

BELGIUM

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1. INTRODUCTION

A) Origins and basic lines of development of national Tenancy Law

The starting point for Belgian tenancy law is the adoption in 1804 of the Civil Code¹. Whilst the text of the Code has remained virtually unchanged since its introduction, this field of law has been strongly developed and renewed via special laws and the creative work of the Courts.

The first significant legislative modification of the Code took place just after World War I: a special statute was adopted in order to better protect tenants against excessive rent increases and to prevent their forced removal from tenancies in the absence of serious grounds.² Many provisional laws were subsequently adopted with the aim of controlling the indexing of rents³. This tendency was commonplace in the aftermath of the economic crisis of the 1930's⁴. The government in power after World War II decided to put an end to the housing crisis by drafting additional provisional legislation. At the time the United Nations enacted Resolution 217 III (A). The ethos of Article 25, which established the basic right of each individual to enjoy suitable housing⁵, has gradually permeated Belgian law.

It was not until 1991 before Tenancy Law was again deeply reviewed: at that time a special statute devoted to private tenancy introduced a new section into the Civil Code⁶. The need for adopting such regulation resulted from the phenomenal increase in rents due to economic speculation in Belgium, particularly in Brussels and its suburbs⁷. The statute had a double purpose: first, it aimed at ensuring enhanced protection of tenants with respect to their family housing. The second goal was to increase stability in the contractual relationship between landlords and tenants without creating an imbalance between the parties⁸.

This statute, which was significantly reformed in 1997, is the primary legislative act applicable to Belgian tenancy law.

¹ Belgian Civil Code dated March 21st, 1804, Articles 1713 et seq..

² Statute adopted on 25 August 1919.

³ See *e.g.* the statutes adopted on 27 December 1924, on 31 December 1929 and many others.

⁴ Y. MERCHERS, *Le bail de résidence principale*, Rép. Not., Bruxelles, Larcier, 1998.

⁵ Resolution dated 1948 number 217 (III) A.

⁶ Statute of 20 February 1991.

⁷ Y. MERCHERS, *o.c.*, 1998, p. 55.

⁸ P. JADOUX, " La loi du 20 février 1991 modifiant et complétant les dispositions du Code civil relatives aux baux à loyer", *Journ. Proc.*, 1991, pp. 26-29.

In 1993, the Belgian Parliament revised the Constitution so as to insert the right to enjoy suitable housing in the section devoted to the fundamental rights and freedoms of Belgian citizens⁹. In this report we will assess the implementation of this right in practice.

B) Basic structure and content of current national law:

1. Private Tenancy Law

Belgium is a federal state; as a consequence tenancy law is divided into two parts: federal law and regional regulations. In accordance with a special statute adopted in 1980, regions are competent in ensuring healthy housing policy¹⁰. In exercising their competence, the Flemish Community and the Walloon Region have taken measures to ensure minimum standards for rented commercial premises¹¹.

The difference between federal and regional law consists in the obligatory force of regulations. Whilst the majority of federal tenancy rules are *imperative*¹² (*i.e.* they protect particular interests and as such the judge cannot sanction their violation automatically), regional decrees are matters of *ordre public* and a violation may be upheld by the judge as a matter of course¹³.

Tenancy contracts do not confer any real property rights: the tenant receives only an obligatory right via his contract¹⁴. According to article 1709 of the Civil Code, hiring ("le louage" in French) is a contract by which one party commits himself to providing one thing to another party for a certain period of time and for a certain price, with the other party committing himself to pay. This rule leaves no room for any property right to emerge in Belgian tenancy law.

On the other hand, there are some other forms of "lawful possession" which provide property rights to the possessor, but they are quite different from what we call "tenancy". One of them is the right of housing (*habitation* in French): it confers a right to lawfully possess a house. Nevertheless, this right is limited to holder's and their family's needs¹⁵. Another kind of lawful possession is that which confers merely an obligatory right. This is the lending for use ("prêt à usage" also called "commodat"). This contract is defined by articles 1875 and 1876 of the Belgian Civil Code as a contract by which one party gives a thing to another who uses it and returns it after use.¹⁶

⁹ Article 23 of the Belgian Constitution, under the section devoted to "Belgian citizens and their fundamental rights".

¹⁰ Articles 1, §3 and 6, §1 of the special statute of August 8 1980.

¹¹ See for example the Walloon Decree dated April 6 1995 (*Mon.b.* 4.07.1995).

¹² This is not the case for articles 1719 and 1720 of the Civil Code for example.

¹³ Y. MERCHERS, "Les baux. Le bail en général", *Rép. Not.*, Bruxelles, Larcier, 1997, p. 359.

¹⁴ N. VERHEYDEN-JEANMART and C. MOSTIN, "Jouissance d'immeuble: bail et conventions voisines", in *Aspects récents du droit des contrats*, Ed. du Jeune Barreau de Bruxelles, 2001, pp. 93 and f.

¹⁵ *Ibidem*.

¹⁶ N. VERHEYDEN-JEANMART, "La protection assurée au commodant par l'article 1889 du Code civil. Règle impérative ou supplétive?", in *Mélanges Michel HANOTIAU*, Bruxelles, Bruylant, 2000, pp. 415-422.

Concerning the influence of European and national consumer protection legislation, one can say that this influence is quite limited. The only application one can imagine is the prohibition of abusive contractual terms in a tenancy contract¹⁷.

2. Social regulation affecting private tenancy contracts

As previously noted, the right to housing is a constitutional right¹⁸. The will to ensure that the persons with modest earnings can afford housing arose

At the beginning of the twentieth century,¹⁹ a public clamour for suitable accommodation for those of modest income led to the formation of a *National Society for Affordable Housing* (Société Nationale des habitations et logements à bon marché). With the devolution of certain tenancy law matters to the regions, regional bodies have since performed the work of this organisation²⁰. Public housing agencies aim to guarantee housing for those on modest salaries. Though tenancy contracts are agreed directly between the owner and the tenant, in Wallonia, for example, local agencies lend a degree of social support²¹ to tenants on low income, acting as 'intermediaries' between the private landlord and his/her tenant. Moreover, they commonly agree building administration contracts with landlords. The primary difficulty for these agencies is that demand for social housing far outstrips supply. Indeed, Belgium continues to suffer from a chronic shortage of social housing²². One of the consequences of the transfer of powers to the regions is that it is somewhat difficult to give a systemic overview of the Belgian system with respect to social housing measures.

The authorities have consistently offered housing benefits via various schemes and programmes. Their aim has been to promote the upkeep and restoration of premises and to favour access to real estate property. Other initiatives include financial assistance in removing unwanted tenants and to carry out renovation of property, etc²³. Importantly, there is no difference in the schemes regardless of whether the beneficiary is a tenant or landlord. The availability and publicity of information on how to receive existing benefits remains most unsatisfactory²⁴.

