EUI Tenancy Law Project

AUSTRIA

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1. Introduction

a) Origins and basic lines of development of national tenancy law:

i) When was it introduced and where (civil code, special statute, case law)?

Our legal system has two main sources of tenancy law: the "ABGB"[1] (General Civil Code) and the "MRG"[2] (MietrechtsG, TenStatute). Judgments are rendered either according to this code or a special statute[3], never on the basis of precedents. To make it clear, academic writing and court decisions are not regarded as official sources of law in Austria. The Austrian judge is merely interpreter of the law, he or she cannot "create" the law by himself/herself.

Relationship between the general rules of the ABGB and the special rules of the MRG:

As far as the MRG is not applicable (according to § 1 MRG) or as far as the MRG or other special statutes do not contain any regulations, the provisions of the ABGB (§§ 1090 et seq.) have to be applied to a tenancy agreement. The majority of provisions of the MRG are mandatory.

This leads to the question of scope of application of the MRG:

According to § 1 par. 1 MRG the MRG applies to the lease of flats, parts of flats or business premises including the co-leased surrounding house areas or bases and to the cooperative use of immovable property ("genossenschaftliche Nutzungsverträge").

§ 1 par. 2 MRG excludes from the application of the MRG:

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[1] Which was passed in 1811 (JGS Nr. 946/1811), last amendment BGBl. I Nr. 91/2003.

[2] Which became effective on 1st January 1982 (BGBl Nr. 520/1981) and was afterwards repeatedly amended (last amendments: BGBl. I Nr. 36/2000, BGBl. I Nr. 98/2001, BGBl. I Nr. 161/2001, BGBl. I Nr. 71/2002, BGBl. I Nr. 113/2003; BGBl. I Nr. 2/2004).

[3] Special statutes besides the MRG: the "LandpachtG 1969" (BGBl. Nr.451/1969, last amendment BGBl. I Nr. 113/2003) contains statutory limitation on amounts of rent with regard to tenancies for agricultural or fishing purposes. The "KleingartenG" (BGBl. Nr. 6/1959, last amendment BGBl. I Nr. 98/2001) grants similar protection to tenants of properties which do not exceed a certain size and are dedicated to non-commercial use or to relexation purposes (allotments). The "SportstättenschutzG" (BGBl. Nr. 456/1990, last amendment BGBl. I Nr. 113/2003) offers protection against unwarranted notice to quit for premises which are rented out by regional administrative bodies to persons

1. Leased property, being rented out either to hotel trade or multi-storey car parks, transport enterprises, warehouses, workshops, official residences or homes for single or aged people, apprentices, youthful employees, pupils or students.
2. Flats provided by employers,
3. Leases which expire merely with the passing of time and without notice of termination provided that the stipulated duration of the contract does not exceed half a year and the rental unit is either a business premise or a flat which the tenant rents and uses as a second home.
4. Flats which are rented merely as a second home for relaxation purposes.

According to § 1 par. 4 and par. 5 MRG certain provisions of the MRG apply to certain rented property.

The scope of application of the ABGB and MRG is especially important in regard to the issues of maximum rents (§ 16 MRG) and of termination (§§ 29, 30 and 31 MRG). According to the ABGB tenancy agreements are subject only to the general restrictions of *laesio enormis* (§ 934 ABGB) and the regulations of the ABGB concerning exorbitant rents (usury § 879 par. 2 fig.4). The MRG protects the main tenant by narrower limits: in the cases listed by § 16 par. 1 MRG, an adequate main rent has to be agreed on terms of size, situation, furnishings, etc.

Who was / is the political driving force?

The policy of rent control and legal protection of tenants was first introduced into contract law by three regulations for the protection of tenants during World War I[4]. Tenant protection policy was/is supported by the Austrian socialist/social-democratic party.

Were these rules based on a particular philosophy (e.g. socialist)?

The growing needs of workers (the majority of them being relatives of soldiers fighting in the field) gave rise to political parties who were less ideologically orientated, but more committed to practical issues[5]. Their manifestos defended the protection of tenants against unwarranted notice as well as unexpected rent increase (in order to strengthen indirectly the fighting morale of the troops).

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for their sports practice. The "Wohnhaus-WiederaufbauG" (BGBl. Nr. 130/1948, last amendment BGBl. I Nr.136/2001), which entered into force in 1948, introduced state-sponsored housing projects.

[4] (1.) Verordnung zum Schutz der Mieter MSchV 1917 (RGBl 34); 2. and 3. MSchV 1918 (RGBl 21/1918, RGBl 381/1918).

[5] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, before § 1 MRG, note 5 et seq.

Was there an influence by the national constitution or international instruments on tenancy law provisions?

National constitutional law determines how far Austrian provinces can regulate housing matters autonomously (Art. 15 Bundesverfassungsgesetz[6] relating to social legislation and supportive administration). The fundamental rights of the Austrian constitution do not play an important role in tenancy law. The Austrian Constitutional Court (VfGH) does not play an active role with respect to the constitutional review of tenancy law, but rather exercises self-restraint. There have been almost no changes at all in the legal situation concerning housing matters since Austria joined the European Union[7]. The implementation of the Time-sharing Directive in 1994 did lead however to a reform of the protection of the right to use immovable properties on a timeshare basis[8].

Were they inspired by another legal system? What were the principal reforms up to the present date? Were there political ideas behind these reforms? What, if any, has been the interplay between statutory and judicial intervention in the development of tenancy law?

Fundamental reforms[9]:

The "Mietengesetz" was passed in 1922, it sought to limit abuses in industrial strife and led to the passing of the aforementioned MRG 1982.[10]

Since its entry into force the MRG 1982 has been repeatedly amended by way of consolidating acts (2.WÄG[11], 3.WÄG[12], WRN 1997[13], WRN 1999[14], WRN 2000[15], 1.Euro-Umstellungsgesetz-Bund, 2. Euro-JuBeG[16]; MRN 2001[17]; Wohnungseigentumsbegleitgesetz 2002[18] to name but a few). The most important of these, called the "second WRÄG", for instance,

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[6] BGBl. Nr. 1/1930, last amendment BGBl. I Nr. 100/2003; Holoubek, Verfassungsrechtliche Grundlagen des Wohnrechts, *WoBl* 2000, 345.

[7] Eilmansberger, Der Einfluss des Gemeinschaftsrechts auf nationales Wohnrecht, in: *Bundesministerium für Justiz* (ed.), *Erneuerung des Wohnrechts* (2000), 59; Heiss, Der Einfluss des Gemeinschaftsrechts auf nationales Wohnrecht, in: *Bundesministerium für Justiz* (ed.), *Internationales Zivilverfahrensrecht. Internationales Privatrecht–harmonisiertes Privatrecht* (2001), 73 et seq.

[8] Lurger, Regard and Fairness as a New Principle of Contract Law, in: Hartkamp/Hesselink/Hondius/Vranken (ed.), *Towards a European Civil Code*, The Hague [] in print; Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280, 83.

[9] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, before § 1 MRG, note 5 et seq.

[10] BGBl. Nr. 872/1922.

[11] BGBl. Nr. 68/1991.

[12] BGBl. Nr. 800/1993.

[13] BGBl. I Nr. 22/1997.

[14] BGBl. I Nr. 147/99.

[15] BGBl. I Nr. 36/2000.

[16] BGBl. I Nr. 98/2001.

[17] BGBl. I Nr. 161/2001.

[18] BGBl. I Nr. 171/2002.

revised § 10 MRG which allows the lessee to claim compensation for expenses incurred in connection with the flat[19]. Besides a general liberalization of maximum rents, the second WRÄG further tightened legal requirements for rent increases. The WRN 2000[20] intensified the efforts of earlier consolidating acts to simplify both the fixing of time limits and the termination of tenancies.

The major reforms in tenancy law were brought about by the legislature and were not triggered by the judiciary. Generally, the courts take provisions protecting the tenant seriously and give them a wide scope.

b) Basic structure and content of current national law[21]

aa) Private tenancy law

Short and basic overview of central rules such as requirements for conclusion, conditions for termination of contracts by the landlord, for rent increase etc.:

Requisites for agreement for lease:

According to Austrian tenancy law, a tenancy is based on an (oral or written) agreement between landlord and tenant (§ 1090 ABGB)[22]. No special words are required and any words which express the intention of giving and taking exclusive possession for a certain period of time are sufficient (§ 1094 ABGB).

The essential terms of an agreement for a lease are[23]:

The identification of the lessor and lessee, the premises to be leased, the commencement and duration of the term and the rent or other consideration to be paid.

There must be an offer capable of acceptance. A response to a request for information is not an offer but an invitation to treat. Acceptance may be given by conduct (§ 863 ABGB).[24]

The terms agreed between the parties may be incorporated in a document, which must be signed on behalf of each party to the contract. Writing is essential only for the validity of time limitations of the rent.[25]

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[19] BGBl. Nr. 800/1993.

[20] BGBl. I Nr. 36/2000.

[21] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 201 et seq.

[22] OGH in *Miet* 31, 1.631; LGZ Wien in *Miet.* 46.083. (Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1092 ABGB, note 10).

[23] OGH in *Miet* 8.750; 17.113; 27.141; 33.134; 34.180; *WoBl* 1997, 184; *NZ* 1986, 207. (Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1092 note 6).

[24] OGH in *JBl* 1950, 62; *Miet* 28.105; 32.148; 33.137; 38.106. (Schwimann/Apathy, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 863 ABGB, note 10).

Varieties of tenancies:

The Austrian system differentiates between tenancies for a fixed term (contract limited in time) and tenancies unlimited in time (contract unlimited in time[26]). The alternative words in brakets are used interchangeably in the following text.

ABGB: Contracts limited in time expire without notice at the end of the time limit (§ 1113 ABGB). All the circumstances must be examined to see whether the parties have reached an agreement for some further tenancy there being no presumption that a new tenancy arises ("relocatia tacita"- § 1115 ABGB[27]). Tenancies unlimited in time are tenancies which can be terminated by either party by notice of termination. Like other tenancies, a tenancy unlimited in time arises by contract binding both lessor and lessee.

MRG: Any limitation of leases granted of business premises is possible (§ 29 par.1 fig.3 lit.a MRG), leases granted of flats let as dwellings can only be limited to three years (§ 29 par. 1 fig.3 lit.b MRG)[28]. Tenancies unlimited in time are terminable under exceptional circumstances (the provision of § 30 par. 2 MRG contains strong limitations of notice of termination, which is possible only for important reasons).

Termination of tenancy[29]:

Contracts limited in time:

ABGB: A lease for a fixed term generally requires no notice to quit at the end of the term, whether the term expires by effluxion of time or on the happening of an event on which it is deemed to terminate the lease (§ 1113 ABGB). A lease for a fixed term lasts until the last moment of the last day. A lessee is not justified in quitting before the end of the term because the lessor has failed in the performance of a stipulation on his part.

Before expiry of the time the tenancy agreement for a fixed term may be terminated by either party by virtue of important grounds (termination under exceptional circumstances, regulated in § 1117 ABGB: unhealthy housing conditions[30], unusability[31], etc).

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[25] OGH in *EvBl* 1991/27; *WoBl* 1992, 55 (Hanel); *EvBl* 1995/25.(Koziol/Welser, *Bürgerliches Recht*, 12th edition, vol. II (2002), 224 FN 174).

[26] OGH in *Miet* 7.832, 18.111; 8.571.(Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1092 ABGB, note 66 and 67).

[27] OGH in *WoBl* 1991, 163 (Würth*)*; overruling OGH in *JBl* 1993, 584 (Watzl). (Koziol/Welser, *Bürgerliches Recht*, 12th edition, vol. II (2002), 224 FN 157)

[28] For futher information please see the following text, "determination of a tenancy" in case of contracts unlimited in time .

[29] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 222 et seq.

[30] OGH in *WoBl* 1990, 12. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 223 FN 159).

[31] OGH in *JBl* 1990, 375. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 223 FN 158).

The lessor can cancel the contractual relationship according to § 1118 ABGB if the tenant is liable for adverse use[32] of the thing, for an arrears of rent[33] or if the building rented out must be erected newly.

MRG: Before expiry of a fixed time (only 3 years or more limitations as regards flats, no time limitation as regards business premises according to § 29 MRG) the contract can be terminated (by both parties) only under exceptional circumstances (§ 30 MRG, § 29 Abs.1 Z 5 MRG)[34]. According to § 29 par. 1 fig. 4 and 5 MRG, § 1117 and § 1118 ABGB the tenant can moreover terminate the contract in case of unusableness or unhealthy housing conditions.

In addition the lessee can terminate (by judicial decree; "gerichtliche Kündigung") a lease limited in time (cases listed in § 29 par.1 fig. 3 MRG) one year after conclusion or prolongation of a contract (§ 29 par.2 MRG). An agreement for more favorable terms for lessee is effective, nevertheless (right to terminate the contract before expiry of time)[35].

Contracts unlimited in time:

ABGB: Subject to any applicable statutory provision under which the tenant is afforded security of tenure, an unlimited tenancy is terminable by either party by giving notice of termination, which becomes effective after a reasonable period of notice ("ordinary" termination: without reference to any grounds for termination). A tenant has to have reasonable time move out of the flat/premises before the termination becomes effective. But until such termination the tenant is lawfully in possession. Where rent is payable, the rent is apportioned.

Tenancies unlimited in time can be further terminated without period of notice (to terminate the lease) by termination under exceptional circumstances ("extraordinary" termination: §§ 1117 et seq. ABGB).

The ordinary termination can moreover be carried out only at particular dates for giving notice. These periods and effective dates for termination can be fixed by the parties. Unless some specified length of notice is agreed on by the parties, § 560 ZPO[36] (General Civil Code of Civil Procedure) requires a minimum length of four weeks in the case of a notice to quit premises let as a dwelling. Any question as to the validity of the notice may be avoided by giving it in general form (§§ 1116 ABGB, § 560 ZPO). However, a judicial decree ("gerichtliche Kündigung") is not compulsory.[37]

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[32] OGH in *Miet* 40.168; 42.128; *ecolex* 1995, 718. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 223 FN 163).

[33] OGH in *JBl* 1985, 423. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 223 FN 162).

[34] OGH in *WoBl* 1991, 136 (Call) and 257. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 224 FN 175).

[35] OGH in *WoBl* 1998/2. (Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 29 MRG, note 26).

[36] RGBl. Nr. 113/1895, last amendment BGBl. I Nr. 114/2003.

[37] Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 29 MRG, note 5.

MRG: The lessor can hand in his notice only for an important ground for termination listed in § 30 par. 2[38]. The blanket clause of § 30 par. 1 MRG (the tenant´s violation of the agreement), is to be applied restrictively according to § 30 par. 2[39]. Agreements which grant a cancellation right going beyond § 30 MRG to the lessor/landlord are ineffective (unilaterally mandatory nature § 30 par. 3 MRG).

According to § 33 par. 1 MRG tenancy agreements can only be terminated by judicial decree ("gerichtliche Kündigung", § 560 ZPO). The lessee can terminate the lease by judicial decree if he complies with the time limit (period of notice to terminate the lease).[40]

Conditions for rent increase:

ABGB: Outside the scope of application of the MRG, tenancy agreements are subject only to the general restriction of *laesio enormis* (§ 934 ABGB) and the provisions of the ABGB concerning exorbitant rents (§ 879 par. 2 fig.4 ABGB). If a landlord intends to increase the agreed rent, he has to give notice of termination pending a change of contract.

