

## LEGAL UPDATE

### **Burden of proof with regard to having main residence at address of rented home is unfair**

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Landlords like to keep control over which people actually use the homes they let. For this reason, it is very common to include a clause in the general terms and conditions applying to the tenancy agreement whereby the tenant is required to personally reside at the home and to have their main residence there during the term of the tenancy agreement. In a recent case before the [Amsterdam Court of Appeal](#), the general terms and conditions also included the following clause: "The burden of proof for demonstrating that the home is the main residence rests with the tenant".

There was a dispute between the landlord and the tenant about whether this clause is unfair within the meaning of Directive 93/13/ EEC on unfair terms in consumer contracts. If a clause is unfair within the meaning of this Directive, that renders the clause null and void.

The Court of Appeal ruled that the clause is unfair (and therefore null and void) because it contravenes the principle of good faith, as it significantly disturbs the balance between the rights and obligations of the respective parties arising from the tenancy agreement. According to the Court of Appeal, the clause in particular infringes the tenant's right to security of tenure.

However, even though the landlord's invocation of the clause was unsuccessful, the landlord has not yet lost the case. This is because the Court of Appeal also considered that if the landlord states with good reason that the tenant does not have his main residence in the home, the tenant may be expected to provide factual data demonstrating that he does indeed have his main residence there. Subsequently, based on the evidence provided, the Court of Appeal ruled that it has been provisionally proven that the tenant did not have his main residence in the home at the time when the legal proceedings were initiated by the landlord. The Court of Appeal has now given the tenant the opportunity to provide evidence to the contrary against this provisional ruling.