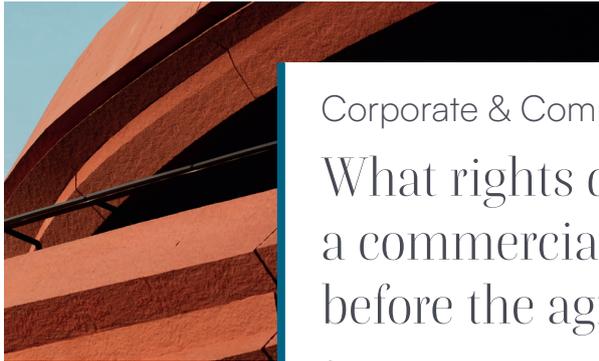


# ANALYSIS

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Corporate & Commercial

What rights does a landlord have when a commercial tenant vacates the premises before the agreed term has expired?

(Supreme Court Judgment no. 4569/2025 of 21 October)

Although the judgment states that the landlord has three remedies available, in reality he has only one — whether *he seeks performance or opts for termination* — which is damages.

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## 1. The facts

The legal issue raised concerns the consequences of the unilateral withdrawal from an agreement by the tenant of commercial premises when early termination had not been agreed.

In both instances, the action brought in the alternative by the landlord was upheld.

The defendant tenant, who was ordered to pay 33,000 euros in rent, lodged a last-resort ‘cassation’ appeal. The claimant’s main claim sought a judgment ordering the co-defendants “to comply with the terms of the agreement dated 1 January 2015, so that, in accordance with the provisions thereof, they would continue to hold the leased property — intended for use as a warehouse and for the sale of machinery, equipment, electrical materials, and as an electromechanical workshop — paying the rent accrued up to the date of continuation and paying the subsequent rent, together with other similar amounts, that would accrue until the end of the agreement”. In the alternative, the claimant requested that, “if it were established that it was impossible to perform the agreement under the terms set out therein, the co-defendants be ordered to pay my client the sum of 33,300 euros, an amount to be increased by the statutory interest accrued”. The amount claimed resulted from adding up the rent that would remain to be accrued until the end of the agreement. In the statement of grounds for the claim, it was argued that this alternative claim was asserted in the event that performance of the contractual obligations was not possible, as the co-defendants seemed to indicate by expressing their intention to withdraw from the lease

agreement. As regards the amount of compensation, the first appellate judgment affirmed the trial court’s decision and rejected the argument that, in accordance with Supreme Court case law (judgments of 18 March 2016; 16 May and 3 October 2017, and 23 July 2018), the amount claimed should be adjusted, since what is sought and granted is not compensatory damages, but rather payment of the rent owed, as the claimant had sought performance of the agreement (Art. 1124 of the Civil Code).

The tenant’s appeal is based on Judgments no. 221/2012, dated 9 April, and no. 481/2018, dated 27 July. According to the appellant, upholding the alternative claim means that, in this case, what has been upheld is an action for termination of contract and, therefore, in accordance with the Supreme Court’s case law, an adjustment is applicable.

## 2. The cassation judgment

It is the settled doctrine of the Supreme Court in judgments no. 183/2016 of 18 March; no. 297/2017 of 16 May; and no. 481/2018 of 27 July, that there are three categories of cases involving the unilateral termination of a commercial lease:

- 1) Cases in which the commercial lease agreement contains a clause granting the tenant the right to terminate the agreement (*more precisely*: to unilaterally withdraw from it), in which case the tenant is obligated to pay the landlord a specific sum of money — a liquidated damages clause — (judgments of 23 December 2009, 6 November 2013, 10 December 2013, and 29 May 2014).

- 2) Cases in which such a clause does not exist and the tenant expresses a desire to terminate the lease, but the landlord does not accept this and demands performance of the agreement, that is, payment of rent in accordance with the contractually agreed due dates (judgment of 26 June 2002). This is the case here.
- 3) Cases in which such a clause does not exist either, but the tenant expresses a desire to terminate the lease and the landlord accepts or ultimately accepts the termination while claiming com-

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pensatory damages (judgment of 9 April 2012).

Given that we are dealing with a case from the second group, we should agree with the respondent and the appealed decision that no adjustment in the compensatory damages is applicable, since what was requested and granted was not compensation, but rather payment of the rent owed, as the claimant (now the respondent) sought exclusively the performance of the agreement (Art. 1124 CC), coupled with the fact that the termination was not accepted nor were any liquidated damages agreed upon that would allow for adjustment. But that is not the case.

The claimant accepted the ruling of the trial court, which did not uphold the primary claim, but did uphold the alternative claim, ordering the landlord to pay all rent for the remaining term of the lease as provided in the agreement (without applying the annual increases stipulated in the agreement). The *Audiencia* (first appellate court), affirming the trial court's reasoning and accepting the claimant's characterization of the action, holds that what was requested in the alternative and granted is substitute performance of the lease agreement, since it considers that full performance of the contract — with the tenant returning to occupy the premises — is not possible. This characterization of the action as substitute performance is what leads the appealed judgment to consider that what is being sought is not compensation subject to adjustment, but rather the rent that was due under the entire agreement, and therefore no adjustment would be appropriate. *But the fact is that, since these are monetary debts — which is what the landlord is owed — it cannot be said that requesting payment of future rent constitutes an action for substitute performance, as such an action makes sense only when claiming the sum of money that represents the monetary equivalent of the performance due, which is impossible or can no longer satisfy the creditor's interest — which is not the case here. Therefore, in this case, a claim for a sum of money against the tenant, if it is not an action for performance of the agreement under its terms (as rent accrues and with adjustments), it is strictly speaking for termination, and what is being sought is compensation for the monetary harm caused to the*

landlord. Thus, the landlord ultimately accepted the termination of the agreement, which the tenant had unjustifiably carried out unilaterally.