At a federal level, a specific rule of the 'New Town' statute (nouvelle loi communale, here after NLC) permits the mayor - acting upon a request from the chairman of the welfare public centre - to requisition unoccupied housing in order to provide a temporary premise to an individual or family deprived of a home²⁵. This possibility was introduced into the NLC by an act containing emergency measures which favour social solidarity²⁶. There are certain conditions and limits to the application of this article. The building must firstly be abandoned. The owner can, however, refuse to agree to the requisition provided he can establish legitimate grounds²⁷. The owner of the requisitioned housing may seek compensation

¹⁷ For an application of these regulations into Belgian private law, see Mons, June 26 1997, *R.R.D.*, 1997, p. 433. Nevertheless this case is about car rentals.

¹⁸ Article 23 of the Belgian Constitution.

¹⁹ See for example the Statute of October 11 1919.

²⁰ See above.

²¹ Article 2 of the Walloon Government Order of July 29 1993.

²² P. JADOUL, "La mise en œuvre du droit au logement", *R.D.C.*, 1996, p. 302.

²³ See on this matter P.-M. DUFRASNE, "Les instruments de la politique sociale du logement en région wallonne", *Mouv. Comm.*, 1991, n°5, pp. 209-215.

²⁴ *Ibidem*, p. 312.

²⁵ NLC, article 134bis.

²⁶ Act of January 12 1993 (*Mon.b.* 4.02.1993).

²⁷ For more information, see Ph. VERSAILLES, "La réquisition d'immeubles et les personnes sans abri: l'étonnant pari de la loi du 12 janvier 1993", *C.D.S.*, 1993/8, pp. 350-360.

corresponding to the potential rent. Having accepted the requisition, the Act forbids the owner from changing his mind. This has been sanctioned by the state Council (Conseil d'Etat)²⁸. Unfortunately, left to the mayor the practical importance of this measure is practically negligible: requisitions are most uncommon²⁹ and the procedure is particularly cumbersome³⁰.

There exist certain additional statutes with social purposes. There are a number of rules that permit a tenant to prolong the duration of a contract. They apply only when the tenant is faced with exceptional circumstances such as the worsening of his health, the impossibility of finding alternative housing³¹, the fact that he receives a low income and is expecting to receive social housing³². We will analyse this point further later in this report³³.

Much uncertainty remains with regard to the consequences of incorporating the right to housing into the Constitution. The practical implementation of this right remains somewhat abstract. In order to ensure the respect of this fundamental right the authorities are empowered to take effective measures.

C) Summary account on "tenancy law in action"

In Belgium it is the owner who occupies most housing. This tendency accounts for 74 percent of the overall total, with approximately 19% of all residential accommodation occupied by private tenants. Though the percentage has increased significantly since 1990³⁴ social housing accounts for a mere 8 percent³⁵. As is apparent, tenancy has no wide scope of application: it concerns only one in five homes. The average housing expenditure in 2001 is approximately 26 percent of the monthly average expenditure. This rate is one of the largest in the European Union³⁶.

Whilst there is no significant tendency towards tenancy in Belgium, landlord and tenant associations remain notably active. There are a number of different associations³⁷ and they aim to provide legal and technical support to their members. Among other things, they offer samples of standard e-contracts³⁸. They also play an important lobbying role. For example, an association acting on behalf of landlords has recently drafted a list of "bad tenants" who have failed to pay rent for at least three months, etc.³⁹ This measure was adopted after much debate upon the possible violation of tenant's privacy and the making available of their personal details.

With regard to legal procedure, the Justice of the Peace (the "Juge de Paix") is competent to handle matters of tenancy law^{40,41}. The remit of his competence includes small

²⁸ C.E., n°69976, December 3 1997 (*Mon.b.* 24.12.1998).

²⁹ P. JADOU, "La mise en œuvre du droit au logement", *o.c.*, p. 315.

³⁰ See e.g. J.P. Philippeville, January 21 1998, *J.J.P.*, 1998, p. 81.

³¹ J.P. Westerloo, June 18 1993, *Turnh. Rechtsl.*, 1993, p. 95.

³² J.P. Wolvertem, April 14 1994, *R.W.*, 1996-1997, p. 859.

³³ See *infra*, "set 5: breach of contract", pp. 27 and f.

³⁴ European housing statistics, available on the site of the Walloon Region.

³⁵ *Economie et Statistiques*, n° 343, 2001-3, p. 39.

³⁶ *Ibidem*.

³⁷ See for example the website of the "Syndicat national des Propriétaires", www.snp-aes.be

³⁸ *Ibidem*.

³⁹ See for more information the website of the "Syndicat national des Propriétaires", www.snp-aes.be.

⁴⁰ Article 591, 1st of the Civil procedure Code.

⁴¹ Since January 2003, each lawsuit presented before the Justice of the Peace must be preceded by a conciliation procedure. If parties cannot reach an agreement, the judicial procedure will then take place before the same Judge. See the law programs of December 24, 2002 (*Mon.b.*, 31 décembre 2002). The legislator added a subparagraph *septies* to article 1344 of the Civil procedure Code and the conciliation procedure become obligatory before any eviction of a tenant could be made - even for a failure to pay rent.

claims, family disputes and cases involving neighbours, etc⁴². By means of contract, the parties may also decide to resolve any difference of opinion by arbitration though there is no legal obligation to do so. A decision of the Justice of the Peace may be brought on appeal before the Court of First Instance (Tribunal de Première Instance)⁴³.

Each individual is guaranteed access to the Courts: legal aid is available for those who cannot afford a lawyer's counsel, though strict criteria must be met and fees may be claimed if a party's claim is rejected. In practice legal aid is not common.

Legal certainty in Belgian tenancy law is not a major problem. As previously stressed, the greatest difficulties are that of ascertaining what are federal and what are regional law provisions, and coping with a lack of transparency in respect of benefits available for tenants and landlords.

Nevertheless, the term "*principal requests*" excludes from the conciliation process the counterclaims introduced by conclusions of the lessor into a procedure in progress. One can for the same reason exclude minor requests or the modifications from requests (art. 807 of Civil procedure Code).

The law doesn't envisage any sanction. The law specifies only that the requests "*must obligatorily be subjected as a preliminary to the judge*". One can thus think that this formality is a condition of admissibility and not a cause of nullity of the act.

However, some judges (J.P. Molenbeek, March 25 2003, *J.T.* 2003, p. 321) and a part of the doctrine consider that a 'regularization' should be possible in the course of procedure: the judge could "postpone" a ruling to allow the applicant to introduce a conciliation procedure (See DE FRESART, "Conciliation obligatoire en matière de location de logement, article 1344 *septies* du Code judiciaire", *J.T.* 2003, p. 112 ; VERRYCKEN, "Le Juge de paix conciliateur", *J.P.P.*, 2002, p. 437). This position does not appear to us however to respect the text of the law.

⁴² Article 591 of the Civil procedure Code.