MRG: The MRG protects the main tenant by narrower limits: in the cases listed by § 16 par. 1 MRG, an adequate main rent has to be agreed on terms of size, situation, equipment etc[41]. The MRG lists in its par. 2 seq. of § 16 classes (Kategorie A-D) of maximum rents assessed on the basis of the condition of the flat for those tenancies excluded from § 16 par. 1 MRG. The landlord may increase the rent according to § 18 MRG if he is burdened with great repair and maintenance expenses. Rent increases are also possible if tenants of business premises sell their enterprises and these enterprises are afterwards continued by the purchasers (§ 12a MRG)[42].

Is current tenancy law state law or infra-national law ? (If legislative jurisdiction is devided: What is the allocation of competencies and for which subject matters?)

Austrain tenancy law is mainly federal (national) law (ABGB, MRG, Richtwert-Gesetz etc). The Austrian Federal Ministry of Justice issued different regulations for the different federal states ("Bundesländer") laying down different standards ("Richtwerte") for the determination of the maximum rent in these states.

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[38] Derbolav in Korinek/Krejci, *Handbuch zum Mietrechtsgesetz (1985)*, 439 et seq.; Fenyves, *Erbenhaftung und Dauerschuldverhältnis* (1982), 207 et seq.

[39] Leading cases: OGH in *SZ* 63/31; OGH in *SZ* 65/6; *EvBl* 1992/123. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 225 FN 180)

[40] Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 29 MRG, note 6.

[41] OGH in *WoBl* 1991, 171 and 253; *WoBl* 2000, 83. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 214 FN 104)

[42] For further information see chapter 2 „*Questionnaire*" question 13: „Requirements for rent increase".

To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive?

See chapter a)i).

Are there other forms of "lawful possession" of a premise for housing purposes (e.g. licence vs. tenancy in English law)?

Other housing legal forms are the easement ("Wohnungsgebrauchsrecht", "Wohnungsfruchtgenußrecht"- right of *usufruct*), time-sharing and the life tenancy with respect to rural premises ("Ausgedinge", "Leibrente"- life annuity)[43].

To what extent does national or European consumer protection legislation play a role?

The Austrian Civil Code does not mention consumers at all. All provisions pertaining to consumers are collected in a *Consumer Protection Act* ("KSchG" = "Konsumentenschutzgesetz"[44]). The national "KSchG" offers the tenant protection if flats are procured by entrepreneurs who act as brokers (§§ 3, 30b, 30c and 31 et seq. KSchG; § 3 Maklergesetz[45]) or as professional lessors (§ 1 par. 1 KSchG).

European consumer protection: The implementation of the Time-Sharing Directive in 1994 in the Austrian "Teilzeitnutzungsgesetz"[46] led to the introduction of the protection of consumers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. If the lessee is a consumer in the sense of § 1 par. 2 KSchG and the lessor an entrepreneur in the sense of § 1 par. 1 KSchG several special protective rules come into play which have been partly influenced by EC consumer protection directives: as e.g. the protection against pre-formulated unfair contract clauses in § 6 KSchG or the right of withdrawal of § 3 KSchG in doorstep-selling situations.

Does the relationship between general and special rules work properly so as to create legal certainty?

The relationship between general and special rules works properly, though it is in some cases rather complicated to find out which statute (either the ABGB or the MRG) applies to the concrete case. As far as the MRG is not applicable or as far as the MRG or other special statutes do not contain any regulation the ABGB provisions apply (§§ 1090 et seq.) apply. The frequent amendments and its complex regulations – also with respect to its scope of

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[43] Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1090 ABGB, note 1 et seq.

[44] BGBl Nr. 140/1979, last amendment BGBl. I Nr. 91/2003.

[45] BGBl. Nr. 262/1996, last amendment BGBl. I Nr. 98/2001.

[46] BGBl. I Nr. 32/1997, last amendment BGBl. I Nr. 98/2001.

application – make the MRG and the regulations connected to it a rather "dark" discipline which is normally only overseen by lawyers specialized in the field of tenancy law.

Is the position of the tenant also considered a property right (and therefore also governed by property law) of (only) as an obligatory right?

The position of the tenant is formally not considered as a property right, but an obligatory right and is thus not governed by property law. However, the court decisions have over time interpreted various ABGB and MRG provisions in a way that led to the creation of a quasi in rem position of the tenant ("quasi-dingliches" Recht). Thus the tenant is entitled to ordinary possessory remedies, just like the landlord. The tenant is protected against disturbances and infringements by third parties: e.g. he/she has a damages claim against a third tortfeasor (§ 1295 ABGB)[47], the "actio Publiciana" (§ 372 ABGB), protection against noise, smells or against trees and other plants, which deprive light and air (§ 364 ABGB: "Immissionsschutz")[48]. And he/she has a "possessory action" ("Besitzstörungsklage") according to § 454 ZPO.

bb) Social regulation affecting private tenancy contracts

The *Austrian legislation* (social legislation and supportive administration –"Wohnbauförderungsgesetze" of the 9 Austrian provinces – "Länder") recognizes no official right to housing. A certain protection against eviction is nevertheless enshrined in national legislation guaranteed by the central Government (§ 35 MRG and § 45 par. 2 Exekutionsordnung –EO[49]). Avenues open to the homeless and disadvantaged are social assistance and community accomodation such as hostels. Currently, the Austrian government does not initiate measures designated to bring vacant housing back onto the market (like requisitioning, taxation, tax incentives).

There are no longer tax reliefs, such as deduction of renovation costs, as in previous years. Nowadays the state does not intervene with regard to private rental housing by tax incentives to encourage investment, housing regulations, housing allocation, special taxation on underoccupancy or financial subsidy.

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[47] OGH in *NZ* 2002/17.

[48] § 364 ABGB (nuisance by emission from neighbouring property): OGH in *SZ* 54/137; Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 254 FN 24, 25; § 364a ABGB (nuisance by emission from neighbouring plant): OGH in *SZ* 54/137; Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 257 FN 54, 55; § 364b ABGB (excavation of a piece of land lowering the level of the land so as to withdraw support from neighbouring land): OGH in *SZ* 68/101; Bumberger, Nachbarrechtsschutz für unrechtmäßige Nutzung, *JBl* 1999, 407; (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 257 FN 57).

[49] RGBl. Nr. 79/1896, last amendment BGBl. I Nr. 113/2003.

The social housing stock:

Austria has considerable stocks of social rent housing. Local authorities account for the absolute majority of the public housing stock. But in this context one has to mention also non-profit organizations or private companies whose purpose it is to construct social housing units. Either the institutions that own social housing themselves or companies designated as agents manage this housing stock[50].

Access to social housing is restricted. The elegibility criteria for social rental housing are: a certain income ceiling, homelessness, unhealthy housing conditions, specific social circumstances (single parent families, young households, the elderly, retired people, the unemployed).

Besides social aid (allowances and specific benefits) local authorities provide financial assistance in the form of loans, reduced interest rates and subsidies for new housing construction or for restauration and housing improvement ("Sozialhilfegesetze" and "Wohnbauförderungsgesetze" of the provinces, as well as the "Wohnungsgemeinnützigkeitsgesetz" – WGG[51]).

If existing: public law measures to prevent dwellings from staying empty (such as fines against owners unwilling to rent their houses in Germany, or tax incentives as in France): In Austria no such measures exist.

c) Summary account on "tenancy law in action":

What is the general situation in regard to housing? (i.e. a housing shortage?, does a substantial part of the population own their own home?, local market divergences?, attractiveness of renting houses for landlords-investors? do rents consume large parts of average salaries?

Home ownership versus rentals:

The supply of the social rental housing is considered insufficient.

Approximately 60 per cent of the population own their own home (building or flat, apartment).[52]

Approximately 23 per cent of the total number of persons in private dwellings (7,641.981 persons) live in private rental units (lessees; MRG) and about 9 per cent in social rental units

[50] [http://www. Statistik.Austria//] (30.5.2003); social legislation of the provinces.

[51] BGBl Nr. 139/1979, last amendment BGBl. I Nr. 113/2003.

[52] [http://www.Statistik Austria//](30.5.2003), Statistisches Jahrbuch 2003, Statistik Austria, persons in private dwellings (main residences) in 1991.

(non-owner; WGG), 57,9 per cent are (house- or flat-) owners and 9,6 per cent live in an apartment provided by the employer.[53]

Local market divergencies:

The housing shortage is stronger in specific geographical areas, namely the eastern provinces ("Bundesländer") which are highly industrialized and (over-)populated. In these eastern provinces, especially in Vienna, the total number of tenants exceeds the total number of house owners considerably (Vienna: 45.000 house owners, 97.000 owners of dwellings compared to 609.000 tenants and 19.000 subtenants; the total number of dwellings being 805.000)[54].

Approximately 22,5 per cent of the tenant´s (or actual the family´s) net before-tax income is devoted to rent (before and after housing benefit)[55].

Renting houses is definitely not very attractive to landlords-investors because of the strong mandatory provisions of the MRG, especially those referring to the termination of tenancy agreements and rent increase and the rent ceilings (§ 16 MRG).

What is the role of associations of landlords and tenants?

Tenant protective associations (Mieterschutzverbände) offer their members and tenants in general consultations which are normally free of charge. Representatives of tenant protective associations are allowed to appear in courts. Associations of landlords offer their members and landlords in general consultations which are normally free of charge.

What is the role of standard contracts prepared by a tenants' or landlords' association?

Model contracts of tenant protective associations are of minor importance as they are often too unilateral to meet the consent of both parties. Landlords often propose standard contracts drafted by the landlords associations which are frequently accepted by the tenant party. These contracts are valid within the limits of the mandatory protective provisions of consumer protection and tenancy law.

Is tenancy law often enforced before courts by landlords and tenants, or are there - voluntary or compulsory - mechanisms of alternative dispute resolution frequently made use of?

To the relief of ordinary courts in some municipalities arbitration boards try to settle cases in first instance (§ 39 MRG). If they fail in doing so, tenancy law is enforced by ordinary courts (district courts; "Bezirksgerichte").

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[53] [http://www.Statistik Austria//](30.5.2003) Statistisches Jahrbuch 2003, table 12.03.

[54] [http://www.Statistik Austria//](30.5.2003) Statistisches Jahrbuch 2003, table 12.11.

[55] [http://www.Statistik Austria//](30.5.2003) Statistisches Jahrbuch 2003, Statistik Austria, Einkommen, Wohnungsaufwand.

Are there peculiarities for the execution of tenancy law judgements (e.g. prohibition of or delays for eviction)?

Execution against tenants:

The MRG as well as the "Austrian Execution Order" (EO) guarantee protection of the debtor. Both statutes provide that a tenant can file a petition for a (at the most three month´s) postponement of eviction in case of homelessness (§§ 35 MRG; 45 par. 2 EO).

To what extent does a fair and effective access to courts for tenants exist? (what is the situation concerning legal fees, legal access, legal aid, the average length of procedures, possibilities of appeal?)

Protection of tenure in social housing as well as private housing is given in Austria. Tenants enjoy a good legal protection including the possibility to legal enforcement. The average length of procedures is about 2-6 months. The tenant can, the prerequisites given, ask for a counsel representing legal aid (§ 64 ZPO, 45a RAO[56]).

How about legal certainty in tenancy law (are there contradicting statutes, is there secondary literature usually accessible for all lawyers, etc)?

Secondary literature is usually accessible for all lawyers. There are databases which contain collections of published decisions, though the access to these databases is partly at great expense[57].

There are no contradicting statutes. As already outlined, Austrian parties struggle a bit with this dual system of a general civil code (ABGB) and either the MRG or (fragmented) special statutes. Tenancy law is considered a very complicated and highly specialized field of law: due to the complexity of the MRG rules which are frequently changed and amended and the problematic of having different sources of law, especially the duality of the general ABGB rules and the often partly applicable MRG regime (besides other sources like WohnungsgemeinnützigkeitsG etc.).

[56] RGBl. Nr. 96/1868, last amendment BGBl. I Nr. 93/2003.

[57] RDB, RIS, celex, RIDA plus, etc.

2. Questionnaire

Set 1: Conclusion of the Contract

Short General Introduction

An agreement for a lease is created when, subject to the statutory requirements as to the form of the contract (requirement of writing only with respect to time limitations of rent), the parties in their declarations of will agree on the essential terms of the contract.

An agreement for a lease is an ordinary contract, and in accordance with the general principles of contract law it will not be binding on the parties until one is able to identify an offer by the lessor to let, and a convergent assent by the lessee to take, the property to be demised or on certain terms. Or an offer by the lessee and an acceptance by the lessor. The essential terms of an agreement for a lease are

- the identification of the lessor and lessee;
- the premises to be leased;
- the commencement and duration of the term; and
- the rent and other consideration to be paid.

The agreement must identify both contracting parties. There must be an offer capable of acceptance. A response to a request for information is not an offer but an invitation to treat. The distinction between an offer and an invitation to treat depends on intention.

New terms may be added to the offer, as the offer may be withdrawn at any time, as long as it has not been accepted. No reason for withdrawal need to be given. The withdrawal of the offer must be communicated to the offeree.

If no time is specified within which the offer should be accepted, the offer is capable of acceptance only within a reasonable time after the offer has been made. What is a reasonable time depends on such circumstances as the nature of the subject matter and the means used to communicate the offer.

There must be an unqualified and final expression of assent to the terms of the offer for a concluded contract to arise. Where there are lengthy negotiations it may be difficult to say exactly when an offer has been made and accepted. However, the court will look at the whole correspondence to decide whether on its true construction, there was an agreement to the same terms.

As long as the essential terms have not been agreed to, or any additional terms have been mentioned on one side and not unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract. An offer cannot be accepted after it has been rejected, revoked or has lapsed.

An acceptance which introduces new terms, not contained in the offer, is not an acceptance but a counter offer which the original offeror may accept or reject. There need not be precise correspondence between the offer and acceptance.

If the offer lays down conditions for its acceptance these must be complied with. Thus, stipulations as to time or method of acceptance must generally be adhered to.

In considering whether there is a binding agreement for lease arising out of correspondence regard should be made to the following matters:

- the need to identify a correspondence between offer and acceptance;
- the existence of words negating contractual intention.

The terms agreed between the parties may be incorporated in a document, which must be signed on behalf of each party to the contract. Writing is only required with respect to time limitations of rent. Every written document, however is subject to tax according to the Gebührengesetz 1957[58].

Avoidance of contracts due to mistake:

If consensus is the basis of contractual liability, it follows that no contract is concluded if the parties are not ad idem, in other words if one or both parties are under a misapprehension regarding some element of the agreement. Such an error or mistake, whether unilateral or bilateral, does not render the contract void but voidable, however. The law upholds such a contract even though there was no actual consensus. One party is only able to avoid the contract if her error is "material" ("wesentlich"): i.e. it must relate to a material element of the contract – without the error the contract would not have been concluded by the parties. Examples of material mistakes are those relating to the object of the contract or the nature or type of contract. An error with regard to the identity of the other party (error in persona; "Irrtum in der Person/den Eigenschaften der Person des Vertragspartners") is "material" only in a kind of contract where it makes a difference with whom one contracts. Mistakes relating to not material parts of the contract give the mistaken party only a right of correction of the contract. Non-material errors are those in the absence of which the parties would have concluded the contract on different terms. Avoidance and correction are only possible if one of the requirements of § 871 ABGB is met: the mistake was caused by the other party, the mistake was obvious

[58] BGBl. Nr. 267/1957, last amendment BGBl. I Nr. 84/2002.

for the other party or the mistake was discovered before the other party acted in reliance on the contract. Avoidance and correction nullify or correct the contract with *ex tunc* effect.

One type of error that principally does not give rise to a right of avoidance or correction is an error relating to a party´s personal motive for entering into the agreement ("Motivirrtum"). An error of law ("Rechtsirrtum"; the question of scope of application of the MRG, for example) is normally regarded as irrelevant since everyone is presumed to know the law (§ 2 ABGB).