Hence, the Supreme Court rules in favour of the appellant and sets aside the appealed judgment, as it is contrary to the Supreme Court's established doctrine in holding that, in this case, it is not appropriate to adjust the amount claimed — which is equivalent to the full amount of rent lost during the term of the lease — without having conducted any assessment of the harm suffered by the landlord, taking into account, among other concurrent circumstances, the possibility of entering into a new lease, in principle for a similar rent, at the time the landlord became able to dispose of the premises, or for the remaining term at the time of withdrawal (judgments no. 221/2012 of 9 April; no. 42/2016 of 11 February, and no. 925/2022 of 19 December, among others). The Supreme Court, allowing in part the appeal, retains the compensation set by the trial court of five months' rent for each remaining year of the contract, an amount recognised as proportionate for a case involving the termination of an agreement with the characteristics of the one under review, especially since the trial court had established that the compensation would be payable provided that the premises were not re-leased while the landlord received the compensation for non-payment of rent on a monthly basis (until April 2014). Since this is a commercial lease agreement, governed by the principle of party autonomy, the parties *could have established the consequences of an unjustified unilateral withdrawal; and, having failed to do so, the general rules must apply, which require proof of harm — a requirement that, in the case*

*of loss of earnings, demands balancing of the circumstances.* There is no doubt that the tenant's withdrawal in itself constitutes a failure to pay rent, which implies monetary harm to the landlord; however, it cannot be presumed that, since the premises were on the market, they could not be leased—in principle for a similar rent—after a reasonable period of time had elapsed since the premises became available to the landlord.

The lease was entered into on 1 January 2015, for a term of eight years. The tenant, who notified the landlord via *buropax* (content-certified letter with return receipt) on 31 August 2016, of his intention to withdraw — an intention reiterated in communications dated 28 September and 22 November — paid only through October 2016, ceasing to pay rent for November and December 2016 and for the years 2017 through 2022. If, as the *Audiencia* states, in November 2018 the expert was able to access the premises because the tenant, who still held the keys and thus retained possession, granted him access, we can conclude that only thereafter could the landlord, who initially retained the option to enforce the agreement, reasonably assess the possibility of re-listing the premises on the market under similar financial terms or of obtaining revenue through other means. We identify that moment as the date of the trial court's judgment in May 2019, when the alternative claim was upheld, because from that point on, the parties disputed only the amount of compensation due.

Therefore, it is considered appropriate to include in the compensation arising from the unilateral withdrawal of the lease agreement in favour of the claimant, now the

respondent, the amount equivalent to the rent for the months of November and December 2016 (450 euros per month) and those for the years 2017 (5,400 euros), 2018 (5,400 euros), and through May 2019 (2,250 euros). We therefore add to the compensation the amount for twelve months' rent (5,400 euros) as the period during which, under normal circumstances, the premises could have been refurbished for another type of use and released. Consequently, the compensation owed by the defendant is set at a total of 19,350 euros.

### 3. Commentary

§ 1. The last-resort judgment is somewhat verbose, but it contains an important legal principle, namely, if the landlord requests “substitute performance” of the agreement, and since the claim involves a sum of money, the landlord is effectively accepting the tenant’s unlawful termination of the agreement. Implicitly, perfor-

## A judgment cannot obligate a tenant to make use of a tenancy

mance cannot be sought on its own either, because the tenant has already left and there is no longer any basis for the landlord to fulfil his obligation to make the property available to the tenant. A judgment cannot obligate a tenant to make use of a tenancy. Consequently, in fact or in law, the landlord is left with no option but termination.

§ 2. Why does the Court state that an adjustment is *prima facie* applicable because the action brought is for termination? Note that, had the agreement contained a liquidated damages clause, an adjustment would not have been possible, in accordance with the long-established doctrine of the Supreme Court (see Judgment no. 485/2021 of 1 July). Therefore, it is not strictly speaking that an adjustment is applicable, but rather that the judge must set the amount of compensation based on the actual harm caused, because there are no liquidated damages. Compensation is set, not “adjusted.” What matters is not whether the agreement is terminated or if substitute performance is sought, but whether or not there is a liquidated damages clause. In fact, it is standard practice to include “substitute performance” as a liquidated damages clause for all monthly payments contractually agreed.

§ 3. But if this is the case, then it is irrelevant whether an action for substitute performance or for termination plus damages has actually been brought. Because substitute performance could not, in this case, be anything other than an action for damages, since the landlord must “deduct” from the future contractually agreed rent the cost savings resulting from having free disposal of the property. And, for the same reason, the landlord cannot demand specific performance if the tenant wishes to leave.

§ 4. We do not, therefore, object to the conclusion reached by the Supreme Court. But ultimately, this is an accounting adjustment to recalculate and reduce the quantum of damages awarded at the lower

court, already factoring into the calculation (without waiting for the future) the time during which the landlord could have minimised his harm by relisting the property on the market. And this is another lesson to be drawn from the judgment,

namely, if no (non-adjustable) liquidated damages clause has been contractually agreed, the compensation must be reduced to the extent that the landlord could have minimised his harm by re-letting the property.