⁴³ Article 577 of the Civil procedure Code.

2. QUESTIONNAIRE

SET 1: CONCLUSION OF THE CONTRACT

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?*

(a) The law of 20 February 1991 concerning the lease of a principal residence does not contain any specific rule on this point. Consequently it is advisable to turn again to common and fundamental principles. On this point, there are several relevant notions:

- The notion of "*offer*": the offer of a contract constitutes a binding⁴⁴ unilateral proposal that is *complete* (in the sense that it must determine all the 'essential' and 'substantial' elements of the contract), but also *firm*⁴⁵: there will be a lack of firmness if the offeree reserves the ability not to conclude the contract (subject to approval). In this case, his/her proposal has no binding effect and it will be the person who comes to visit the premises who will be considered as issuing an "*offer*" in the legal sense of the term. There seems to be no objection on this point that the offeree reserves his/her approval and issues a simple "*invitation to treat*";
- However, by principle, the theories of "*abus de droit*"⁴⁶ ("*abuse of right*") and pre-contractual liability would justify a sanctioning of "*precontractual fault*" (articles 1382 and 1383 of the civil code) and the imposition of damages if the plaintiff were to succeed in demonstrating that the person who offered his/her accommodation for rent in reality had no intention of concluding a contract and/or refused consent for an illegitimate reason;

⁴⁴ Cass., May 9, 1980, *Pas.*, 1980, I, 1127-1130. According to the Belgian Supreme Court, the binding character of a "*offer*" finds its base in an engagement resulting from the manifestation of the unilateral will: it is thus enough that the other party accepts this offer so that the convention is concluded.

⁴⁵ Cass., September 23, 1969, *Pas.*, 1969, I, 84-89. In this decision, the Belgian Cour of cassation distinguishes the "*preliminary talks*" - which have the single aim of permitting the parties to examine whether the contract is possible - and the "*offer of contract*" by which the offeree emits its final will to conclude the contract.

See also H. DE PAGE, *Traité élémentaire de droit civil belge*, t. II, 3th. ed., nos 498, 499, 499bis, 501 et 525.

⁴⁶ According to the Supreme court, "*the exercise of rights in a manner which obviously exceeds the limits of the normal exercise of these rights by a careful and diligent person*" (bonus pater familias) constitutes an "*abus de droit*". See on this point: Cass., February 8 2001, C98.0470; Cass., 1st February 1996, R.G. C.93.0532.N, n° 66; Cass., October 19 1989, *Pas.*, 1989, 212.

An "*abus de droit*" is corrected by returning matters to their normal state or by an order for compensation of damage that the abuse has caused: Cass. December 16 1982, *Pas.*, 1983, I, n° 231; Cass., June 11 1992, *Pas.*, 1992, I, 898.

- The illegitimacy of the refusal to conclude a contract could result from the violation by the lessor of fundamental human rights, and in particular the right to the respect for private life and family life (a, c⁴⁷, d⁴⁸ and e) (article 23 of the Belgian Constitution) and the prohibition on adopting racist or xenophobic behaviour (see Law of 30 July 1981 aiming at repressing certain acts inspired by racism or xenophobia, *Mon.b.*, 8 July 1981⁴⁹) (b)

This hypothesis remains, however, highly theoretical since cases where it will be possible to highlight the unreasonable nature of a refusal to contract will be rare.

(b) Being untruthful with regard to an 'essential' element of a contract in principle should allow for the cancellation of the contract based on "fraud" ("*dol*") or at least of "error" (article 1109 and following of the civil code)⁵⁰. The lessor who would like to obtain the cancellation of a contract on this basis would, however, find himself in a difficult situation because he would have to prove that the element concealed by the tenant was "*determinant*" upon his consent - not an easy thing if the reasons that impelled him to demand the cancellation are not legitimate⁵¹.

Note 1: A law dated February 25th 2003 aimed at combatting discrimination, which modified the law of February 15th 1993 and which has created a "Centre pour l'égalité des chances et la lutte contre le racisme" (i.e. Centre for equality of opportunity and the prevention of racism) has enabled the transposition into Belgian law of directive 2000/43⁵². This law forbids any direct, or indirect, discrimination in the "*supply or availability to the public of goods and services*" (article 2, § 4) and may therefore be applicable to tenancy contracts⁵³.

The aim of this law is to afford individuals who are the victims of discrimination (be it on the basis of race, gender, sexual orientation, marital status, religious beliefs, disability, etc.) the power to enforce their fundamental right to equal treatment.

Note 2: In any event, it is a principle that any citizen has the right to assert in front of the "ordinary" judge the protection of his fundamental rights - those found in the Constitution

⁴⁷ A contract may contain certain clauses relating to the enjoyment of the property. The most frequent clause is that which prohibits the tenant from keeping a domestic animal. Case law seldom enforces such clauses, particularly when the landlord has tolerated the presence of a pet for a period of time prior to his claim (See Y. MERCHIER, *Les baux, Le bail en général*, Larcier, 1997, p. 210, n°262 who quotes Civ. Termonde, February 20th, 1989, R.W., 1990-1991, p. 216 and J.P. Lennik, January 25th 1988, R.W., 1989-1990, p. 161). It was judged that to prohibit an animal undermines the tenant's private life (a principle enshrined in article 8.1 of the Convention, safeguarding human rights and fundamental freedoms (See Civ. Liège, October 21, 1986, *J.L.M.B.*, 1987, 578 - *contra* : J.P. Namur II, March 20th 1990, *J.J.P.*, 1990, p. 150 quoted by Y. MERCHIER, *Les baux, Le bail en général*, Larcier, 1997, p. 210).

⁴⁸ The answer must however be moderate for the point (d). If the landlord cannot refuse to rent his apartment for this sole reason, he can, without abuse of his right, propose to the tenants a "*règlement d'ordre intérieur*" imposing the need for them to respect certain constraints imposed upon "common life". If they agree to the tenancy, and this rule, they will have to respect it.

⁴⁹ With "*discrimination*", the Belgian law means "*any distinction, exclusion, restriction or preference having or being able to have for goal or effect to destroy, compromise or limit the recognition, the quality or the exercise, under conditions of equality, humans right and fundamental freedoms in the political fields, economic social or cultural or in any other field of the social life*".

See for an application in tenancy law: Corr. Liège, December 28 2001: in October 2000, an offer of a tenancy appeared in various newspapers with the term "*no foreigners*". The Centre for Equal Opportunities and the Prevention of Racism brought a complaint against the landlord under the Law of 30 July 1981 aimed at preventing certain acts inspired by racism or xenophobia. The Court condemned the landlord and granted the Centre an indemnity of 1 BEF as moral damage.

⁵⁰ See in particular for development of these concepts: P. WÉRY, S. STIJNS and D. VAN GERVEN, "Chronique de droit des obligations, Les sources", *J.T.*, 1996.