Question 1: Choice of the Tenant

L offers an apartment for rent in a newspaper. T replies and shows interest. However, L rejects T after she tells him that she:

a) has a husband and three children.
b) is a Muslim, and L is afraid of terrorism.
c) has a small dog.
d) is a hobby piano player and wants to play about 1 hour every evening from 8-9 pm.
e) does not have full capacity and is under custody.

Does T have a claim against L?

Variant: In order not to lose any chances to get the apartment, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages?

As regards the Directive 2000/43/EC (OJ 2000, L 180, 22), this Directive has not yet been implemented by the Austrian legislator. The implementation provisions though might restrict the landlord´s discretion in choosing the tenant as concerns discrimination on ethnical and racial grounds. According to its wording, this Directive shall not cover difference of treatment based on confession (as referred to in Question 1.b), however, but covers solely difference of treatment based on ethnic origin. So Muslims are covered by the Directive because of this reason.

Ad a) b) c) d):

There must be an unqualified and final expression of assent to the terms of the offer for a concluded contract to arise (acceptance may be by conduct, §§ 861, 864, 1090 ABGB).

As long as the essential terms have not been agreed to, or any additional terms have been mentioned on one side and not unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract[59]. T has no claim against L.

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[59] OGH in *EvBl* 1961/450; *JBl* 1973, 617; *SZ* 54/112; *JBl* 1992/118*; DRdA* 1994/39; *Miet.* 26.084; *EvBl* 1961/335; *JBl* 1969/91; *JBl* 1986/786. (Schwimann/Apathy, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 869 ABGB, note 6)

Ad e):

A declaration of intent made by a person without legal capacity is void (§ 865 ABGB). L cannot conclude a contract with T.

Appendix to the variant of Question 1.b): "third party effect":

A much discussed of constitutional theory is whether basic rights may have "horizontal effect" on relations between private parties. It is generally held that basic rights do not bind private individuals directly, but *indirectly* through the general clauses of contract law (e.g: good faith, "public morals") and via the interpretation of private law rules.[60] The equal protection clause of the Austrian constitution does not oblige a salesman to sell his goods to everybody. He may choose his business partners freely without regard for the equal protection clause. Some basic rights, however, indirectly bind private partners in so far as special statutes based on them extend their effect to relations between such individuals. For example, labour law statutes prescribe equal treatment of men and women.

"Public morals" (§ 879 ABGB: "gute Sitten") may necessitate the equal treatment of private business partners under certain conditions: A monopolist who sells goods of vital importance, or power supply companies, or public transportation enterprises are indirectly bound by the equal protection clause, which restricts their freedom of contract. They are obligated to sell to anyone on the same conditions and to contract with anyone willing to fulfill their conditions. This obligation either arises from statutes which are based on the equal protection clause or from the "public morals" ("gute Sitten") clause, both of which in these cases include the principle of equal protection. But this principle would not apply in our cases, because the landlord is not in an equal position as a monopolist.

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[60] Berka, *Die Grundrechtfreiheiten und Menschenrechte in Österreich* (1999), note 130, 226, 235, 712, 718, 989 und 993; Bodner, Die Glaubens- und Gewissensfreiheit als genuin privatrechtlicher Wert, *ÖJZ* 2003, 13 et seq. With reference to Bydlinski, Bemerkungen über Grundrechte und Privatrecht, *ZÖR NF* 12, 1962- 63, 423f; Bydlinski, Die Grundrechte in Relation zur richterlichen Gewalt, *RZ* 1965, 67 et seq.; Bydlinski, Der Gleichheitsgrundsatz im österreichischen Privatrecht, *ÖJT* 1961, 1, 18 et seq.; Bydlinski, Thesen zur Drittwirkung von Grundrechten im Privatrecht, in Rack (Hrsg.), *Grundrechtsreform 1985*, 181 et seq.; Mayer, Der Rechtserzeugungszusammenhang und die sogenannte Drittwirkung der Grundrechte, *JBl* 1990, 768f; Walter/Mayer, *Grundriss des österreichischen Bundesverfassungsrechtes* (2000), note 1330f; Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 31 et seq. This is also established practice of the courts: OGH in *EvBl* 1989/47). But note the specific legislative provision concerning the direct effect of Article 1 of the Data Protection Act of 2000 concerning the protection of personal data.

Ad variant: a) b) c) d):

If a party is induced to enter into a contract by an untrue statement of fact made by the other party (by fraud; "bewußte Täuschung"), irrespective of the kind of error - whether relating to the object of the contract ("Geschäftsirrtum") or a party´s motive for entering into an agreement ("Motivirrtum"), whether the error is material ("wesentlicher Irrtum") or not[61] - the mistaken party can avoid the contract for deceit (that is to rescind the contract by judicial decree according to § 870 ABGB). Furthermore in all cases of fraudulent misrepresentation the party who has been misled may claim damages (according to § 874 ABGB). The damages will usually consist of expenses incurred in contemplation of the contract ("Vertrauens-schaden").

A misrepresentation may be made expressly or by conduct; even the concealment of facts may amount to a fraudulent misrepresentation if there was a duty to reveal them. The duty on anyone to disclose (there is no general legal duty to disclose, it is just an obligation out of the contract, "Schutzpflicht, abgeleitet aus den Grundsätzen des redlichen Verkehrs"[62]) relates to material facts of which the parties had actual knowledge or constructive knowledge prior to the conclusion of the contract. The misrepresentation must relate thus to a matter of present or past fact and it must have induced the innocent party to enter into the contract. Where a party has made a fraudulent misrepresentation, he/she cannot reasonably defend himself by claiming that the other party should not have been deceived by it.

Ad b) further:

It is not unlawful for the landlord or other person to discriminate against a person on grounds of confession. Refusal of consent on this ground is not expressly stated in the relevant Austrian statutes and would presumably not be held to be so by civil courts. Furthermore it is not expressly stated in the afore-mentioned Directive 2000/43/EC to be unreasonable. See above.

Ad e):

A declaration of intent made by a person without legal capacity or with restricted is void or ineffective until consent is given by its legal representative (parent or other; § 865 ABGB).

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[61] In contrast to § 871 ABGB, § 870 ABGB does not differ between errors relating to the object of the contract and errors relating to a party´s motive for entering a contract ("Geschäfts- und Motivirrtum") or between essential errors and minor errors ("wesentlicher und unwesentlicher Irrtum"): OGH in *SZ* 14/18; *SZ* 27/63; *EvBl* 1956/149; *SZ* 33/114; *EvBl* 1965/199; *Miet* 19.055; *JBl* 1971, 304; *ÖBA* 1996, 382; ua (Dittrich/Tades, *Das Allgemeine Bürgerliche Gesetzbuch* (2003), 36nd ed., vol. I, § 870 ABGB, E. 18).

[62] OGH in *JBl* 1980, 424; *SZ* 52/22; *JBl* 1987, 657.

Question 2: Sharing with Third Persons

L rents an apartment to T. After some months, T wants to take into the apartment:

a) her husband and children.
b) her boyfriend.
c) her homosexual partner.
d) her parents.

Is this possible against the will of L? If not, what are L's remedies?

Variant 1: T dies. The persons listed under a) – c), who were sharing the house with T during the last years, want to continue the contract with L under the same conditions.

Variant 2: Students' house: From the very beginning the apartment was inhabited by a group of students with L's consent. However, the contract was concluded only between L and T, who is one of the students and was selected by L because she had the best financial background. After the departure of one of the students from the house, T wants to accept another student called A. Is this possible against the will of L, who does not like A?

It is very rare for a lease to contain no express restrictions on the users. The reason for such contract provisions from the landlord´s viewpoint is usually to preserve the value of the property owned by him. But apart from any express restriction the tenant may not be prevented from using the premises for any purpose which is not unlawful. So T is allowed to take her husband and children a), her boyfriend b), her homosexual partner c) and her partens d) into the apartment.

There are public law minimum requirements as regards available space for each inhabitant of an apartment only as regards foreigners living in Austria (see the annually amended "Quoten-Verordnung" according to § 2 "Aufenthalts-Gesetz"). To avoid an excessive number of foreigners on little space e.g. in Vienna foreign inhabitants must dispose of an average housing space of about 33 squaremetres (comparable to Austrian citizens) in order to be allowed to stay in Vienna[63].

L cannot ask for a higher rent as the usage of the apartment will be higher on account of the increased number of persons living there, but only for higher actual operating costs ("Betriebskosten").

[63] For further details see: Davy, Überfremdung und Familiennachzug, *exolex* 1997, 469 et seq.

Variant 1:

On the death of a lessee, the tenancy agreement is not annuled automatically (§§ 1116a ABGB, § 14 par. 1 MRG). According to § 1116a ABGB the landlord as well as the tenant´s heirs can terminate the contract at particular dates for giving notice on a usually 4 weeks`notice[64].

According to § 14 MRG the former lessee´s interest in the rented premises, whether for a period of time or without time restriction, vests henceforth in his "personal respresentative" (§ 14 par. 3 MRG: which is either a close relative (spouse, relations by blood in direct line including adopted children, brothers and sisters and the companions in life) who lived in the flat together with the deceased lessee and is in danger of homelessness or the deceased lessee´s companion in life with whom the lessee engaged in a sexual and financial relationship and who lived together with the lessee in the demised flat for three years or at least moved into the premises together with the lessee at the time when the tenancy agreement was concluded[65].

So a deceased (female) lessee´s husband and children, her boyfriend, her homosexual partner, her parents, take(s) the premises "as assignees", the assignment takes place by operation of law ("Eintrittsrecht")[66].

Variant 2:

T is the main tenant of this tenancy agreement, the students are subtenants. L oviously agreed to sub-renting. So T, the lessee of the property, can in the absence of agreement restricting her right, underlet it for any period less than her own term and can even choose A as tenant without consent of L (provided L and T did not agree on L´s exclusive right to choose the subtenants)[67].

The other students do not automatically receive contractual rights against L and they are not each liable for the whole rent, just for the rent which was stipulated between T and the single subtenant. An implied clause could be interpreted (in the contract) that the landlord – who knows that the students can only pay the rent if their number remains the same – must accept a successor student if he does not have important objective reason, as the tenant can, as outlined above, in the absence of agreement restricting his right, underlet the premises for any period less than his own and can even choose a subtenant without consent of L.

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[64] Schwimann/Oberhammer, *Praxiskommentar zum ABGB*, (1998) 2nd ed., vol. II, § 364 ABGB, note 7.

[65] Vonkilch in: Hausmann/Vonkilch (ed.), *Österreichisches Wohnrecht* (2002), § 14 MRG, note 13; Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 14 MRG, note 8.

[66] Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 14 MRG, note 8 et seq.

[67] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 217.

Question 3: Sub-renting

Does, and if yes under what conditions, T possess the right to sub-rent a room in his apartment to S? Can T make the permission conditional on an increase of the rent? What are L's rights if T sub-rents a room without permission (termination, damages)?

The lessee of a premise can, in the absence of an agreement restricting his right, underlet it for any period less than his own term (§ 1098 ABGB), but if he underlets for a term equal to, or greater than, the residue of his own term, this operates as an assignment of his term, and not as an underlease[68] (for which he needs the consent of the landlord).

It is rather unusual to insert a contract provision in a lease which prohibits subletting either absolutely or without the consent of the lessor. T cannot make the permission conditional on an increase of the rent. If there is a subletting in contravention of the contract the landlord can terminate the lease, not the sublease, by action for possession as well as claim damages (§ 1118 ABGB; 30 par. 2 fig.3 MRG)[69].

According to § 11 MRG the lessor can only rely on a contractual prohibition of sub-renting if he can show an "important reason" ("wichtiger Grund"): Such an important reason would be the fact that the flat shall be sublet completely, the number of lodgers would exceed the number of available rooms, the sub-rent would represent a diproportionally high consideration in comparison with the rent to be paid by the sub-letter or the threat that the new lodger would disturb the household community.

Question 4: Formal Requirements and Registration

a) Does the tenancy contract require a specific form (e.g. in writing) – if yes, what is the rationale of this requirement? What is the consequence if this form is not observed?

b) If an oral contract is valid, are there any additional requirements to be satisfied to render it enforceable before a court?

c) Does the contract need to be registered in a public register? What are the consequences in private law, especially in court actions, if the registration does not take place?

a) A lease may be made orally or in writing[70] (requirement of writing only with respect to time limitations of rent).

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[68] Mayrhofer, Abtretung von Bestandrechten und Abtretungsverbot, *ÖJZ* 1973, 146 und 169; Wilhelm, Übergang des Bestandverhältnisses durch Vermächtnis? *JBl* 1972, 79; Bydlinski P., Zur Abtretbarkeit der Rechte aus einem Mietverhältnis, *JBl* 1985, 730 ff.

[69] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 218.

[70] OGH in *Miet* 31, 1.631; LGZ Wien in *Miet* 46.083. (Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1092 ABGB, note 10 et seq).

b) Oral time limitations in time are not enforceable (§ 29 MRG).

c) Every written document is subject to tax according to the Gebührengesetz 1957. Compulsory VAT and income tax registration is required, too (§ 6, 10 UstG 1994[71], § 28 EstG 1988[72] „Einkünfte aus Vermietung und Verpachtung"): the rent constitutes income of the lessor.

Registration of title at the land registry is essential in order to acquire the ownership of land (§ 431 ABGB; § 4 Allgemeines Grundbuchsgesetz 1955 – GBG[73]; "Intabulationsprinzip", though there are some exceptions like usucaption). According to § 1095 ABGB, § 9 GBG a tenancy agreement can be entered into the land registry. Then the position of the tenant is considered as an "absolute right" – with effect as against third parties, that is to say the buyer cannot terminate the lease merely with reference to the fact of sale (§ 1120 ABGB). In case of an auction this "absolute" right is treated like a servitude (easement), which the auction buyer must assume provided that the encumbrancer is prior to the petitioning creditor ("Dienstbarkeiten, denen der Vorrang vor dem Befriedigungsrecht eines betreibenden Gläubigers oder einem eingetragenen Pfandrecht zukommt §§ 1121 ABGB, § 150 EO)[74].

Question 5: Key Money

During the negotiations for a tenancy contract, L requests from T, who wants to become the tenant, the sum of 100 Euro (the monthly rent being of 1000 Euro) for the drafting of the contractual documents. Is this legal?

Variant 1: The sum of 500 Euro key money is requested from T by F, who is the current tenant in the house,

a) because F promises to make L accept T as her successor;
b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move in earlier.

According to §§ 1102, 879 ABGB and § 27 par. 1 MRG "key money" requested by the landlord or by the former tenant (variant 1) is illegal and the contract condition in question is void[75].

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[71] BGBl. Nr. 663/1994, last amendment BGBl I Nr. 71/2003.

[72] BGBl. Nr. 400/1988, last amendment BGBl. I Nr. 133/2003.

[73] BGBl. Nr. 39/1955, last amendment BGBl. I Nr. 112/2003.

[74] OGH in *WoBl* 1991, 123; *SZ* 32/124; *SZ* 33/68; *SZ* 70/193; Angst/Jakusch/Pimmer, *Exekutionsordnung* (2004), 14nd ed, § 150 EO, E. 7-18.

[75] Ostermayer, *Verbotene Ablöse im Mietrecht* (1996); OGH in *Miet* 41.079/28; *SZ* 69/243; *SZ* 68/174; *SZ* 66/28; *SZ* 68/148; *SZ* 63/23 (violation of moral principles) (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 215 FN 116).

Variant 2: Estate agent A, who acted as an intermediary in the conclusion of the contract, requests the sum of 2000 Euro from T as commission. The agency contract concluded between T and A foresees a commission of two monthly rents for A´s services, whereas L is not supposed to pay for A´s services. Is this claim lawful?

