL:RBNHO:2024:7841, r.o. 2.1) and ECLI:NL:RBNHO:2024:5859, r.o. 5.4.

Prejudicial questions and P-G's opinion

74. In January 2024, the Amsterdam District Court submitted preliminary questions to the Supreme Court on this issue.[41] These questions relate first of all to the test as to whether the ROZ provision is unfair and what standards and points of view are relevant in this respect. In addition, the questions include the issue discussed above of whether the indexation part can be separated from the surcharge part, after which only the surcharge part is annulled. To substantiate this question, the Amsterdam court points out that - summarised - on the one hand the effects for the landlord are very significant (being: return to commencement rent, no annual indexation going forward and a tenant claim for reimbursement of excess paid rent) and on the other hand landlords have in good faith entered into lease agreements which these clauses therein, as since 1994 both the legislator and the judicial power have extolled that landlords are free in setting the indexation arrangements in liberalized residential rental agreements. It is only now that (part of) the judicial power is – after 30 years – backtracking on this point. Considering this, the Amsterdam court has asked the Dutch Supreme Court to clarify whether the effects of the current Amsterdam rulings are not (far) too excessive.

75. On July 19, 2024, the Opinion of the Attorney General to the Supreme Court, Prof. Dr. Mr. Wissink, was published in the cases in which the preliminary questions were raised.[42] In the opinion, the Attorney General gives advice to the Supreme Court on how to answer the preliminary questions. Our memorandum will not go into the entire conclusion, but only touch on those aspects we consider most relevant. We start however by listing the main conclusions of the Attorney General:
    i. the clause can be divided into two clauses: an indexation clause and the surcharge clause. There is no discussion that the indexation clause is acceptable, but the discussion focuses only on the (un)fairness of the surcharge clause;
    ii. the possibility for landlords to charge a surcharge of up to 1, 2 or 3% on top of indexation is not unfair;
    iii. the Attorney General "*considers it conceivable*" that even a 4 or 5% surcharge option would not be deemed unfair.

Below we set forth the Attorney General's most important arguments for the above conclusions:

a. there are reasonable grounds for the existence of a rent adjustment clause. It concerns long term leases, which can only be terminated by the landlord on limited grounds. The landlord therefore has a legitimate interest to be able to adjust the initial rent regularly;
b. there are reasonable grounds for the surcharge clause in addition to the indexation clause, namely: absorbing cost increases above inflation rates and keeping pace with house price value increases;
c. the surcharge clause is transparent about the fact that the rent may increase, at what time and how often the rent may increase and about the maximum surcharge percentage;
d. the surcharge clause is not transparent insofar that it does not mention the *reasons* for applying the surcharge nor *how* those grounds are then actually applied. However, the Attorney General does not consider this a decisive factor. He concludes that it is sufficiently plausible that there are reasonable grounds for the surcharge clause, and furthermore, that it is conceivable that the existence of the need to sometimes be able to increase the rent by more than inflation is sufficiently apparent to the average consumer. As such, mentioning the grounds will only be able to contribute to a limited extent to a better understanding by the average consumer of the concrete application of the clause by the landlord;
e. since 2021, the possibility of rent adjustments for liberalized housing has been capped, through the Act Nijboer. The Attorney General draws a number of arguments from both the content of this act as well as from the legislative deliberations that took place on the draft legislation (so prior to its enactment). When debating this draft legislation, the government assumed the existence of a rent adjustment clause and did not express a negative opinion on such clauses. It was also considered in the debate on the draft

41 ECLI:NL:RBAMS:2024:129 and ECLI:NL:RBAMS:2024:131.
42 Supreme Court Prosecutor's Office July 19, 2024, ECLI:NL:PHR:2024:770 and ECLI:NL:PHR:2024:771.

act that having a 1% surcharge would allow a sufficient return for landlords on the rent and that this surcharge would ensure a sufficient rent increase for landlords and investors to be active long-term sustainable landlords. According to the Attorney General, the consideration that the surcharge would continue to allow landlords a reasonable return on the rent could be seen as an acknowledgement that the surcharge serves in part to keep rents in line with house price value increases or related return requirements. The consideration that the surcharge would allow landlords and investors to be active long-term sustainable landlords could be seen as an acknowledgement that the surcharge serves in part to absorb cost increases above inflation rates. Finally, this act only provides a cap/capping on the rent level. It does not entail that a clause providing for a surcharge higher than 1% becomes null and void altogether. Such a civil-law sanction would go further than the legislator deemed necessary, because it would deprive future rent increases that are in accordance with the applicable rent increase percentage;

f. the higher the maximum surcharge percentage, the more vulnerable the clause becomes because such higher percentage increases the likelihood of "improper use" of the clause. Improper use meaning: the application of the surcharge clause not being justified by absorbing cost increases above inflation rates and/or keeping pace with house price value increases.

From an overview of the average rent increase rates excluding rent harmonization (i.e. without taking into account the level of the new starting rents[43]) over the past eight years (from which it follows that the rent increase over this period was annually between 1.3% and 3.4%), the Attorney General draws the conclusion that application of the surcharge clause is mostly based on absorbing cost increases above inflation rates and keeping pace with house price value increases.

The Attorney General sees the outcome of the aforementioned overview as an indication that the chance of improper use inherent in the clause is not as great as would in first instance seem to follow from the clause. We would like to add here that the chance of the landlord making improper use of the surcharge option is in our opinion not great anyway: a landlord will obviously not want to ask a rent that is far *below* the market rent at that time, but also will not want to ask a rent that far *exceeds* such market rent, as in the latter instance, the tenant will easily be able to find (and move to) a comparable, but cheaper, home.

The Attorney General then compares the percentages used by the government with the surcharge that occur in practice. On this basis, he concludes as follows:

i. a 1% surcharge is consistent with the Nijboer Act, so it is not unfair;
ii. a surcharge of 2 or 3% is close to surcharge used in the past for the regulated sector (namely: 2.5%). Thus, there is an example of the government for this too, so a surcharge of 2 or 3% is also not unfair;
iii. For higher surcharge percentages (e.g. 4 or 5%), no support can be found in examples provided by laws and regulations. However, the Attorney General has sympathy for a landlord's wish to build in some margin and thus considers it conceivable that even these maximum surcharge percentages would not be considered unfair.

76. Finally, it should be noted that the Attorney General's opinion is only an advice to the Supreme Court: the Supreme Court is not obliged to follow this advice, but will make its own assessment and ruling on the questions raised.

43 Incidentally, we believe this is a major flaw in the line of reasoning of the Attorney General. We do not see why the annual development of starting rents should not affect the question of what constitutes a reasonable rent increase. Especially since the Attorney General rightly concludes that an important reason for the surcharge is to keep pace with the house price value increases (in other words: what would someone else be willing to pay to rent the property at that time?), combined with the landlord's inability to terminate the lease. Only by being able to align the surcharge with the more general rent development can the landlord ensure that the rents of longer renting tenants will not end up lagging behind those of shorter renting tenants. Such a comparison - see also para. 58 et seq. - is therefore, in our view, the main justification for the reasonableness of a surcharge of 4 or 5%.

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