⁵¹ Indeed, *good faith* is enshrined in the law via article 2268 of the Civil Code. According to this article, "*good faith is always supposed and he that pleads in justice must prove bad faith*".

⁵² The Law of February 25th 2003 against discrimination, which modified the law instituting a Centre for Equality and the Fight against Racism, *Mon.b.*, 17 mars 2003.

⁵³ One must note that, besides sanctions in criminal law (articles 6 to 17), the law makes provision for civil sanctions (articles 18 to 22). The law also allows the victim to bring an "*action en cessation*" (in case of need, together with a request for a daily fine) before the Tribunal of First Instance.

or in an international instrument having direct effect in Belgian law. The "*tribunal de première instance*" is qualified to sanction any behaviour which contravenes these principles and to award damages to the victim on the basis of article 1382 and 1383 of the Civil code (extra-contractual liability).

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?

In principle, and unless the contract concluded between the parties states otherwise, the tenant is free to share the rented premises with the person(s) of his choice. The lessor would not be able to object to this except where the *objective* conditions so justify (e.g. the size of the rented premises prevent sharing, the accommodation is reserved for people of the same sex, etc.).

In addition, it is possible for two or several people to rent the same apartment together. In this case, each one is held responsible "*for the whole*" and the performance of the contract by only one of them releases the others ("*undivided*" right)⁵⁴. The request to leave must thus be given by all the tenants and the lessor must also send his request to each one separately.

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.

It is important to distinguish a situation whereby two individuals conclude a contract as co-tenants from a situation whereby one person concludes a contract as a tenant but thereafter shares the property with a third party. In the latter case, the third person isn't in theory a "*party*" to the contract and, unless married to the tenant⁵⁵⁶ or a cohabitant⁵⁷⁵⁸, does not, by his/her presence alone, acquire any right to the building because he/she is not 'party' to the contract concluded with the lessor. In the event of the death of the tenant, therefore, this person would have to leave the premises. The best protection on this point certainly lies in the prudence of having an amendment to the initial contract signed by the lessor, which would also be signed by the third party.

With regard to cohabitants (marriage or legal "cohabitation"), two situations can arise :

⁵⁴ Y. MERCHIEERS, *Les baux, Le bail de résidence principale*, Larcier, 1997, p. 133, n°70.

⁵⁵ So, a spouse who hasn't signed the agreement is a 'party' to it and is therefore jointly obliged to the payment of the rents, even if he/she leaves his/her spouse and abandons the premises (article 222 of the Civil Code). There is however a controversy about the duration of such joint obligation.

If it concerns people living in 'concubinage' and if both have signed the rent agreement, each person will be responsible for only half of the debts, unless the agreement provides otherwise (this is frequent). See exception when there is "cohabitation".

⁵⁶ We must however hold account of the law of January 28 2003 which automatically allots the family housing to the spouse or the legal cohabitant who was victim of acts of physical violence of her/his partner, *Mon. b.*, February 12 2003.

⁵⁷ See the law of 23 November 1998 founding the legal (*Mon.b.* January 12 1999).

⁵⁸ See Y. MERCHIEERS, *Les baux, Le bail en général*, Larcier, 1997, pp. 130 and ff., n°68 and ff.

1. - One of the partners is already a tenant and the other comes to live with him. The lessor cannot revoke the contract merely for this reason (as a consequence of the duty to respect private life), even where the contract so provides .

During the marriage or cohabitation, the rented property is thus shared between both partners (article 215 of the civil code⁵⁹). The couple have an "undivided" right to enjoy the property.

The "new" tenant cannot, however, pursue a modification of the initial lease.

The request to leave and/or other notifications relating to the lease must be addressed separately to each party (article 215, § 2 of the civil code).

This protection is afforded to the "*legal cohabitant*"⁶⁰ (article 1477, § 2 of the Civil code).

Note 1: The question arises as to whether or not the protection provided by virtue of article 215 of the Civil code exists *after* the couple have separated. We think that this protection ends when the rented property is no longer affected⁶¹.

Note 2: Situation of the "concubins"⁶² : if only one of the "concubins" is party to the contract, the other has no right or interest vested in the property. The protection provided by virtue of article 215 of the civil code affords no protection.

2. - The two partners are tenants⁶³. In this case, the two tenants have an equal right to enjoy the premises and the owner is required to respect this situation ("*undivided*" right). For this reason it is preferable for both parties to sign the contract. Should the couple separate (either by death or through disagreement) or in event of separation "*de fait*" (article 223 of the civil code) each partner has an identical right to remain in the property.

It should however be noted that the existence of the shared right of the two partners implies that each one remains a tenant even after the breakdown of the relationship. The lessor can thus exert his right - in particular for the payment of the rent - against both. A calculation will be made between the partners at the time of a divorce.

Y. Merchiers considers that each partner can unilaterally terminate the contract - except where the solidarity of the husbands was provided for in the contract. In such a case, one party's request to end the tenancy agreement will have no effect on the other, who will thereafter become the sole tenant⁶⁴.

When the two partners are regarded as being individual "parties" to the lease contract, the lessor will have to give a request to leave to both (by individual letter).

Note : It is also important to note that regional regulations enforce minimal requirements in order to ensure each person a "*decent*" standard of housing. This relates to in particular the obligation imposed upon the lessor to respect minimal requirements in terms of safety, health

⁵⁹ See Y. MERCHIER, *Les baux, Le bail de résidence principale*, Larcier, 1997, pp. 201 and ff., n° 343 and ff.

⁶⁰ By "legal cohabitation", the law aims "the situation of common life of two people having made a statement within the meaning of article 1476" (article 1475 of the civil code). See the law of 23 November 1998 founding the legal (*Mon.b.* January 12 1999).

⁶¹ Y. MERCHIER, *Les baux, Le bail de résidence principale*, Larcier, 1998, p. 210, n°362.

⁶² By "concubins" we means the people who live together without their relation being recognized by the law (marriage and legal cohabitation).

⁶³ See Y. MERCHIER, *Les baux, Le bail de résidence principale*, Larcier, 1998, p. 203, n°346.

⁶⁴ Y. MERCHIER, *Les baux, Le bail de résidence principale*, Larcier, 1998, p. 209, n°361.

and equipment (see not. article 3 of the Brussels's code of housing⁶⁵⁶⁶). For example, article 7 of the Brussels's code of housing states that furnished and small residences - i.e. residences whose living space does not exceed 28 square meters - can be leased once the landlord obtains a certificate of conformity. A copy of this authorization must be given to the tenant or the candidate tenant. There are also minimal residence standards⁶⁷.

Variant 2 : Students' house⁶⁸

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?

In principle, the landlord can only refuse other persons the right to live with his tenant if his reasons are justified objectively⁶⁹. This can be the case when a student decides, without having previously informed the landlord, to share the rented accommodation with others despite the fact that the property is unfit for this purpose, e.g. lack of living space, etc.