The claim is lawful. In general the commission or remuneration of the real estate agent for the mediation of the tenancy, rent of single living accomodations or flats must not exceed the triple amount for rent.[76]

Set 2: Duration and Termination of the Contract

Short General Introduction

Duration of contract:

The maximum duration of the contract must be either fixed by specifying the number of years in first instance, or expressed by reference to a collateral matter which can, at the time when the lease takes effect, be looked to in order to ascertain precisely the latest date on which the contract must end. Thus the term may be fixed by reference to a certainty or to a matter capable of being rendered certain before the lease takes effect. The time limit must be a minimum of 3 years for dwellings or any longer period of time, the time limit may be shorter in leases to businesses (§ 29 MRG).

Termination of a tenancy:

Contracts limited in time:

ABGB: A lease for a fixed term generally requires no notice to quit at the end of the term, whether the term expires by effluxion of time or on the occurrence of a special event (§ 1113 ABGB). Before expiry of the time the tenancy agreement for a fixed term may be terminated by either party by virtue of important grounds (§ 1117 ABGB).

MRG: Before expiry of a fixed time the contract can be terminated by both parties under exceptional circumstances (§§ 29, par. 1 fig.5, 30 MRG).

Contracts unlimited in time:

ABGB: A tenancy unlimited in time is terminable by either party by giving notice of termination without reference to any grounds of termination on four week`s notice. Tenancies

[76] §§ 23 et seq. „Verordnung Standes- und Ausübungsregeln für Immobilienmakler"; BGBl. Nr. 297/1996, last amendment BGBl. II Nr. 490/2001.

unlimited in time can further be terminated, without a period of notice, by termination under exceptional circumstances (§ 1117 ABGB et seq.).

MRG: The lessor can hand in his notice of termination by judicial decree only for an important reason for termination (listed in § 30 par. 2 MRG). The lessee has a right to terminate as well by judicial decree if he complies with the period of notice.

Question 6: Contract Unlimited in Time

a) L and T have concluded a tenancy contract which does not contain any limitation in time. Under which conditions and terms is L allowed to give notice? In particular: Can L give notice if she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?

b) Let us assume that in a trial, L wins a title for eviction which acquires *res iudicata* effect. How will the execution of the title be normally enforced? Does T have any legal defences in the execution procedure if she does not find another apartment and risks becoming homeless once the title is executed?

a) ABGB: Contracts unlimited in time are terminable (according to § 1117 ABGB) by the landlord by notice of termination (without reference to any grounds for termination). Contracts unlimited in time can be further terminated without notice (period of time) by termination under extraordinary circumstances.

Tenancy agreements, to which the **MRG** applies: (Very strong restrictions in § 30 MRG!): The lessor can hand in his notice only for an important ground for termination listed in § 30 par. 2, as for instance if building is due for demolition (fig.14)[77], demolition or reconstruction/alteration in the public interest[78] (fig.15) or the need to use the apartment for one´s own personal use, or that of family members (fig.12)[79]. Fig.12, the need for personal or family use, is construed extremely narrowly by the courts.

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[77] OGH in *EvBl* 1976/108. (Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 30 MRG, note 53). It is a prerequisite for this termination ground (fig. 15) that the district administration has noticed („bescheidmäßig festgestellt") after a balancing of interests that the planned construction („Neubau") or structural alteration to a house („Umbau") benefits the public interest. Recognised interests include urban renewal („Assanierungszwecke"), procurement of living accomodation („Wohnraumbeschaffung"), the provision of sufficient medical care via extensions of private hospitals (VwGH in *Miet.* 25.289/2) as well as the construction of student hostels (VwGH in *Miet.* 47.410) and garages (VwGH in *Miet.* 38.483).

[78] VwGH in *Miet.* 22.354/1. (Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 30 MRG, note 54).

[79] OGH in *Miet.* 31.374/38.(Vonkilch in: Hausmann/Vonkilch (ed.), *Österreichisches Wohnrecht* (2002), § 30 MRG, note 111).

b) If the landlord brings an action for eviction (termination is only possible by judicial decree; "gerichtliche Kündigung"), he can additionally claim the rent due until the service of the writ as well as place a charge on movable goods (generally called impounding - "pfandweise Beschreibung"). The lease is terminated then. A lessee is not liable for rent becoming due after he has been evicted from the premises by the bailiff ("Gerichtsvollzieher"). The MRG as well as the EO provide that a tenant can file a petition for a postponement of eviction if he/she does not find another apartment and risks becoming homeless once the order is executed (§ 45 EO)[80].

Levying the distress: The bailiff ("Gerichtsvollzieher") distrains as agent of the landlord and is authorized to act as a bailiff via a certificate in writing (applying to the particular distress) under the order of a county court judge (Bezirksrichter). The process of distress consists of three stages: entering the premises, a seizure of goods and the subsequent securing of the goods (§§ 253 et seq. EO). The levying of an execution upon the goods of a tenant places them in custodia legis. The bailiff must give to the landlord who brought the action for eviction a report on the payments received and on the goods secured in executing his mandate. Statute law (§§ 253 et seq. Exekutionsordnung) requires that the tenant receive some form of list or outline of what items have been removed, and the remaining amount of unpaid rent. An evaluation of the goods distrained may be necessary as a condition precedent to a sale, first, when the tenant or owner of the goods distrained by writing requires such an appraisal to be made, and secondly, when the tenant or owner of the goods distrained so requires. If it is required, those performing the evaluation must be reasonably competent, though not necessarily professional appraisers, and they must be disinterested persons.

Any goods distrained for rent, which have not been demanded ("exzindiert"), as belonging to a third party, may be sold for satisfaction of the rent, for the best price that can be obtained (§ 249 EO).

Question 7: Contract Limited in Time and Termination

L and T have concluded a contract limited to one year. Under which conditions and terms is such a contractual stipulation possible?

The limitation is effective according to § 1090 ABGB[81]. A lease granted for the use of business premises can be limited at will (§ 29 par. 1 fig.3 lit.a MRG); leases granted for the use of flats let as dwellings can only be limited to three years or more in written form [§ 29

[80] Angst/Jakusch/Pimmer, *Exekutionsordnung* (2004), 14nd ed, § 349 EO, E 127.

[81] OGH in *Miet*. 7.832; LGZ Wien in *Miet.* 22.108.

par. 1 fig.3 lit.b MRG – see chapter a)i)]. In this latter case (flat) the time limit is ineffective, a contract unlimited in time is thereby concluded.

Question 8: Justification For Time Limit

a) L and T have concluded a contract limited to one year with automatic renewal for another year, provided that no party has given notice three months before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, three months before the annual deadline, L gives notice of termination without alleging any reasons. Is this lawful?

b) Does the restriction of notice under a) (which is possible only once per year) apply to T, too?

a) If the **ABGB** applies to the tenancy agreement: It is possible to renew the contract on the same terms as the original lease. The new lease contains clauses identical with those in the original lease (§ 1115 ABGB with some exceptions to this general rule)[82].

If the **MRG** applies: Contracts validly limited to one year (business premises, not flats) with automatic renewal for another year become contracts unlimited in time and duration if the lease is neither terminated by the tenant nor the landlord (§ 29 par. 3 MRG).

b) The restriction of notice also applies to the tenant. One can depart from that by agreement (in favor of the tenant)[83]. The lessee can terminate the contract for important reasons. The tenant of a flat has the mandatory right to terminate a contract limited in time after expiry of one year (§ 29 par. 2 MRG).

Question 9: Termination in Special Cases

L and T have concluded a contract with or without time limit.

a) L dies. Can her heirs give immediate notice to T?

b) The house is sold. Has the buyer a right to give anticipated notice?

c) A bankruptcy procedure is carried out against L at the end of which the house is auctioned off. Can the buyer give anticipated notice?

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[82] OGH in *Miet.* 7.530; *JBl* 1961, 234; 1987, 659; (Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1115 ABGB, note 1).

[83] OGH in *WoBl* 1998/2.

a) The death of a party does not automatically annul the lease (§§ 1116a ABGB; 14 par. 1 MRG)[84]. L´s heirs are not in a position to give immediate notice to T.

b) and c) On completion of a sale of property the seller is not released from the tenancy contract merely by virtue of the sale if the tenant already lives in the flat. Then the purchaser becomes bound by the lessor's duties of tenancy, except to the extent that he or she can terminate the tenancy agreement, at least according to § 1120 ABGB[85]. This provision gives the purchaser the right to terminate the tenancy agreement by notice of termination if the premises have been handed over. The tenant then is entitled to compensation by the former owner (lessor) (§ 1120 second sentence ABGB). The tenancy agreement binds the new owner only if the contract was registered in the land register according to § 1095 ABGB.

The MRG nevertheless does not provide such a right of termination[86]. Contracts limited in time are converted into contracts unlimited in time and duration.[87] The same applies to the (successful) purchaser at compulsory auctions (§ 1121 ABGB).[88]

Question 10: Tenancy "For Life"

L rents an apartment to T, with the contract containing the explicit clause "for life". May, and if so under what circumstances, L give notice before T's death?

a) **ABGB**: A lease for life without mentioning the life which was to define its duration is deemed to be for the life of the lessee. The "for life" clause will be interpreted as denying the lessor the right to give notice of termination.[89]

b) **MRG**: The MRG considers such a "tenancy agreement for life" a contract unlimited in time. The contract can be terminated by the landlord on 4 weeks` notice provided that an important ground for termination exists (§ 30 MRG).

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[84] OGH in *JBl* 1992, 454. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 228 FN 215).

[85] OGH in *WoBl* 1990, 43 (Apathy); *SZ* 63/190; *RdW* 1992, 304; *SZ* 64/97; *ecolex* 1994, 226; *WoBl* 1997, 139; (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 230 Fn 225). Bydlinski P., Der Übergang von „vertragsbezogenen" Gestaltungsrechten bei Veräußerung der Bestandsache am Beispiel der Vermieterkündigung, *JBl* 1997, 151; Iro, Probleme des Eintritts des ausserbücherlichen Erwerbers in das Bestandverhältnis, *WoBl* 1997, 117.

[86] OGH in *JBl* 1986, 386 (P. Huber); *WoBl* 1991, 59 and 73 (Würth), *EvBl* 1999/116. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 231 FN 237).

[87] Klang/Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* (1954) 2nd ed., vol. V, 129ff; Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol. I, § 1120 ABGB, note 5; Hoyer, Aufkündigung von Bestandverhältnissen bei Miteigentum, *WoBl* 1991, 154. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 230 FN 228).

[88] Schaar, *Rechte und Pflichten des Erstehers bei exekutivem Liegenschaftserwerb* (1993), 66 ff; OGH in *SZ* 69/246. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 230 FN 230).

[89] OGH in *Miet* 19.084/6, 34.193; *JBl* 1973, 259. (Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VI, § 1092 ABGB, note 66).

Question 11: Termination under Exceptional Circumstances

L and T have concluded a tenancy contract with or without time limit. Under what conditions and terms may one party give "exceptional" notice in unforeseen circumstances?

§§ 1162 and 1210 ABGB provide for every continuous obligation (whether limited in time or unlimited) a general possibility to terminate in case of the following "exceptional circumstances", namely breach of confidence (lost confidence in the other party)[90], frustration of contract[91], serious impairment of performance.

1. Contract limited in time:

1.a) **ABGB**: Grounds for termination under exceptional circumstances are unhealthy (insanitary) housing conditions[92], unuseableness[93], harmful use of the premises, arreas in rent payment and the like (§ 1117 ABGB for the lessee, § 1118 for the lessor).

1.b) **MRG**: Exceptional circumstances referred to in §§ 29 par. 1 fig.5, 30 MRG are

the tenant´s breach of contract[94] ("Vertragsverletzungen des Mieters" § 30 par. 2 fig.1-3, 7: ["arrears of rent; Mietzinsrückstand" (fig.1); "failure to perform a service; Nichterbringung von Dienstleistungen" (fig.2); "adverse use; Erheblich nachteiliger Gebrauch, illegal conduct; unleidliches Verhalten, illegal act; strafbare Handlung" (fig.3), „adverse use of business premises; nicht- bzw. nicht entsprechende Benützung von Geschäftsräumlichkeiten") (fig.7)]

or lack of need on the side of the tenant[95] ("mangelnder Bedarf des Mieters" § 30 par. 2 fig.4-6) ["subleasing; Weitergabe" (fig.4), "death of the former tenant; Tod des Vormieters" (fig.5), "non-use of a flat; Nichtbenützung einer Wohnung" (fig.6)], the landlord´s own or family need for housing[96] ("Eigenbedarf des Vermieters" § 30 par. 2 fig.8-11) ["the landlord´s own need for housing without procurement of replacement; Eigenbedarf an Wohnung ohne Ersatzbeschaffung" (fig.8), „the landlord´s own need for housing with procurement of

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[90] OGH in *SZ* 60/218 (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 8); Fenyves, *Erbenhaftung und Dauerschuldverhältnis* (1982), 207 et seq.; Fenyves, Bewegliches System und die Konkretisierung der „wichtigen Gründe" bei Auflösung von Dauerschuldverhältnissen, in: *Das bewegliche System im geltenden und künftigen Recht* (1986), 141.

[91] Harmann, *Wegfall der Geschäftsgrundlage bei Dauerschuldverhältnissen* (1979), 128 et seq.; Fenyves, Der Einfluss geänderter Verhältnisse auf Langzeitverträge, *Gutachten für den 13. ÖJT, vol. II/1* (1997), 97 et seq.

[92] OGH in *WoBl* 1990, 12. (Koziol/Welser, *Bürgerliches Recht*, 12th ed, vol. II (2002), 223 FN 159).

[93] OGH in *JBl* 1990, 375. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 223 FN 158).

[94] OGH in *JBl* 1991, 321, *WoBl* 1992, 190; *SZ* 67/72; *WoBl* 1997, 50 (Dirnbacher); *ecolex* 1998, 308; *JBl* 1999, 333. (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 225 FN 181).

[95] OGH in *Wobl* 1991, 193; *WoBl* 1992, 20; *WoBl* 1993, 139; *ecolex* 1996, 520 (Hausmann). (Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 226 FN 189).

[96] Gimpel-Hinteregger, „Notstand" und „Existenzgefährdung" – Die Rechtsprechung des OGH zum Kündigungsgrund des dringenden Eigenbedarfs nach § 30 MRG, *JBl* 1998, 16; Bydlinski M., Zur Eigenbedarfskündigung bei der Geschäftsraummiete, *RZ* 1988, 102.

replacement; Eigenbedarf an Wohnung mit Ersatzbeschaffung“ (fig.9), „the (landlord´s) employees` need for housing; Bedarf für Betriebsangehörige“ (fig.10),“the state´s need for head offices; Verwaltungsbedarf“ (fig. 11)], termination of subleases („Kündigung von Untermieten“ § 30 par. 2 fig.12), important grounds for termination stipulated in the contract in writing[97] (“ein schriftlich als Kündigungsgrund vereinbarter Umstand tritt ein“ § 30 par. 2 fig.13), premises due for demolition[98] (“Abbruchreife des Hauses” § 30 par. 2 fig.14), deconstruction/alteration in the public interest[99](“Umbau im öffentlichen Interesse” fig.15); if the tenant of a category D-flat refuses an improvement of the standard conditions („wenn der Hauptmieter einer Kategorie D-Wohnung eine Standardverbesserung verweigert“ § 30 par. 2 fig.16) etc.

2. Contract without time limit:

2.a) **ABGB**: The right to terminate is based on §§ 1117, 1118 ABGB.

2.b) **MRG**: § 30 par. 2 MRG as explained above: The lessor can hand in his notice only for an important ground for termination listed demonstratively in § 30 par. 2 ABGB (see question 11. 1) b) and chapter b) aa) i)).