This circumstance could also be considered a "fault" on the part of the tenant, if the contract expressly foresees the consent of the landlord as necessary for any proposed sharing of the property and/or if this would cause "unreasonable" nuisance for T's neighbours. The landlord may in such circumstances refuse entry to the new tenant. However, the judge will appreciate the "reasonableness" of the landlord's refusal⁷⁰ (requirement of "good faith" - see article 1134 of the civil code).

If the new tenant does not become a "party" to the contract, the initial tenant remains solely liable to the landlord for the proper performance of his contractual obligations, e.g. the payment of the entire rent. T will not be able to require L to accept payment from another person that is not party to the tenancy contract.

Note : It is equally necessary to take account of the regional laws applicable to persons that rent housing to students (rooms and "kots"). One should note the Decree of the Flemish Government of July 28, 1998 concerning the quality and security of student's rooms⁷¹.

⁶⁵ Ordonnance of July 17 2003, *Mon. b.*, September 9 2003.

⁶⁶ See also the decree of 29 October 1998 instituting the Walloon Code of Housing, *Mon.b.*, January 18 2001 ; decree of July 15, 1997 instituting the Flemish Code of housing, *Mon.b.*, August 19 1997.

⁶⁷ Reglement of town planning of the Region Brussels-Capital of April 11, 2003 - Title II: Standards of habitability of the residences, *Mon.b.*, May 15 2003. This specifies the minimal standards of surface and equipment.

⁶⁸ It is first of all advisable to note that the situation of the students who rent an apartment during their studies often does not fall under the terms of the law of February, 20th 1991, but under the "common law" of tenancy (articles 1713 and ff. of the civil code). Indeed, the majority of these students have their "main home" at their parent's house.

⁶⁹ See the principle *supra*, question 2.

⁷⁰ In particular, the judge will consider the behaviour of the landlord.

⁷¹ *Mon.b.*, September 10, 1998.

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)?

Article 4 of the Statute on Tenancy (1991) explains that the transfer of the rental lease is in principle prohibited, except with the prior written agreement of the landlord⁷².

Likewise, the prospective tenant who has rented accommodation as his principal residence may not sublet the entire property. He may only sublet a *part* of the property and only with the agreement of the landlord and on condition that the remainder of the property remains assigned as his principal residence. If the property that is sublet is intended to serve as the subtenant's principal residence, the rights and obligations of the potential tenant and subtenant are, in their respective relations, determined by the law (landlord/tenant relationship), subject to certain specific rules. Thus, if the *landlord* puts an end to the principal lease, the tenant is obliged to notify the subtenant with a copy of the notice at the latest on the 15th day following receipt of the notice, notifying him that the sublet will end on the same date as the principal lease. If the *tenant* puts an end to the principal lease before the end of his contract, he is obliged to give the subtenant notice of at least three months, accompanied by a copy of the notice that he gives to the lessor. He must pay the subtenant compensation equivalent to three months rent.

In addition, according to article 4 § 3 of the Statute on Tenancy, the tenant alone is responsible for the consequences that result from the failure to respect the law⁷³.

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?***

The lease is not subject to any particular formal condition, unless it is concluded for a period of less than three years, more than nine years, or for the life of the tenant (written contracts).

It is, however, useful to keep a written contract, not only for the purposes of proof in the event of litigation, but also in order to ensure better protection of the tenant, especially in the event of a sale of the rented building⁷⁴. The written contract has a “definite date” for the third

⁷² See in particular P.A. FORIERS and A.M. VERHEYDEN, “Cession et sous-location”, in *Le bail de résidence principale, 5 ans d'application de la loi du 20 février 1991*, La Chartre, 1996, pp.211 and f.

⁷³ This solution is the one that results from the common rule because the legislator didn't foresee special rules on this point. The judge will appreciate.

⁷⁴ See G. BENOIT, “La transmission du bien loué et l'interférence entre bail commercial et bail de résidence principale”, in *Les baux à loyer après la loi du 13 avril 1997*, La Chartre, Kluwer, 1998, pp. 157 and f. ; M.-H. MINON-GILLIS, “La transmission du bien loué”, in *Le bail de résidence principale, 5 ans d'application de la loi du 20 février 1991*, La Chartre, Bruges, 1996, pp. 275 and f.

(article 1328 of the Civil Code) when it has been registered with the tax administration by means of the payment of registration fees (about 25 euros)⁷⁵.

In case of non-respect of this formality, the date isn't "*opposable*" to the third⁷⁶ to the contract, what means that *them* may act as if this contract doesn't exist⁷⁷.

Question 5: Extra payments and Commission of Estate Agents

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

Variant 1: *The sum of 500 euros 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.***

Variant 2: *Estate agent A, who was first approached by T and subsequently 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?*

As a general rule, a deposit or pre-payment is acceptable between the landlord and tenant, subject to the Law on Consumer Protection (1991) and the rules of the Statute on Tenancy (1991).

It can also occur that a landlord accepts to "save" the premises that he wants to rent for a certain period, until the visitor makes his final decision. In that case, it may happen that he asks for the payment of a lump sum aimed at compensating the temporary non-availability of his premises (called "option").

In variants 1 and 2, the requested sum is the counterpart of a service rendered or the granting of a right and seems therefore acceptable in principle, even if the sum mentioned in variant 2 (agency fee) is particularly high in proportion to the rent^{78/79}.

⁷⁵ The rent agreement must be registered within the four months following its signature. Failing to do so, there will be a fiscal penalty, although the rent agreement will remain valid between parties.

⁷⁶ The contract however always exists between the parties. The "*inopposability*" aims only its effects to the thirds.

⁷⁷ The recording of the contract is an important protection (of the tenant) in the event of sale of the rented good by the lessor. Indeed, the lease which isn't recorded doesn't have any "date certaine" for the new purchaser and this one will not be held to respect it (See Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, pp. 298 and ff., n°493 and ff ; articles 1743 to 1751 of the civil code). The conclusion is nevertheless different if the contract provides that the lessor can put an end to the lease in the event of sale.

It is in principle the same for any third which claims to have a right on the leased property : the anteriority of the lease could indeed be proven only if one of the formalities envisaged in article 1328 of the civil code were accomplished (death, recording, notarial act). See Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, pp. 292 and ff., n°482 and ff.

⁷⁸ In principle, the mere disproportion between the mutual services does not allow the cancellation on account of "injury" if consent was freely given.

⁷⁹ It is worth noting that Belgian case law and doctrine admit the principle of the "*reduction of the salary of the agent*".

SET 2: DURATION AND TERMINATION OF THE CONTRACT⁸⁰

The law of 20 February 1991 introduced a new section into Book III of the Civil Code in order to govern leases in particular - of furnished or unfurnished properties - that the tenant (or the subtenant⁸¹) assigns, from the entrance into use or in the course of the lease (but in this case by means of written agreement of the lessor), in whole or in part, as his principal residence⁸².