2.c) A contractual clause according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents is void (§ 1118 ABGB (there has to be a “Einmahnung” – express demand for the outstanding rent payment by the landlord); §§ 29, 30 par. 2 fig.1 MRG: termination by legal proceeding).

Set 3: Rent and Rent Increase

Short General Introduction

As counter-performance for using the rented object it is the tenant’s obligation to pay the rent. According to the Austrian ABGB rent agreements are subject to only the general restrictions of *laesio enormis* (§ 934 ABGB) and immorality/unconscionability (usury, “Wucher”, § 879, par. 2 fig.4 ABGB). The MRG protects the main tenant by narrower limits since in certain cases only an "adequate" main rent can be agreed, which is calculated by size, situation, equipment etc. (§ 16 par. 1 MRG). In other cases particularly for “Altbauwohnungen” (old apartments) the upper limit lies even lower and follows a "Richtwertsystem” (reference value system): The Attorney General fixes the "reference value" for every federal state under

[97] Lenneis, Gedanken zum vereinbarten Kündigungsgrund des § 30 par. 2 fig.13 MRG, *AnwBl* 1992, 269.

[98] OGH in *EvBl* 1976/108; *Miet* 27.354; 23.349; 23.351; 42.353; 35.377. (Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 30 MRG, note 53).

[99] VwGH in *Miet.* 22.354/1; *Miet.* 25.289/2. (Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 30 MRG, note 54).

consideration of the building and ground costs per square meter orientated by an average standardized apartment (§§ 1, 3 RichtWG[100]). This is a fictitious apartment in a certain situation and with certain equipment features. The concrete permitted rent arises from additions to and reductions from the reference value which is calculated by a comparison of the situation and equipment with the standard of the standardized apartment. Since 1.4.2002 the reference value for Vienna for example amounts to Euro 4.24 per square meter and month and to Euro 5.85 for Salzburg. In the case of the transgression of the upper limits the exceeding rent agreed on is invalid and can be claimed back within three years (§ 16 par. 8 MRG). The rent for objects which are located in the rented main object have to be adequate as well, just like other special performances of the landlord (§ 25 MRG). Sub-tenancies must not exceed the main rent around more than half.

In Austrian practice, frequently invalid agreements ("Ablöse", "key money") are concluded besides the valid contract (§ 27 MRG): These are payments of the new tenant or the landlord to the earlier tenant for giving up the rented object. Treated as equivalent to this are payments - without an equal service in return – paid to the landlord for not giving notice even if there was a reason, or immoral performances, which are not in any relationship to the agreement.[101] The rest of the contract remains effective.[102]

Question 12: Settlement Date and Modes of Payment, Right of Distraint

When is the rent due? Is there any restriction on modes of payment?

Does and if yes, under which conditions, have L a statutory lien [right of distraint (pledge)] on T's furniture and other belongings to cover the rent and possible claims against T?

Outside the scope of application of the MRG, the rent is judged according to § 1100 **ABGB**, provided that nothing else was agreed on[103]: If the object is rented for one or several years, it is due twice a year, at shorter periods after expiry of the same. In the scope of application of the **MRG** the tenant has to pay the rent in advance on the first day of every month, again provided that no other date for payment is determined by the parties (§ 15 par. 3 MRG). This rule on payability is optional; it is possible to effectively agree on a longer period, such as for a half or also for a whole year. In case of delay the general rule of § 918 ABGB (delay) is not applied, but according to § 1333 ABGB the landlord may claim overdue interest and give

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[100] BGBl. Nr. 800/1993, last amendment BGBl. I Nr. 113/2003.

[101] OGH in *SZ* 68/148.

[102] OGH in *SZ* 63/23.

[103] *Miet*. 47.242.

notice of termination after reminding the tenant (1118 ABGB resp. § 30 par. 2 fig.1 MRG). If there is an "index-clause" the landlord may choose to relate the interest either to the due date or the payment day.[104] The claim for rent and operating costs has a prescription period of three years (§ 1486 fig.4 ABGB), in which the period for operating costs starts to run with the end of the accounting period.[105] Regarding the mode of payment there are no special legal restrictions. Particularly the rent does not have to be quoted in money or other recurring performances.[106] It can rather be rendered in one single payment[107], by a performance in kind ("Naturalleistung")[108] or by work performances[109] and can furthermore be performed in advance[110].

According to § 1101 ABGB the landlord has a statutory lien ("gesetzliches Pfandrecht") on items of furniture ("Einrichtungsgegenstände") and on movable property ("Fahrnisse") which were brought in by T or by T's family members living with him in a common household, as long as those objects are not legally excluded from lien. The lien expires when the objects are removed before beeing declared in a special protocol ("pfandweise Beschreibung")[111], except this (the removal) happens because of a judicial order and L files his right within three days.

Question 13: Requirements for Rent Increase

What are the ordinary substantive and procedural requirements for an increase in the rent? Are there rules on a maximum increase in private and criminal law (e.g. on profiteering)?

Focusing on the requirements for an increase in the rent, it has again to be asked if the MRG is applicable or not. Outside the MRG the rent can be usually agreed without restrictions ("freie Mietzinsbildung"). Nevertheless, there is no way for the landlord to increase the rent one-sidedly and take legal action for an "adequate" increase. He has to give notice of termination in a motion at court and make a new agreement with the tenant.[112] In case the

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[104] *SZ* 42/182; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1100 ABGB, note 2.

[105] Express regarding the claims of house supervisor against the landlord, *SZ* 52/137; *Miet.* 35.275/10; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1100 ABGB, note 2.

[106] *Miet.* 9.369; LG Linz 27.156.

[107] *Miet.* 6.958: Objekt-Investitionen; 19.084/6: Errichtungsbeitrag; 29.143; *JBl* 1973, 259: Bauwerkseinrichtung; *Miet.* 39.086: Wohnungsbau.

[108] *Miet.* 6.956; OLG Wien 15.074; *SZ* 30/17; *Miet.* 40.091.

[109] See § 28 MRG; furthermore 6.957 and *JBl* 1969, 89: Pflegedienst; *SZ* 29/73: Hausgehilfentätigkeit; *WoBl* 1995/53: Hausbesorger- and Hausverwaltertätigkeit.

[110] *Miet.* 9.369: Handwerksarbeiten; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1092 ABGB, note 59; Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol. I, § 1092 – 1094 ABGB, note 17 and 18.

[111] See § 253 Exekutionsordnung (EO, Law on Execution).

[112] *Miet.* 2.206; *JBl* 1961, 158; LGZ Wien *Miet.* 15.055.

tenant refuses to consent to the increased rent requested by the landlord rent, but continues to use the object, he has to pay an adequate compensation for use (§ 1431 ABGB) which will be calculated in reference to the original motion of the landlord.[113] Paying the increased rent for longer than half a year is regarded as an implied agreement.[114]

A fixed flat rent ("Pauschalmietzins") cannot be increased under consideration of increased incidental expenses ("Nebenausgaben"), that are divided in single components[115] but can be requested if the operating costs ("Betriebsausgaben") and public taxes ("öffentliche Abgaben") have increased during several years.[116] In case the landlord does not assert his right to increase the flat rent despite increased operating costs and public taxes in several years, an implied renunciation for the past could be assumed.[117] However, an implied renunciation of the right for the future cannot be assumed, even if the landlord does not increase the rent for fourteen years – provided there are no special circumstances.[118] Assuming an "index-clause" was agreed and the landlord constantly has accepted the lower basic rent, it can also be assumed he renounces the difference amounts for the past.[119] A subsequent demand for the increased rent is denied because of a violation of loyalty and good faith, if the landlord did not request the increase although he had the possibility to do so.[120]

Within the scope of application of the MRG the rent can be determined by party agreement only in certain limits (§ 16 MRG). Nevertheless it is possible and permitted to link an increase in the rent to future events[121], such as the completion of a subway station[122], the construction of an elevator[123] or the termination of a life annuity insurance[124]. Apart from those agreements the landlord may increase the rent under the title of § 18 MRG. This is possible if the landlord is obliged to undertake immediately upcoming greater preservation works and if the deposits of the last ten years and the future rent in a certain period (not more than ten years, "Verteilungszeitraum") are not sufficient.[125] The calculation of the possible increase or the difference is complicated in detail. According to its wording § 18 MRG is only applicable to

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[113] *SZ* 22/88; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1100 ABGB, note 10.

[114] *Miet.* 17.114.

[115] LGZ Wien *Miet.* 18.159; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1100 ABGB, note 10.

[116] See Question 17: Utilities.

[117] *ImmZ* 1978, 27 and 351; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1100 ABGB, note 11.

[118] *Miet.* 36.131/46; *Miet.* 18.156/21; 19.098/9.

[119] *JBl* 1958, 362; *Miet.* 18.157; 26.121/4; even stricter § 16 par. 9 MRG.

[120] *Miet.* 18.158, LGZ Wien 21.152; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1100 ABGB, note 12.

[121] *WoBl* 1999/73 = *immolex* 1999/73.

[122] *Miet.* 47.257.

[123] *Miet.* 47.260.

[124] *Miet.* 43.190/17; see Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 16 MRG, note 9.

[125] Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 18 MRG, note 1.

immediately "upcoming" works, in practice (court decisions) an increase is also possible for already executed preservation works.[126]

Furthermore an increase is possible if the main tenant of business premises sells his enterprise and this is continued by the buyer. The buyer becomes the tenant's successor by law (§ 12a par. 1 MRG). Seller and buyer have to announce the enterprise disposal, however, the disposal alone already entitles the landlord to increase the rent, depending on the type of the business activity performed in the rented object.[127] This restriction does not apply if the enterprise buyer changes the manner of the business activity. The increase is only gradually carried out when the enterprise buyer belongs to the circle of the legal heirs of the seller.[128] A renunciation of the possible increase towards one tenant must not burden other tenants. The landlord has therefore to pay for the renounced part himself.[129] With respect to objects in category D ("Ausstattungskategorie D" – lowest category) and certain contracts limited in time an increase in rent is excluded by law (§ 18 par. 5 fig.1 and 2 MRG).[130]

The increase in the main rent has to be effected by the persons cited in § 19 MRG (landlord, municipality, administrator according to § 6 par. 2 MRG). According to § 18 MRG only the landlord and the main tenant are parties in the procedure. Several objects on a property form procedurally an economic unity, so that one single application for the increase in rent is sufficient.[131]

The following agreements are invalid and forbidden: The core of the so called prohibition of "key money" clause ("Ablöseverbot" - § 27 par. 1 fig.1) are performances rendered by the tenant for the conclusion of the contract. "Key money" is often demanded as a compensation for the low maximum rents determined by mandatory law. The functional background is therefore located in the protection of the rent restriction regulations against circumvention. A special circumvention intention or other motives are not required, only the missing equivalence of the service in return is relevant.[132] Payments to the landlord (or a third party) for the renunciation of his right of giving notice are forbidden as well.[133] The mentioned agreements are null and void (§ 879 ABGB).[134] A distinction is made between administrative offences and criminal offences (§ 27 par. 5-7 MRG), the latter named are hardly ever applied

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[126] Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 18 MRG, note 2.

[127] Reich-Rohrwig, *Mietzinserhöhung bei Geschäftsraum-Hauptmiete* (1994).

[128] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 209.

[129] *WoBl* 1992/12; Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 18 MRG, note 3.

[130] Vgl Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 18 MRG, note 28 et seq.

[131] *WoBl* 1992/111; Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 18 MRG, note 32.

[132] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 27 MRG, note 23.

[133] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 27 MRG, note 40.

[134] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 27 MRG, note 3.

in practice. The most important state of fact concerns the receipt of performances which violate § 27 par. 1 MRG. The administrative fine rises up to Euro 15.000. The delict can be legally punishable following other laws and regulations (e.g. as a fraud), though.[135]

Question 14: "Index-clause"

Is it possible to contractually link the annual increase of the rent with the annual average increase of the cost of living as established by official statistics?

Variant: Is a progressive rent arrangement, providing for an annual increase of X percent, lawful?

The rent is not linked to an index by law, but it is permitted to link the annual increase of the rent contractually with the annual average increase of the cost of living as established by official statistics (in Austria: "Verbraucherpreisindex")[136] if the additional performance is determined or at least determinable.[137] Fluctuations of up to 5% have to remain out of consideration, fluctuations above 5% have to be taken into account in their entirety.[138]. It can be agreed in the contract that the clause only becomes valid after the prolongation of the contract.[139]

As mentioned before, the MRG limits the maximum permissible rent at the time of the conclusion of the contract and sets restrictions to an increase. Therefore an "index-clause" is necessary and recommended to keep track of the current maximum permissible rent (changed every year) and to compensate higher costs of the landlord.[140] The restrictions of the MRG have to be pointed out again, since they can set limits to such agreements (§ 16 par. 9, § 16a MRG).[141] The upper limit is set by the index of consumer prices ("Verbraucherpreisindex" § 16 par. 6) and the maximum permissible rent (§ 16 par. 1-7 MRG – see General Introduction to Set 3), which may never be exceeded.[142] Any part of the rent exceeding this upper limit is null and void, while the rest of the contract remains valid.[143] The nullity can only be cured if

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[135] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 27 MRG, note 116.

[136] *Miet.* 19.098/9.

[137] *Miet.* 6.278.

[138] LGZ Wien *Miet.* 20.123/65; LGZ Wien *ImmZ* 1969, 167.

[139] § 1114 ABGB, § 29 par. 3 MRG; *Miet.* 20.122; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1092 ABGB, note 64.

[140] The MRG refers in § 16 par. 2 to the "Richtwertgesetz" and the "Richtwertverordnungen" of the federal states to increase the maximum permissible rent annually.

[141] Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1092 ABGB, note 63.

[142] *Miet.* 45.292 = *WoBl* 1995/2; *immolex* 1999/167.

[143] *JBl* 1957, 533; *JBl* 1973, 617; *Miet.* 43.124 = *WoBl* 1991/125.

the exceeding rent is paid by the tenant under knowledge of this nullity.[144] § 16 par. 8 is (unilaterally in favor of the tenant) mandatory law, so the tenant may not renounce his claim in advance.[145]

In any case it is necessary that the landlord demands the increase of the rent in writing and that the tenant can take notice two weeks before the next date of payment.[146] A retroactivity for the increase of the rent, such as it was often practiced in the past, is therefore impossible[147], even if it was stipulated in the contract.[148]

An annual increase of increase of X percent, as mentioned in the variant, can therefore be lawful, as long as the maximum permissible rent of the MRG is not exceeded and the increase does not exceed the upper limit set by the "Verbraucherpreisindex". All increase agreements exceeding these limits are void.

Question 15: Rent Increase by Contractual Amendmend

By ordinary letter, L tells T that the rent will be increased by 10% in three months time to compensate for the general increase of the cost of living. No further justification is provided to support this claim. Without protesting, T pays the increased rent for 3 months without any reservation. After this time only, she gets doubts and consults a lawyer. Can T get some money back? If yes, can T off-set the sum to be repaid against future rent instalments on her own motion without judicial intervention?

The question, if T can get some money back, although she paid the increased rent for 3 month depends on the question, whether the increase was lawful or not.[149] The landlord cannot justify the increase by reference to § 18 MRG, since there were no immediately upcoming greater preservation works to pay for. L cannot refer to an index clause either, if it was not agreed in the contract. A unilateral modification of the contract or a unilateral rent increase by contractual amendment by L is not possible although L's announcement can be qualified as a valid offer for a new contract. As long as the upper limits for the maximum permissible rent are not exceeded, the parties can modify the rent without following special regulations. That means T can theoratically accept L's offer by implied intent such as paying the increased rent.

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[144] *Miet.* 39.321.

[145] Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 16 MRG, notes 62 and 63.

[146] *WoBl* 1998/231.

[147] *WoBl* 1991/50.

[148] *WoBl* 1989/44; Schwimann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 16 MRG, notes 56 and 57.

[149] It is assumed, that the MRG is applicable.

But even in case of a valid modification, T can claim the rent exceeding the maximum permissible rent (§ 1431 ABGB, condictio indebiti), unless T knew of the nullity of the exceeding amount.

The limitation of actions is three years for unlimited contracts (§ 27 par. 3 MRG) or ten years if the rent is time limited (§ 16 par. 8 MRG). The excessive rent can be claimed together with declaratory suits in a special procedure ("Außerstreitverfahren").[150] Instead of suing T can set off against future rent instalments under general principles (i.e. when they are due; § 1438 et seq. ABGB) without judicial intervention.

Question 16: Deposits

What are the basic rules on deposits?

The English expression "deposit" can cover two meanings in the Austrian legal system. (A) On the one hand, payments made by the tenant to the landlord for the latter's future claims because of illegal damages inflicted to the rented object by the tenant can be meant ("Kaution"). (B) On the other hand, differences between income and expenses that have to be put aside for necessary preservations works ("Mietzinsreserve") can be covered as well.

(**A**) A "**Kaution**" is an agreement in the contract that shall create a fund for possible future claims of the landlord that may arise because of a contractually prohibited or illegal usage of the rented object by the tenant. The tenant has to pay a certain amount so that claims of the landlord other than claims for rent (like damages[151]) are secured. According to the court decisions such payments are limited to the amount of six monthly rents within the scope of the MRG. Any exceeding payments violate the "key money" prohibition ("Ablöseverbot") of § 27 MRG[152] except if there are special circumstances that justify a higher security of the landlord.[153] The "Kaution" has to be paid back to the tenant at the end of the rent if no claims arose.

(**B**) The basic rules on "**Mietzinsreserven**" on the other hand can be found in § 20 par. 2 MRG. These are defined as the difference between income (main rent, rent for other objects, 25% of advertising revenues of the roof or façade, contributions to preservation works or improvements) and expenses (costs of preservation works or improvements, amounts for wealth tax, amounts for certain repayments, etc.) of one year. Since the 3rd WÄG

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[150] *WoBl* 1993/101; Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 27 MRG, note 92; see Schwi-mann/Schuster, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 16a MRG.

[151] Graf, Die Pflicht des Vermieters zur Veranlagung und Verzinsung der Barkaution, *WoBl* 1990, 88.

[152] See introduction to Set 3.

[153] OGH in *WoBl* 1997/66 (Hausmann) = EWr I/27/129 et seq. See Wolf P., Die Kaution im Mietrecht, *WoBl* 1999, 343 et seq.

("Wohnrechtsänderungsgesetz"), there is no obligation for repayment of "Mietzinsreserven". Contributions to preservation works or improvements therefore can be regarded as an increase of the rent.[154] Interim arrangements are scheduled for past payments (before the 3rd WÄG) to the landlord (Art. II section II fig.4 3. WÄG).[155] Consequently in a change of the owner, the former owner has to hand out the invoice documents, but not amounts rising out of these calculations, unless agreed differently.[156]

Question 17: Utilities

What are the general rules on utilities? Which utilities may the landlord make the tenant pay by contractual stipulation? Is it legal to establish in the contract a monthly lump sum to cover certain or all utilities?

Again, utilities can be understood in a double meaning. Either (A) general expenses or operating costs can be meant ("Betriebskosten" and "öffentliche Abgaben") or (B) performances to keep the condition of the object ("Erhaltungsarbeiten") or which improve it ("Verbesserungsarbeiten").

(**A**) A splitting of the rent into main rent and "Betriebskosten" and "öffentliche Abgaben" is unknown to the general rules of the **ABGB**. According to § 1099 ABGB as general rule all expenses and public charges have to be borne by the landlord. It is assumed that the landlord takes these expenses into account when he calculates the rent.[157] A different reallocation of expenses requires a determination in the contract.[158] § 1099 ABGB is replaced by cogent law when applying the **MRG**. "Betriebskosten" (§ 21 par. 1 MRG) and "öffentliche Abgaben" (§ 21 par. 2 MRG) are next to the main rent part of the rent (§ 15 par. 1 fig.2 MRG). The following costs are finally included in "Betriebskosten": costs for water supply ("Wasserversorgung"), chimney sweep ("Rauchfangkehrung"), canal dues ("Kanalräumung"), garbage collection ("Unratsabfuhr), pest control ("Schädlingsbekämpfung"), lights ("Beleuchtung"), insurance ("Versicherung").[159] "Öffentliche Abgaben" are tax on land and buildings ("Grundsteuer") and several taxes of the states ("Landesabgaben") if they may be passed on

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[154] Tades/Stabentheiner, Das 3. Wohnungsrechtsänderungsgesetz, *ÖJZ* 1994, special issue 1A, 19 et seq.; Korinek St., Rückzahlung und Verzinsung von EVB, *WoBl* 1998, 129; see OGH in *SZ* 69/99.

[155] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 209.

[156] *Miet.* 40.080.

[157] Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1099 ABGB, note 1.

[158] Palten G., Die mietrechtliche Betriebskostenüberwälzung bei Wohnungseigentum, *ÖJZ* 1982, 645 et seq. Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3nd ed., vol. I, § 1099 ABGB, note 1.

[159] Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 21 MRG, notes 4, 11, 13, 16, 22, 24 and 28.

the tenant.[160] The costs can be paid as a flat rate (in the sense of a lump sum) which is calculated by the costs of the previous year (§ 21 par. 3 MRG, "Jahrespauschalverrechnung") or every month according to the actual accounts (§ 21 par. 4 MRG, "Einzelabrechnung").[161]

(**B**) Although "Betriebskosten" and "öffentliche Abgaben" are listed finally, it may be difficult to delimit them from the possible second meaning of "utilities", the "Erhaltungsarbeiten" and "Verbesserungsarbeiten", which contain non-recurrent performances that have to be borne by the landlord[162]. Following § 1096 par. 1 ABGB the landlord has to keep the rented object in useable condition whilst T has to inform L immediately about necessary works (§ 1097 ABGB).

In the scope of application of the MRG it has to be distinguished between performances to keep the condition of the object ("Erhaltungsarbeiten") and performances that lead to an improved object ("Verbesserungsarbeiten"). L has to take care according to the legal, economic and technical conditions and possibilities that the house, the rented objects and the plants serving the common use of the residents of the house remain unchanged in the respectively local standard (§ 3 MRG). The tenant on the other hand has to service the rented object ("Instandhaltungspflicht", § 8 MRG par. 1 sentence 2) and inform the landlord about serious damages immediately (§ 8 par. 1 sentence 3 MRG).

L has to carry out the useful improvements in the house or single rented objects according to the legal, economic and technical conditions and possibilities as far as this is useful with regard to the general preservation condition of the house. Priority has to be given to useful improvements in the house, and not to useful improvements in single rented objects (§ 4 MRG). The connection and other technical redesign of two objects (change of category) are considered as useful improvements as well. The resulting new object has to be offered to the former tenant for rent (§ 5 MRG).

The main tenant has to inform the landlord about essential changes to the object, even about improvements. If not rejected within two months, the landlord's consent is assumed. For certain improvements the landlord cannot refuse his consent if the improvement corresponds to the respective level of the technological development (§ 9 MRG). Any preservation or improvement works have to be paid using the "Mietzinsreserve"[163] of the last ten years, including possible subsidies (§§ 3 par. 3; 4 par. 3 MRG).[164] Costs resulting from new purchases of rented objects or because of rebuilding may only be paid with these deposits as

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[160] Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 21 MRG, note 36.

[161] See Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 21 MRG, notes 38 and 55.

[162] Schwimann/Egglmeier/Jäger, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 21 MRG, note 3.

[163] See Question 16: Deposits.

[164] Koziol/Welser, Bürgerliches Recht, 12th ed., vol. II (2002), 209.

far as they are necessary for preservation or improvement.[165] For those cases in which the "Mietzinsreserve" is not sufficient it is necessary raise outside capital, if this can be recovered through ordinary rent income until the expected date of the repetition of the work. Credit costs are considered as costs for preservation. If not being financable this way either, the preservation works are lined-up by urgency, however certain works have to be carried out in any case without consideration of cost recovery (§ 3 par. 3 MRG).[166] Such privileged preservation works are those, that have to be done because of an administrative order, that are necessary to avoid dilapidation or that are vital to sanitary equipment or water and energy supply (§ 3 par. 3 fig.2 MRG)[167]. As mentioned above it is possible to increase the rent for immediately upcoming or finished[168] greater preservation works for a limited time period (§ 18 MRG).[169] If the demanded preservation work is not privileged, the landlord can only be forced to undertake those works, if the rent is increased (§ 6 par. 1 and 4 MRG).[170]

Useful improvements have to be financed only if they can be afforded through deposits of the last ten years or if the majority of the tenants agree on a funding of the uncovered costs and the remaining minority is not affected financially or impaired in any other way (§ 4 par.3 MRG). An increase of the rent for improvements is not provided by law.[171] In case the landlord desists from undertaking the incumbent performances, the court can force the landlord to fulfil his obligations on application by the majority of the main tenants or by the municipality (§ 6 MRG, § 27 par. 6 MRG: under threat of severe fines and imprisonment).[172]

An additonal monthly lump sum to cover the costs of performances that have to be carried out by L because of his "Erhaltungspflicht" can be legal as long as the maximum permissible rent is not exceeded.[173]

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[165] Koziol/Welser, Bürgerliches Recht, 12th ed., vol. II (2002), 209.

[166] Koziol/Welser, Bürgerliches Recht, 12th ed., vol. II (2002), 209 et seq.

[167] OGH in *Miet.* 41.191/29; *WoBl* 1991, 11 (Call) and 166; Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 210.

[168] OGH in EvBl 1985/138.

[169] OGH in *Miet.* 41.285/16; *WoBl* 1992, 155 (Call); *WoBl* 1993, 134 (Würth). Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 210.

[170] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 210.

[171] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 210.

[172] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 210.

[173] See Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 8 MRG, note 45.

Set 4: Obligations of the Parties in the Performance of the Contract and Standard Terms

Short General Introduction

Standard Terms are subject to §§ 864a, 879 par. 3 ABGB and to the special rules of interpretation of § 915 ABGB and § 6 KSchG (Consumer Protection Act).

According to § 864a ABGB ("Einbeziehungskontrolle") special attention has to be paid when General Terms and Conditions or Standard Terms are used since those Terms are in general not the result of negotiations and typically are not read by the other party. They are provided by one party and are used mainly to the purpose of rationalization.[174] Standard Terms of one party only become part of the contract if the parties agree so and the other party has the possibility to read the Standard Terms under reasonable conditions. According to § 864a ABGB, unusual clauses in Standard Terms of one party do not become part of the contract if the other party could not expect such provisions under the circumstances (e.g. "small print") and if the clauses are unfavourable to the other party.[175] § 879 par. 3 ("Inhaltskontrolle") provides protection against clauses which do not define the main performance of one of the parties and which worsen the position of the other party unreasonably. Such clauses are null and void.[176] In consumer contracts § 6 KSchG applies which lists a huge number of forbidden unfair contract clauses.

Additionally unclear clauses are interpreted against the party who used it (§ 915 ABGB, "Unklarheitenregel").[177] Assuming the landlord was acting in a commercial way because the transaction is part of his business activity and that the tenant was a consumer, § 6 par. 3 KSchG has to be applied. The commandment of transparency extends nullity to incomprehensible conditions.[178]

In relation to § 915 ABGB it has to be cleared up if the unclear condition can be interpreted in favour to the customers and only if this attempt should fail the clause has to be regarded as null and void.[179]

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[174] Schwimann/Apathy, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 864a ABGB, note 1 et seq.

[175] See Rummel/Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 864a note 1 et seq.

[176] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 120 et seq; Rummel/Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 879 ABGB, note 231 et seq.

[177] Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 915 ABGB, note 15 et seq.; Rummel/Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 915 ABGB, note 1 et seq.
Schwimann/Apathy, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 864a ABGB, note 12.

[178] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 123.

[179] See Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 99.

Question 18: Control of Standard Terms

What kind of control exists for clauses contained in standard contracts used by a landlord acting in a non-commercial capacity?

Clauses contained in standard contracts ("Vertragsformblätter") are void (invalid) or voidable because of the rules mentioned in the introduction. Since the landlord acts in a non-commercial way the interpretation of the contract is only subject to the "Unklarheitenregel" of § 915 ABGB, § 6 KSchG is not applied. §§ 864a and 879 ABGB are applicable.

Question 19: Frequent Standard Terms

Are these clauses lawful? If not, may the standard terms be challenged by a tenants' association, too?

The terms of a standard contract used by L (acting in a non-commercial capacity) provide that:

a) The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorized by a judge.

Such a clause is not unusual and does not lead to a gross disadvantage for the other party (see § 879 par. 3 ABGB). Since setting-off can be excluded in contracts[180] the clause can be validly included in the contract. The right of retention, to withhold or to set-off is mandatory only within the scope of application of the KSchG (§ 6 par. 1 fig. 6-8 KSchG).

b) The cost of small repairs, up to Euro 100,- per annum, has to be borne by the tenant.

According to the MRG the costs of preservation of the rental object ("Erhaltungsarbeiten", § 3 MRG) have to be borne by the landlord and minor works to service the apartment have to be undertaken by T ("Instandhaltungspflicht", § 8 par. 1 sentence 2 MRG). T must bear small repairs up to Euro 100,-, but has other than L no duty to replace the impaired objects with new objects[181]. Preservation works of L have to be paid by using the "Mietzinsreserve"[182] (§ 20 par. 2 MRG). Clauses providing different rules are invalid because of the mandatory nature of the MRG rules. To both contracts within and outside the scope of the MRG § 1096 ABGB applies, which states that it is the landlord's duty to keep the rental object in usable condition at his own cost/expense. Outside the scope of the MRG a shifting of the costs to the tenant is possible, because there the provision of § 1096 ABGB is not considered mandatory.[183] Within

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[180] See Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 101 et seq.

[181] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 8 MRG, note 32.

[182] See Question 16: Deposits and Question 17: Utilities.

[183] Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 1096 ABGB, note 5 et seq.

the scope of the MRG costs can be shifted as long as the maximum permissible rent is not exceeded.

c) At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.

The general rule of § 1109 ABGB defines, that the tenant has to give back the rented object in the same condition as he received it. As this is an optional rule, T can agree to give back the object on his own costs even in a better condition as he received it.[184] Therefore a term that provides that at the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant is lawful following ABGB.

Since the courts say that painting is no performance to keep the condition of the object ("Instandhaltungsarbeiten") in the sense of § 8 MRG and therefore not covered by law, it is possible to agree on such a clause in the scope of application of the MRG as well.[185] Furthermore it is no extension of T's duties if performances to keep the condition of the object have to be done only by professionals, because L's interest in a proper execution of works has to be protected.[186]

d) If the tenant becomes a member of a tenants' association, the landlord has no right to give notice of termination.

A tenancy may be terminated by giving notice (§ 29 MRG), but the restrictions of § 30 MRG have to be regarded, which link termination to an important reason. Additional reasons may be set in the contract, but may only be raised, if they are in fact important and significant (§ 30 par. 2 fig.13 MRG). The membership of a tenants' association is not to be regarded as such an important reason, since it serves the protection of the tenant and makes sure, that the MRG is applied correctly. Outside the scope of application of §§ 29, 30 et seq. MRG the contract can be always terminated by giving notice (including a certain period of time) even without an important reason. The question whether this instrument of "ordinary" notice of termination can be used by the landlord even if its use seems to be in conflict with the fundamental right of association guaranteed by the Constitution has, as far as we can see, not yet been answered by the courts. It involves the issue of private party effect ("Drittwirkung") of human rights: Do human rights also bind private parties? Generally this effect is recognized by Austrian case law as an "*indirect*" effect: Human rights bind private parties through the general clause

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[184] *Miet.* 29.171, *Miet.*. 32.187, *Miet.* 34.237, *Miet.*. 38.186, *Miet.* 45.121; see Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 1109 ABGB, note 7 et seq.