This law is important in several respects as far as the duration of the residence lease is concerned:

- *first of all*, henceforth any lease contract is *always* concluded for a definite duration⁸³, either that having been fixed by the parties (more than nine years, less than three years or duration of the life of the tenant) or it is imposed by the law if the parties are silent (nine years); the conclusion of contracts between 3 and 9 years of length is also possible under certain conditions (see *infra*);
- *then*, and in spite of its definite duration, the lease will not come to an end solely through the expiration of the term: notice is *always* necessary, within the time period provided for by the law. Late notice moreover will be without effect and will lead to the automatic renewal of the conditions of the lease previously concluded⁸⁴;
- in conformity with common principles, the lease can end before the term, either through mutual agreement, or because of a fault justifying the termination of the contract⁸⁵, or through early termination in the cases and under the conditions restrictively enumerated by law⁸⁶;

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?

⁸⁰ See N. VERHEYDEN-JEANMART and I. DURANT, "La durée du bail", in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE, 1998, pp.41 and f.

⁸¹ See *supra*, question 3.

⁸² The situations in which this assignment is secondary to a professional assignment are nevertheless excluded (Article 1^{er}, § 2).

⁸³ N. VERHEYDEN-JEANMART and I. DURANT, "La durée du bail", in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE, 1998, p. 43.

⁸⁴ If, in spite of the notice to quit, the tenant stays in the premises without opposition from the landlord, the question has arisen whether the lease is extended. We do not think so as the will to break the lease was clearly expressed by one of the parties. In this case, the tenant's position is somewhat precarious. This is the established doctrinal position: Y. MERCHERS, *Bail de résidence principale*, Larcier, 1998, p. 126, n°166.

⁸⁵ See B. LOUVEAUX, "Expiration du bail avant terme", in *Le louage de choses, I, Les baux en général*, sous la direction de J. VANKERCHOVE, *Les Nouvelles*, Bruxelles, Larcier, 2000, pp. 232 à 276.

⁸⁶ See Y. MERCHERS, *Bail de résidence principale*, Larcier, 1998, pp. 126 et suivantes.

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) Since the introduction of the law of 20 February 1991, no lease can be considered as having an "indefinite" duration. Failing stipulation of a conventional term, the law assumes that the lease has been concluded for a duration of nine years (article 3). It must come to an end by means of notice given at least six months before the expiration⁸⁷, failing which it is renewed by periods of three years at the same conditions.

When the lease is for nine years, which constitutes the "common rule" for leases for principal residences, the lessor and the tenant retain the right nevertheless to terminate it, but by means of an express authorisation of the law concerning the lessor. In effect, § 2 et seq. of article 3 explain three situations in which the *lessor* can put an end to the contract before the expiration of nine years⁸⁸. There will be a right to these powers of termination in advance, however, only if the lease has not excluded or limited them, expressly or tacitly⁸⁹.

1. in view of personal occupation or occupation by close family members⁹⁰ (§ 2) unless the contract excludes this ability, or is silent on this point, the law imposes on the landlord the obligation to respect strict conditions under risk of having to pay the tenant compensation equivalent to 18 months of rent⁹²:

- the notice period cannot expire before the end of the first three-year period starting from the entry into force of the contract,
- the request to leave⁹³ must respect a notice period of a minimum of six months (imperative time period),
- the request to leave must mention the identity of the person who will occupy the property as well as his/her family tie with the landlord⁹⁴ (this

⁸⁷ See nevertheless Article 11 of the Statute on Tenancy (applicable in all cases), according to which " *When the lease falls due or ends by the effect of a leave, the tenant who justifies exceptional circumstances can ask for an prolongation. Under penalty of nullity, this prolongation is requested from the lessor by letter registered to the post office at the latest a month before the expiry of the contract. In the absence of agreement between the parties, the judge can grant the prolongation by taking account of the interest of the two parties, and, in particular, of the great age of one of the parties. He fixes of it the duration, which must be given. He can also, if he considers it equitable, grant in this case an increase in rent to the lessor which makes him the request of it and reduce, or remove, the allowance due pursuant to article 3, § 4. Only one request for renewal of the prolongation can be introduced, under the same conditions. In the absence of agreement between the parties, the judge can grant it, also under the same conditions.*"

⁸⁸ See for more details Y. MERCHERS, *Bail de résidence principale*, Bruxelles, Larcier, 1998, pp. 99 and f.; M. VANDERMERSCH and Th. DE RIDDER, " Les baux de neuf ans – Questions communes à certaines facultés de résiliation anticipée ", in *Le bail de résidence principale, 5 ans d'application de la loi du 20 février 1991*, sous la direction de P. JADOU and M. VANWUICK-ALEXANDRE, La Charte, J.J.P., 1996, pp. 79 and f.

⁸⁹ See Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 100, n°99 ; N. VERHEYDEN-JEANMART and I. DURANT, " La durée du bail ", in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOU and M. VANWUICK-ALEXANDRE, 1998, pp. 45 and f.

The terms of the contract can indeed "implicitly" exclude the anticipatory resolution for the reasons authorized by the law. It will be for example the case when the tenancy is stipulated "non terminable" or "in any event for 9 years". The faculty of anticipated termination is the rule and the exceptions must thus be restrictively interpreted. See Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 100, n°99.

⁹⁰ See Article 3 § 2 : "his/her descendants, his/her adopted children, his/her ascending, his/her spouse, descendants, ascending and adopted children of this one, his/her collateral and the collateral ones of his/her spouse until the 3rd degree".

⁹¹ For more details, see Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, pp. 100 and f.

⁹² Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 109, n°118.

⁹³ See Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 104, n°108.

⁹⁴ The complete identity is however not required. The lessor could thus simply say to want to lease his good by his spouse or his son by example. It is however to note that the validity of the notice is appreciated at the time when it is given. The identity and the family tie must thus be specified in the request to leave. With defect, the notification will be void and the tenant will be able to remain in the places.

connection moreover will have to be proved by the landlord at the tenant's request),

- except for exceptional circumstances⁹⁵, the premises must be occupied in the year that follows the expiration of the notice period given by the landlord, or, in the event of renewal, of the restitution of the premises by the tenant,
 - except for exceptional circumstances, the premises will have to remain occupied "in an *effective* and *continuous* way" for at least two years,
2. in view of the reconstruction, transformation or broad-scope renovation of the rented premises (request to leave "because of works") (article 3, § 3) unless the contract excludes or limits this ability⁹⁶: this ability is allowed only at the expiration of a three-year period – except when the work concerns several accommodations in the same building (article 3, §3, paragraphs 1 and 2) - and imposes the obligation on the lessor to notify the tenant at least six months in advance. The lessor will also have to submit to the tenant proof of the importance of the works that he claims he will undertake on the rented property (either the building or town planning permit, or a description of the premises and a detailed estimation of the cost, or a detailed quote or a copy of the contract for the tender⁹⁷). Beyond this, and under risk of having to pay the tenant compensation equivalent to 18 months of rent, this work will have to⁹⁸ :
- respect the purpose of the premises as it results from the legal and regulatory arrangements concerning town planning,
 - affect the body of the accommodation occupied by the tenant,
 - reach a minimum cost : three years of rent or two years of the total amount of the rent if it concerns an apartment building,
 - begin within six months and be finished within the 24 months that follow the expiration of the notice or, in the case of renewal, the restitution of the premises by the tenant,
3. at the expiration of each three-year period⁹⁹; without a reason, but by means of the payment of compensation that decreases depending on the three-year period in the course of which the request to leave occurs (§4) : nine or six months of rent depending on whether the contract comes to end at the expiration of the first or the second three-year period (period notice : six months);

No form is imposed for the request to leave¹⁰⁰. It could therefore be given verbally. However, in order to avoid any problem of proof in the event of a dispute, it is preferable that the lessor gives notice by registered letter or by writ.