[185] *Miet.* 45.225/34; Würth/Zingher/Kovanyi, *Miet- und Wohnrecht* (2004) 21st ed., § 8 MRG, note 4; according to Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 8 MRG, note 44 such clauses are null and void.

[186] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 8 MRG, note 51.

of § 879 ABGB concerning illegality and unconscionability ("public morals", "gute Sitten")[187] and would, therefore, also bind L in this case. The general prohibition of abuse of rights ("Rechtsmissbrauch") could also come into play through § 879 ABGB[188].

Law does not provide possibilities to challenge standard terms by a tenants' association. An action by an association against a violation of law or *bonos mores* (unconscionability) in standard terms can only be filed in the scope of application of the consumer protection law ("Verbandsklage"; §§ 28f KSchG)[189].

Question 20: Changes to the Building by the Tenant

T is a tenant in a building with 4 floors and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses the permission by alleging that otherwise, he would have to give the permission to every tenant, which would ruin the view of the house esthetically. In addition, he argues that 15 TV programs are already accessible via the cable TV connection of the house, which should be more than sufficient to satisfy the tenant's demand.

L wants to install a parabolic TV antenna on his balcony but L refuses the permission. First of all T is authorized to use the object carefully and properly (§ 1098 ABGB). He has to avoid any use contrary to the terms of the contract and may not disturb other tenants. The extent of the allowed use is determined by the contract (see § 8 par. 1 MRG) and its purpose, or subsidiary by ordinary local use. L has to tolerate changes of the rented object, if they correspond with current standards in technology and common usage (§ 9 par. 1 MRG fig. 1 und fig. 2) and do not affect the appearance of the house (§ 9 par. 1 fig. 6 MRG).

A parabolic TV antenna fulfils the requirements of par. 1 fig. 2, as long as no connection to other existing systems is possible or reasonable (par. 2 fig. 5)[190]. Other connections are already available via cable TV, so L can refuse the permission, if T cannot prove that cable TV is in opposite to parabolic TV antennas out-of-date. Even if T can prove this it has to be examined whether the appearance of the house is affected or not. Unlike in § 8 par. 2 fig.2 MRG a balancing of interests is not provided in § 9 Abs 1 fig. 6 MRG. In case the conditions of § 9 MRG are not met, T cannot force a permission of L.[191] It does not mean that permission

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[187] See Answer to Question 1 above.

[188] Rummel/Krejci, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 879 ABGB, note 138 et seq.

[189] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 122.

[190] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 211 et seq.; OGH in *WoBl* 1991, 196 and in *WoBl* 1992,191; the general principles of § 13 par. 2 fig.1 and 2 WEG (Wohnungseigentumsgesetz) can be transfered to § 9 MRG, however a compensation for the costs is not provided.

[191] OGH in *WoBl* 1993, 80.

has to be granted to each tenant if it is given to one tenant, since one antenna may not necessarily affect the appearance of the house whilst 10 antennas may ruin the appearance of the building.

Apart from tenancy laws the buildings authority's permission that might check the houses appearance in its surroundings may have to be required as well.[192]

Variant 1: Assuming that no Turkish programs can be received through the existing cable TV connection, does it matter if T is a Turkish immigrant who does not speak the national language well?

The fact that the Turkish immigrant does not speak the national language well leads doubtlessly to an important interest of T (§ 9 par. 1 fig. 2 MRG) to install the antenna. However, following the courts there is no balancing between the interests of the parties as the OGH (Austrain Supreme Court) has pronounced.[193] In case the view of the house is actually affected, T may not install the parabolic TV antenna.

This rule as interpreted by the Austrian OGH seems to violate T constitutionally guaranteed freedom of speech and information (Art. 10 Convention for the Protection of Human Rights and Fundamental Freedoms). Two solutions are possible: The OGH tries to bring its interpretation of § 9 MRG in conformity with the Constitution by allowing a more flexible application of the requirements mentioned in § 9 MRG (balancing of interests). If such an interpretation does not seem possible the provision of § 9 MRG is itself unconstitutional and has to be replaced by a wording which does not violate a tenants right of information.

Variant 2: On his balcony, T exhibits a huge poster with the slogan „Peace in Palestine and Iraq". Can L force him to remove it?

As before the use of the apartment provided in the contract is decisive. If not defined in the agreement, the rules of the house ("Hausordnung") are likely to refer to this state of facts. The rules of the house are only valid if the contract refers to them or if the tenant submits it.[194] Assuming the usage is not subject of the contract or the rules of the house, the common local usage is to be taken into account. The contract has to be interpreted in the light of the constitutional guarantee of freedom of speech (private party effect of human rights,

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[192] Panosch, Wohnrechtliche Probleme bei der Montage von Parabolantennen, *ÖJZ* 1994, 18; see as well Dirnbacher, Satellitenempfangsanlage (Parabolspiegel) - Beeinträchtigung der äußeren Erscheinung des Hauses bei Anbringung an der Fassade, *ImmZ* 1993, 199 et seq.

[193] OGH in *WoBl* 1993, 80; see Dirnbacher, Satellitenempfangsanlage (Parabolspiegel) – Beeinträchtigung der äußeren Erscheinung des Hauses bei Anbringung an der Fassade, *ImmZ* 1993, 199 et seq.

[194] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 211.

"Drittwirkung der Grundrechte")[195]. The exhibition of the poster is no change to the building and the rules of § 9 MRG are not applicable. In doubt freedom of opinion and expression will lead to the result, that the exhibition is permitted.

Question 21: The Landlords' Right of Possession of the Keys

Does L have the right to keep one set of the keys of the apartment rented to T? Under which conditions is L allowed to enter the apartment without T's previous permission? If these conditions are not fulfilled, does L commit a criminal offence when entering the apartment without T's previous permission?

There are no special rules on a possible right of L to keep one set of the keys to the apartment, neither are there decisions on that question. The fact that L keeps a set of the keys itself does not intervene in T's rights. L may keep the keys but must not use them.

Except of danger ahead[196] L may enter only in accordance with T at usual times of the day.[197] T has to allow L to enter the apartment due to important reasons (§ 8 par. 2 MRG) such as supervision for necessary preservation works, preparing and execution of preservation works, showing the apartment to prospective buyers or measurement of the apartment.[198] L's interest to enter and according to this the importance of the reason rises with the value of the apartment and the rented objects within.[199] T's permission can be enforced at court in the special procedure of the „Außerstreitverfahren" (§ 37 par. 1 fig.5 MRG).

If L enters without permission he violates the contract but does not commit a criminal offence since trespassing ("Hausfriedensbruch", § 109 StGB[200] [Austrian Criminal Code]) requires entering using force or threat.

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[195] Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 31.

[196] See Question 30: Negotiorium Gestio.

[197] Würth/Zingher/Kovanyi, *Miet- und Wohnrecht* (2004) 21st ed., § 8 MRG, note 6.

[198] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 8 MRG, note 63.

[199] Schwimann/Böhm, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 8 MRG, note 63.

[200] BGBl. Nr. 60/1974, last amendment BGBl. I Nr. 134/2002.

Question 22: Security Obligations of the Landlord

As the stairs in the house are not well maintained and in a slippery state, C, T's child, falls and breaks her leg. Is L liable, and if yes, on which legal basis?

Note: This case is supposed to deal with distinction of liabilty under contract and tort for general "security obligations" of the landlord.

According to § 1295 ABGB everybody is entitled to claim compensation from the one who caused the damage out of fault. The damage may result from violation of a contractual obligation or be caused without a contract.

Regarding the contract between L and T as an agreement that protects third parties as well ("Vertrag mit Schutzwirkung zu Gunsten Dritter"), L can be liable for the not well remained and slippery stairs if L acted culpably (what seems to be given in the mentioned case). C is covered by the contract too, since C as T's child is a family member and supposed to live with T in the same apartment.[201]

By extending contractual liabilty through the courts as shown above, the duties of the occupier to make premises safer for persons ("Verkehrssicherungspflichten", delictual basis of liability) have become a little less important.[202] The courts acknoledge these duties as tortious obligations. So if L wouldn't be liable out of the contract, he could have the duty to keep the stairs in a good condition because he is the owner of the apartment and gives T and C access to the house. The concrete content of "Verkehrssicherungspflichten" can only be determined on a case by case basis.[203]

Set 5: Breach of Contract[204]

Short General Introduction

The landlord is obliged to submit the object to the contract in usable (serviceable) condition[205] and has to preserve it at his own cost (§ 1096 ABGB). He must not disturb the tenant in the

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[201] See Schwimann/Harrer, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VII, § 1295 ABGB, note 41; SZ 64/76.

[202] Schwimann/Harrer, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VII, § 1295 ABGB, note 41.

[203] Schwimann/Harrer, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. VII, § 1295 ABGB, note 44.

[204] The expression "breach of contract" is used here in a factual sense so as to encompass any problems which may happen at the performance stage. Therefore, this set of questions is supposed to cover situations dealt with under headings such as impossibility, delay and guarantees (warranties) in national legal systems.

[205] OGH in *JBl* 1996, 177; *Miet.* 42.097.

enjoyment of his rights[206] and has to avoid disturbances caused by other parties.[207] The violation of these duties leads to the consequence that the tenant (partially) does not have to pay the rent or parts of the rent (§ 1096 2nd sentence ABGB). The right of rent reduction cannot be waived by the tenant in advance in cases of rent of immovable objects.

It is the tenant's duty in return to pay the rent for the rented object. He must use the object carefully and properly (§ 1098 ABGB) and has to avoid any usage that departs from the contractual provisions and must not disturb other tenants. The extent of the permitted usage is set out in the contract (see § 8 par. 1 MRG) or is determined by local common usage.[208]

Within the scope of application of the MRG the landlord can in general only give notice of termination due to an important reason. § 30 par. 2 fig.1-3 and § 7 MRG deal with breaches of contract committed by the tenant (delayed payments, denial of agreed services instead of the payment, grossly unfavourable usage of the object, ignorant or indecent or other impertinent behaviour, other usage of the object than agreed, etc.).[209]

Question 23: Destruction of the House after Conclusion of the Contract

L and T conclude a tenancy contract. Before T takes possession of the apartment, it is destroyed by a fire for which neither party is responsible. Does it make a difference if the apartment is destroyed after transfer of possession to T?

In case the rented object is destroyed by a fire or other extraordinary incidents for which neither party is responsible, the landlord is not obliged to restore the object and the tenant is no more obliged to pay the rent (§ 1104 ABGB). A different rule on the bearing of the risk can be agreed in the contract or may result from a special relation between the parties (e.g. labour law).[210] The burden of proof of the extraordinary impairment is borne by the landlord.[211]

The tenancy contract is dissolved automatically.[212] The other party can claim compensation if the destruction was caused by one of the parties. Was it caused by an accident neither party is responsible (§ 1112 ABGB). This rule is optional. The tenancy is not terminated if there is any obligation for L to restore the apartment and the restoration is possible.[213]

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[206] § 1096 1st sentence ABGB.

[207] OGH in *JBl* 1970, 523; *JBl* 1991, 46; *RdW* 1997, 525.

[208] OGH in EvBl 1976/127; see also *Miet.* 40.263.

[209] See General Introduction.

[210] Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1104 ABGB, note 5.

[211] Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1104 ABGB, note 1; see *JBl* 1987, 377.

[212] *Miet.* 24.157.

[213] *WoBl* 1995/2.

In this constellation it does not make any difference whether the apartment was destroyed by the fire before or after the transfer of possession to the tenant.

Question 24: "Double Contracts"

L concludes a tenancy contract with T1. Shortly after, he concludes another tenancy contract over the same apartment also with T2, who is not aware of the earlier contract concluded with T1. Equally unaware of the second contract concluded with T2, T1 then takes possession of the apartment. The two contracts are only discovered when T2 wants to take possession of the apartment as well. What are the legal consequences for both contracts and the rights of the parties?

The tenant generally has no obligation to take possession of the apartment and use it, only a right to do so (§ 1098 ABGB).[214] The non-use of an object may lead, however, to the termination of the tenancy by the landlord acccording to § 30 par. 2 fig. 6, 7 MRG. When multiple contracts are concluded, the tenant who gets the apartment first handed out according to § 430 ABGB enjoys priority, even if the tenancy contract of the other party is registered in the land register afterwards.[215] *Rights in rem* in immovables can only be acquired by entry into the land register. The tenancy is generally and formally not considered a *right in rem*. Its entry into the register according to § 1095 ABGB has therefore only declaratory effect but does not constitute the tenant's position, which is already established by the conclusion of the contract. Therefore, T1 can keep the apartment and defend this right also against T2. His contract with L is of course valid. The second contract with T2 is valid as well and L has to fulfil his contractual duties, i.e. to make the usage possible for T2.[216] Since T1 has already taken possession of the apartment L is liable to pay damages to T2[217] or has to offer T1 a substitute so that T2 can take possession.[218] L cannot refer to impossibility of performance since T2 is free to wait until the apartment gets vacant. T2 can insist on performance of the contract unless the impossibility of performance is for sure[219]

In case of T1's bad faith he would become liable for damages (even in the form of handing over the apartment to T2) to T2 only if additional requirements are met: T1 must cooperate

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[214] *Miet.* 2.817.

[215] *Miet.* 5.523; 18.109/14; Gschnitzer, *Schuldrecht Besonderer Teil*, (1988) 2nd ed., 141.

[216] *Miet.* 4.372; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1093 ABGB, note 12.

[217] *Miet.* 5.523; EvBl 1954/328.

[218] *Miet.* 5.525/18.

[219] *SZ* 30/33; *Miet.* 23.123; LGZ Wien 32.250.

with L with the intention to cause harm to T2 or he must motivate or cause L to break his contract with T2.

Question 25: Delayed Completion

L is an investor and buys an apartment from a big building company. According to the contract, the apartment should be ready from 1.1.2003. However, the purchase contract contains a (lawful) clause according to which the builder is not responsible for delay unless caused by him. L rents the apartment to T from 17.1.2003 without any special arrangements in the case of delay. However, as the neighbour N challenges, though unsuccessfully in the end, the building permit granted by the competent authority to B in an administrative law procedure, the apartment is not available until 1/1/2004. Has T any claims against L? Has L claims against N?

T might have claims against L due to delay if the apartment is not available at the date agreed in the contract (§ 1096, § 1295 and §1298 ABGB). A non existing apartment can be subject of a tenancy[220], as long as it can be specified.[221] If L cannot keep the date and is not responsible for the delay ("objektiver Verzug") T can claim fulfilment and compensation or withdraw from the contract[222] after setting a time limit according to § 918 par. 1 ABGB. § 918 ABGB is an optional rule, but under the given circumstances nothing different was agreed. Additionally the delay was foreseeable for L since challenges of building permissions are not unusual. Therefore L is responsible for the delay ("subjektiver Verzug")[223] so that T can claim damages because of non-performance (e.g. the difference between the rent agreed in the contract and the higher rent the tenant has to pay in a substitute apartment) and withdraw (§ 920 1st sentence ABGB) until the beginning of the tenancy[224] even if some rent was already paid.[225]

L on the other hand has no claims against N. Challenging a building permission is a right of the neighbour limited only by the general prohition of abuse of rights. ("Rechtsmissbrauch", § 879 ABGB).

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[220] EvBl 1957/256; *Miet.* 41.029.

[221] *Miet.* 42.606.

[222] HS 219, 6.328; *JBl* 1988, 241; *JBl* 1988, 447; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.V, § 918 ABGB, note 71.

[223] See *Miet.* 31.111: Änderung der Devisenvorschriften; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.V, § 920 ABGB, note 8.

[224] *Miet.* 24.093; 40.069; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.V, § 918 ABGB, note 12.

[225] *Miet.* 17.084; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.V, § 918 ABGB, note 23.

Question 26: State and Characteristics of the House (Guarantees)

L rents an apartment to T. T wants to diminish the rent because stains of mildew have been found in some corners.

Variant 1: By letter, T asks L to renovate the walls affected by mildew within 2 weeks. As L does not reply, T has the repair done by a specialist and wants to off-set the costs from the monthly rent rates. Is this lawful?

Stains of mildew in some corners of the apartment do not correspond in any case to any common local standards. According to § 3 MRG the landlord has to take care that the house, the rented objects and the plants serving the common usage of the residents of the house remain unchanged in the respective local standard (§ 1096 ABGB). T has a claim for compensation if L violates these duties.[226] The duty to preserve the apartment rest upon L in any case, independent of T's fault. In case of culpable acting of T L has the right of recourse.[227] Setting-off the costs of the specialist from the monthly rates is possible under the rules of § 1097 and §§ 1438 et seq. ABGB).

Variant 2: T did not discover the mildew stains when inspecting the house before entering into the contract, even though these had already been present. Does this preclude her from claiming a rent reduction?

According to § 1096 ABGB the landlord has to keep the rented object in useable condition. In case of an unusable object the tenant is exempt from the payment of rent. § 1096 ABGB as *lex specialis* for guarantees in tenancies has priority over the general rules of §§ 922 et seq. ABGB (concerning guarantees in general). But § 1096 ABGB allows for subsidiary application of §§ 922 et seq. ABGB.[228] § 1096 ABGB can be altered by party agreement with respect to subsequent costs of preservation ("Instandhaltungskosten") and only in case the contract is not subject to the rent restrictions of the MRG. The right to rent reduction in § 1096 ABGB can never be waived in advance. Therefore § 1096 ABGB applies (and is mandatory in this respect): L has to remove the stains of mildew as long as they are not highly obvious according to § 928 ABGB.[229] L has to assure compliance with the local standard. T can off-set his costs in this variant as well as claim a rent reduction.

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[226] *Miet.* 39.111/11; 39.177/11.

[227] *WoBl* 2000/47; Schwimann/Haybäck/Heindl, *Praxiskommentar zum ABGB*, (2001) 2nd ed., vol. IV, § 3 MRG, note 4.

[228] *Miet.* 7.046; EvBl 1964/142; differently *Miet.* 3.703.

[229] *Miet.* 7.046.

A noisy building site for a big road is opened by the city administration next to the apartment.

The maximum permissible rent of § 16 par.1 MRG may not be exceeded as was already mentioned previously. When calculating the rent for the standard apartment, increases and reduction according to external influences have to be considered. The location of the apartment is one such influence (§ 16 par. 2 fig.4 MRG). As a result a change of the surroundings may lead to an adaptation of the maximum permissible rent. The exceeding part which was permitted till now can therefore become ineffective. T can reduce his payment of the rent by this exceeding amount. This amount actually will be hard to investigate and if T reduces the rent too much he violates his duties as tenant.

A reduction of the rent according to § 1096 par. 1 ABGB is generally possible in every tenancy contract: T does not have to accept a serious increase of the noise level, because this will prevent his ordinary use of the apartment (§§ 1096 and 364 par. 2 ABGB).[230]

The tenants of the neighbouring apartment in the house have repeatedly and despite T's complaints organised loud nightly parties from 11 pm to 5 am.

It has to be taken into account that T is considered a "possessor of rights" which conveys him a quasi *in rem* position ("quasi-dingliche Rechtsposition") with respect to third parties disturbing his enjoyment and use of the apartment. T can bring an action against disturbances of rights by third persons (prohibitory action, § 364 par. 2 ABGB), if the noise exceeds the common local standard.[231] Furthermore L as the landlord is obliged to terminate disturbances caused by third parties on the basis of the tenancy contract (§ 1096, § 1295, § 1298 ABGB).[232] He has to protect T and must not only refer the tenant to his own rights against the third.[233] In case L culpably fails to undertake measures against the disturbance and can therefore not provide the contractual usage he becomes liable for damages (§ 933a ABGB[234]).[235] According to § 1298 ABGB L takes the burden of proof that he has tried everything to ensure the usage as it was set in the contract.[236] Irrespective of L's fault T can reduce the rent in accordance with § 1096 ABGB and can off-set his claims with the rent.

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[230] *JBl* 1961, 156; LGZ Wien *Miet.* 23.127.

[231] Leading case *SZ* 62/204.

[232] *SZ* 15/101; Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 230 et seq.

[233] *JBl* 1970, 523; *Miet.* 22.123; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1096 ABGB, note 47.

[234] *Miet.* 1.641; § 1096 ABGB alone is not applicable: *Miet.* 5.598; EvBl 1983/63, see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1096 ABGB, note 77.

[235] *Miet.* 6.285; *JBl* 1992, 718.

[236] *SZ* 36/84; *Miet.* 19.109; 21.156; 45.093; Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1096 ABGB, note 78.

Question 27: House to be used for Specific Purpose

L rents a big apartment to T under the assumption shared by both parties that some rooms will be used by T as a surgery. However, the local authorities deny the permission for the surgery to be opened in the studio for fire protection and zoning law reasons. What are T's claims?

Both parties agree that the apartment will be used as a surgery. An (analogous) application of § 3a KSchG that allows T to withdraw from the contract is not possible because L did not present a permission as probable. It cannot be assumed that the contract was concluded under the suspensory condition (§ 901 ABGB) of the permission of local authorities, because the parties did not mention this risk at all. They could as well have wanted to put the risk on T's side. Neither can it be said that one or both parties have made a mistake as to the content of the declarations they made ("Geschäftsirrtum", § 871 ABGB). T has made a mistake of motive ("Motivirrtum"), which is irrelevant under Austrian law, if the motive was not made a condition of the contract (§ 901 ABGB). However, the denial of permission leads to a *frustration of contract* ("Wegfall der Geschäftsgrundlage") because of change of circumstances.[237] The legal consequence is the dissolution of the contract.

Set 6: Relationship among the Tenant and Third Persons

Short General Introduction

In contrary to older jurisdicion[238] the tenant, who has already taken possession of the premises, has his own claim based on his "right of possession?"[239] (quasi *in rem* position) and does not need to involve the landlord, although the landlord is obliged to protect the rights of his tenant (§ 1096 ABGB). For that reason the tenant of immovables has a claim of forbearance against third parties disturbing the ordinary use of the apartment in analogous application of §§ 364 par. 2 ABGB in combination with § 372 ABGB.

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[237] Baur J.F., Die Anpassung langfristiger Verträge an veränderte Umstände, *JBl* 1987, 137; Bydlinski F., Zum Wegfall der Geschäftsgrundlage im österreichischen Recht, *ÖBA* 1996, 499; Fenyves, Der Einfluss geänderter Verhältnisse auf Langzeitverträge, *Gutachten für den 13. ÖJT, vol. II/1* (1997); Wieacker, Gemeinsamer Irrtum der Vertragspartner und Clausula rebus sic stantibus, Wilburg-FS (1965), 229; see Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. I (2002), 144.

[238] *SZ* 23/188; 25/124; *Miet.* 9.412; 9.413; 19.113/24 et al.

[239] OGH in *SZ* 62/204 = *JBl* 1990, 447, dissenting Spielbüchler = EvBl 1990/73 = *WoBl* 1990/21, assenting Apathy = *ecolex* 1990, 82, Wilhelm = *RdW* 1990, 153: Klavierspiel; assenting F. Bydlinski, *WoBl* 1993, 1ff; see also *SZ* 6/218, 6/357; LG Wien *Miet.* 24 and Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1096 ABGB, note 81.

Question 28: Neighbour Relations

T and N are tenants of neighbouring apartments in the same house. How can T react if N continuously plays excessively loud music or constantly produces bad smells penetrating into T's apartment?

Note: In the solution to this case, it should also be briefly outlined whether

a) it makes a difference, if T is not the tenant but the owner of the apartment;

b) it makes a difference, if T and N are tenants of the same landlord and owner.

Whether the tenant is impaired by noise unreasonably or not has to be judged at the scale of Ö-Norm[240] B 8115 dealing with soundproofing and accoustics of rooms, if this was declared obligatory for the federal state in accordance with § 5 "Statute for Technical Standard in Construction Works".[241] In addition, the principles of § 364 par. 2 ABGB have to be applied analogously, wherewith the local conditions may not be exceeded and the local common usage may not be impaired fundamentally.[242]

As mentioned before, T as possessor of rights can proceed against third parties, who continuously play excessively loud music or constantly produce bad smells, with an action against disturbance of possession (§ 364 par. 2 ABGB). It does not make any difference whether T is a tenant or the owner of the apartment.

Furthermore T as tenant can engage his landlord to move against N due to his contractual obligations (§ 1096 ABGB).[243] The contractual obligations of the landlord to provide and to preserve require the landlord to become active already when it is highly possible to achieve a removal or restriction of the impairment.[244] The choice of the suitable measure in order to provide the normal usage of the object must in principle be left to the landlord.[245] In case of doubtful relevance of the impairment it is more appropriate to file a prohibitory action rather than an action for eviction.[246]

Regularly the stating of an alternative petition will be recommended.[247]

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[240] Ö-Norms are standardizations of the Austrian Standards Institute ("Österreichisches Normeninstitut - Das österreichische Dienstleistungszentrum für Normen, Regelwerke, Zertifizierung und Recht der Technik im Dienst von Wirtschaft, Verwaltung und Gesellschaft").

[241] EvBl 1983/171.

[242] *SZ* 15/101; *SZ* 62/204; see Schwimann/Binder, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VI, § 1096 ABGB, note 39.

[243] *SZ* 15/101; Koziol/Welser, *Bürgerliches Recht*, 12th ed., vol. II (2002), 230.

[244] *JBl* 1991, 46.

[245] *Miet.* 24.136; 25.118, 35.170; LGZ Wien 46.100.

[246] *JBl* 1991, 46.

[247] *Miet.* 35.170: „Musizieren".

Assuming L cannot make the agreed usage possible, it the rent due under the lease is reduced by operation of law until the agreed condition is established.[248] If L is acting culpably T can additionally claim compensation for damages, which T would not have incurred if the contract with N had been terminated early.[249]

It makes a difference, if T and N are both L's tenants in so far as L has rights out of the contract with N, which increases L possibilities to end the disturbance. That means in a final consequence that L has to give notice of termination to N if necessary.[250]

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged negligently by a lorry during construction work undertaken at a neighbour's house. Does T have claims against the building company or the neighbour?

Although realization of third party damages (damage of L as the owner of the apartment) is usually impossible[251], T has a direct damage claim against the lorry driver or the building company[252] due to the mentioned quasi right *in rem* (possession of rights) and is no longer forced to involve the landlord. Earlier the courts[253] required L to enforce the compensation interests of the tenant. Questionable claims had to be filed by the landlord only if the tenant asked him to file a lawsuit and lodged security deposits for the costs of litigation.[254] Beyond that T could claim a declaration of assignment for the obtained titles.[255] These possibilities may still be given despite T's direct claims.

The damage claims cannot be derived from §§ 335 et seq. or § 364 (nuisance) ABGB, but have to be based on §§ 1293 et seq. ABGB (general rule on compensation for damages)[256]. However, in cases of immissions the tenant has as well compensation claims based on § 364a and § 364b ABGB by analogy, which are independent of fault and also cover pure economic loss ("reinen Vermögensschaden"). The damage in this concrete case is not a damage resulting from "immissions" (noise, smells) or a case of § 364b ABGB. Therefore, T only has an "ordinary" damage claim based on §§ 1293 et seq. ABGB requiring fault, that means slight

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[248] Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol. I, § 1096 ABGB, note 10.

[249] Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol. I, § 1096 ABGB, note 12.

[250] Rummel/Würth, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol. I, § 1096 ABGB, note 9.

[251] Schwimann/Harrer, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VII, before § 1293 ABGB, note 18; § 1293 ABGB, note 19 and § 1295 ABGB, note 1 et seq; see Schilcher/Kleewein , Landesbericht Österreich in Bar (ed.), *Deliktsrecht in Europa* (1993), 34.

[252] *JBl* 1991, 247.

[253] *SZ* 15/101; *Miet.* 21.027/17; *SZ* 47/140.

[254] *SZ* 56/153.

[255] *SZ* 56/153.

[256] *SZ* 23/191.

negligence ("leichte Fahrlässigkeit"; only the damage incurred has to be replaced), gross negligence ("grobe Fahrlässigkeit"; damage incurred and lost profit have to be replaced) or intent ("Vorsatz"; damage incurred and lost profit have to be replaced).

Tortfeasor and therefore liable is primarily the negligently acting lorry driver. The building company as the lorry driver's employer would be only liable for fault in selecting an unfit or dangerous assistant (§ 1315 ABGB). Therefore, vicarious liability based on contractual relations cannot be invoked, since there is no contract between the building company and T that would permit a claim for damages according to § 1313a ABGB. The courts recognized the problem of this – judged by comparative law – very unique system of liabiltiy and solved it by an extensive interpretation of contracts, so that some agreements protect certain interests of third party as well ("Vertrag mit Schutzwirkung zu Gunsten Dritter"). Following this construction the building company is liable on the basis of the contract with N too, since one could argue that not only the neighbour's house should remain undamaged but also adjacent buildings.

The neighbour himself would be only liable for fault in selecting an unfit building company (§ 1315 ABGB)[257], for which there is no indication in the facts.

Question 30: Negotiorium Gestio

When T has left his rented apartment for holiday, neighbour N notices a gas-like smell coming out of T's door. Assuming that the gas pipe in T's apartment has a leak which might give rise to a danger of explosion, N breaks open the apartment door, at which occasion he destroys his chisel worth 10 E and causes a damage of 200 E at the apartment door. After entering the apartment N discovers, however, that the gas-like smell stems from the garbage bin which T has forgotten to empty before leaving. Has N claim against T or vice-versa?

N was acting on behalf of T to obviate a threat of danger (§ 1036 ABGB). The necessity to act is judged from the point of view of a *negotiorum gestor* in good faith in the concrete situation (ex ante), so a putative case of necessity is sufficient.[258] A prerequisite is that T could not be reached in time to give his approval and that the supposed emergency can be attributed to T. A balance of interests must be achieved by weighing the possibility of resulting damage to T´s apartment - if N did not intervene - and the interference with T's rights caused by N´s

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[257] Rummel/Reischauer, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2003) 3rd ed., vol. II, § 1315 ABGB, note 1; Schwimann/Harrer, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol.VII, § 1315 ABGB, note 5.

[258] Rummel/Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 1036 ABGB, note 1.

intervention.[259] Since all these requirements seem to be given in the mentioned case, N acted lawfully. This means that N is not liable for the damage caused to the apartment door.[260] Whether N can claim compensation for the damaged chisel[261] remains a disputed and unresolved question.

[259] Schwimann/Apathy, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 1036 (1040) ABGB, note 1.

[260] Schwimann/Apathy, *Praxiskommentar zum ABGB*, (1997) 2nd ed., vol. V, § 1036 (1040) ABGB, note 18.

[261] Rummel/Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, (2000) 3rd ed., vol I, § 1036 ABGB, note 4.

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