⁹⁵ Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 108, n°116.

⁹⁶ This faculty of resolution can be excluded expressly or tacitly. See Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 109, n°120 ; N. VERHEYDEN-JEANMART and I. DURANT, "La durée du bail", in *Les baux à loyer après la loi du 13 avril 1997*, La Chartre, Sous la direction de G. BENOIT, P. JADOU and M. VANWIJCK-ALEXANDRE, 1998, pp.56 and f.

⁹⁷ Were considered insufficient on this point: an authorization of housing (J.P. Gand, March 4 1991, *R.W.*, 1994-1995, p. 237), a leave which doesn't describe work having to be carried out (J.P. La Louvière, March 3 1993, *J.J.P.*, 1993, p. 189.

⁹⁸ See for more details Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, pp. 110 and f., n° 122 and f.

⁹⁹ Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 118, n°139 ; N. VERHEYDEN-JEANMART and I. DURANT, "La durée du bail", in *Les baux à loyer après la loi du 13 avril 1997*, La Chartre, Sous la direction de G. BENOIT, P. JADOU and M. VANWIJCK-ALEXANDRE, 1998, pp.65 and f.

¹⁰⁰ See in particular Y. MERCHERS, *Le bail de résidence principale*, Larcier, 1998, p. 123, n°163.

Under the first two hypotheses, in addition the request to leave would have to be motivated. Failing this, the lessor will be considered as having given a request to leave “without reason” and will be bound to pay the tenant the compensation of 18 months of rent provided for by the law (article 3, §§ 2 and 3)¹⁰¹.

However, the landlord does not have to detail the reason for the termination¹⁰².

Under the second hypothesis, the documents will also have to be attached; although the majority opinion supports the view that this may be performed at a later date. A lack of communication will therefore be insufficient to justify alone the nullity of the request¹⁰³.

The validity of the reason is assessed at the time when notice is given. Starting at this moment, the landlord is bound by the grounds that he has mentioned. He will no longer be able to substitute a different reason later. The landlord may not in this way avoid paying the compensation legally due¹⁰⁴.

Under the three hypotheses cited above, the tenant can always serve counter notice if he/she finds new accommodation more rapidly. In this case he/she will have to respect a notice period of one month (article 3, § 5)¹⁰⁵.

The judge can be invited by the tenant to verify the sincerity of the reason given by the landlord under the first two scenarios. However, where a landlord refuses a request to prove the family relationship presented by the prospective tenant (see article 3 § 2.) the unsatisfied tenant may bring an action for nullity of the request at the latest two months before the expiration of the notice period.

Note 1 : As for the *tenant*, the law authorises him/her to put an end to the lease, “at any time”¹⁰⁶, and without having to invoke any reason, but by means of three months’ notice (§5) and the payment of compensation of three, two or one month of rent, depending on whether the lease comes to an end in the course of the first, second or third year of the lease.

Note 2 : The parties can conclude, but by necessity in writing¹⁰⁷,

1. a tenancy "*of short duration*", that is, a tenancy whose duration does not exceed three years. This lease can only be renewed a single time and on condition that the total duration does not exceed three years. If, at the duration fixed by the agreement the tenant remains in the premises with the landlords agreement, the lease will be considered to have been concluded *ab initio* for a duration of nine years and article 3 §§ 2 to 4 will be applicable.

⁸² Civ. Courtrai, May 24 1996, *R.W.*, 1997-1998, p. 1080.

¹⁰² Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 114, n°131.

¹⁰³ Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, p. 115, n°131.

¹⁰⁴ See in particular Y. MERCHERS, *Bail de résidence principale*, Larcier, Bruxelles, 1998, pp.120 and f.

¹⁰⁵ N. VERHEYDEN-JEANMART and I. DURANT, “ La durée du bail ”, in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE, 1998, pp.73 and f.

¹⁰⁶ See N. VERHEYDEN-JEANMART and I. DURANT, “ La durée du bail ”, in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE, 1998, p.72.

¹⁰⁷ N. VERHEYDEN-JEANMART and I. DURANT, “ La durée du bail ”, in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE, 1998, pp. 77 and f. ; I. DURANT, “ Le bail de courte durée : une exception généralisée ? ”, in *Le bail de résidence principale, 5 ans d’application de la loi du 20 février 1991*, sous la direction de P. JADOUL and M. VANWIJCK-ALEXANDRE, La Charte, J.J.P., 1996, pp. 55 and f. .

2. a tenancy "of long duration"¹⁰⁸, that is, a tenancy for a duration of more than nine years. In this case, the lease will come to an end by means of the notification of a request to leave at least six months before the agreed expiration. Lacking this, it will be renewed for successive periods of three years under the same conditions.

b) If the landlord obtains a writ ordering the expulsion of the tenant, in principle the tenant will not have any further recourse¹⁰⁹. He is supposed to have put forward the circumstances that, according to him, would justify his remaining in the premises, in the course of the proceedings. The tenant always has the power, if the landlord wants to put an end to the contract, to refer to "exceptional circumstances" (article 11 of the Law¹¹⁰). The landlord has the right to protect his property, and the right that he exercises over it. He would therefore be able to obtain a writ authorising the expulsion of the person remaining in the premises without "title and right".

It is, however, important to note that articles 1344*ter* et seq. of the Civil procedure code force the compliance with certain rules in order to protect the person being the object of an expulsion. These articles were integrated or modified by the Law of November 30, 1998¹¹¹ and express the wish of the Belgian government to fight against poverty. The idea is above all to reinforce the role of the "Public Centres of Social Assistance" (C.P.A.S.) in the prevention and management of expulsions¹¹² and to humanise the procedure of expulsion.

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?

Whatever its duration - provided for by the law or the parties -, the contract will not come to an end automatically. A notice to leave is necessary¹¹³, contrary to what common contract principles allow.

Article 3, § 6 authorises the parties to conclude a lease "of short duration", that is, a lease whose duration is less than three years. This lease will terminate by means of a request to leave notified by one party to the other at least three months before the expiration of the duration agreed.

¹⁰⁸ See M. VLIES, "Les baux de neuf ans ou plus – Les facultés de résiliation anticipée. Questions propres à chaque type de congé", in *Le bail de résidence principale, 5 ans d'application de la loi du 20 février 1991*, sous la direction de P. JADOUL and M. VANWIJCK-ALEXANDRE, La Charte, J.J.P., 1996, pp. 115 and f

¹⁰⁹ See in particular D. PIRE, "L'humanisation des expulsions", in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, Sous la direction de G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE, 1998, pp.183 and f. See article 23 of the Constitution, article 1244 of the Civil Code ("délai de grâce"), article 1495 of the civil procedure code.

¹¹⁰ See Y. MERCHERS, *Bail de résidence principale*, Larcier, 1998, pp. 133 et suivantes ; N. VERHEYDEN-JEANMART and I. DURANT, "La durée du bail", in *Les baux à loyer après la loi du 13 avril 1997*, La Charte, G. BENOIT, P. JADOUL and M. VANWIJCK-ALEXANDRE (eds.), 1998, pp.75 and f.

¹¹¹ *Mon.b.*, January 1st 1999.

¹¹² By example, the judgement of expulsion can be carried out only a month after the significance of the decision by a bailiff.

¹¹³ Except in the case where the lease were, by the will of the parties or by a court order, prolonged for "exceptional circumstances" (article 11). In this case, the lease automatically ends at the limit of the term. It will be the same if the lease were concluded for the life from the tenant. The absence of leave is justified indeed then also by the particular circumstances of the contract. However, it will be necessary that the lessor is informed of the death of the tenant.

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, respecting the delay of 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?***

When the lease is concluded for a duration of less than three years, and neither of the parties wants to put an end to it by giving notice of a request to leave at least three months before the expiration of the agreed term, this lease will only be able to be renewed a single time, and on condition that the total duration does not exceed three years. If at the expiration of the duration of a maximum of three years set by agreement the tenant remains in the premises without opposition from the landlord, the lease will be considered to be concluded ab initio for a duration of nine years, and article 3 §§ 2 to 4 will be applicable (powers of anticipatory termination).

In the case cited above, because the renewals of the lease concluded initially for one year take the total duration to more than three years, the lease has become a nine-year lease. The lessor will be able to terminate it legally, without reason, only while respecting the conditions decreed in Article 3, § 4, that is by means of the payment of compensation. If the rupture occurs at the expiration of six years that is at the end of the second three-year period the compensation will be six months of rent.

The notice to quit must be given at least six months before the expiration of the three-year period under way¹¹⁴, for lack of which it will be deprived of effect and the tenant will be able to remain in the premises until the expiration of nine years calculated from the day of the conclusion of the *initial* lease.

However, the lease can always be renewed for "exceptional circumstances" (accepted in an agreement between the parties or by judicial decision) (article 11 of the Statute on Tenancy). In this case, a request to leave will no longer have to be given at the expiration of the renewed lease.

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?***

¹¹⁴ One must note that article 3, § 9 of the Law indicates that "when a leave can be given at any time, the length of notice becomes effective the first day of the month which follows the month during which the request to leave is given".

a) Unless otherwise provided in the lease, the contract will not come to an end with the death of the tenant or the lessor¹¹⁵ (article 1742 of the Civil Code). The deceased's heirs are obliged to comply with the lease. If the landlord has several heirs, they become co-lessors until the partition. They can terminate the lease only under the terms prescribed by article 3.

b) Article 9 of the Statute on Tenancy envisages the "*transfer*" of the property rented and explains that, if the lease has a "definite date" *prior* to the sale, the purchaser (free or for a fee) is "*subrogated*" in the rights of the lessor. If the lease does not have a definite date and the tenant has been occupying the leased property for more than six months, the purchaser may put an end to the lease, but only while respecting the conditions provided for in article 3, §§ 2 to 4 (personal occupation, renovation, by means of compensation) and by means of notice of a request to leave, 'under penalty of forfeiture', within the three months that follow the date of the drawing up of the authentic deed noting the sale of the leased property.

c) Unless otherwise provided in the contract, these circumstances have no influence on the lease.

These three reasons never justify as such the termination of the lease contract.

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?

The lease can be concluded for the life of the tenant (article 3, § 8 of the Law). It will then come to an end at the death of the tenant¹¹⁶. The lessor will not be able to put an end to it in advance except if the parties have agreed to this by contract.

Once the landlord has knowledge of the death of the tenant, if he does not wish to allow the heirs to take over the lease, he will have to ensure that his possible tolerance – such as granting an additional period of time to remove the furniture which has been placed by the deceased tenant – cannot be interpreted as his wish to conclude a new lease with them. The landlord will thus have to retain proof that he is only granting the heirs use under set terms and conditions.

Question 11: Immediate termination under unusual circumstances

L and T have concluded a tenancy contract with or without time limit. Under what conditions and terms may one party give immediate notice under unusual circumstances? In particular:

- a) Can L give immediate notice if T did not pay the two last monthly rents?***
- b) Can L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?***
- c) Is a contractual clause ("clause résolutoire") valid according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents or commits any other "gross" breaches of her duties?***

¹¹⁵ Y. MERCHIEIS, *Les baux, Le bail en général*, Larcier, p. 334.

¹¹⁶ And this without a request to leave having to be given.

In order to respect the right to housing, the landlord can never put an end to the contract without granting to the tenant a time, even a limited period of time, to leave the premises and to find another housing. In the event of serious negligence on the part of the tenant, it is certain that the landlord will be able to ask the judge - who must make the final decision - to fix a time shorter than that envisaged by law in "normal" circumstances. The law of tenancy thus derogates on this point with the "common law" of contract, which allows in theory an immediate termination by notification in the event of urgency and of serious failure. The non-payment of rent (hypothesis *a*) does not justify in any case a fast resolution - but justifies as such the termination, a situation denounced by many landlords. A disagreement between the tenant and his landlord, or between the tenant and his co-tenants (hypothesis *b*), will never allow for an exceptional decision and the landlord will simply have to await the expiration of the lease (in the respect of article 3 and f. of the Tenancy Statute).

SET 3: RENT AND RENT INCREASE

Question 12: Introduction - Settlement Date and Modes of Payment, Right of Distraint When is the rent due? Is there any restriction on modes of payment?

As we noted in the short general introduction, the Belgian Government has always taken measures to regulate rent increases¹¹⁷. This phenomenon may explain the relative decline of private tenancy in our country¹¹⁸.

In accordance with article 1728 of the Belgian Civil Code, the tenant must fulfil two essential obligations: he must use the premise as a *bonus paterfamilias* and to pay the rent at the time agreed in the contract by both parties. The rent is thus one of the fundamental elements of the tenancy contract. The rule of freedom in the determination of the price applies in tenancy law and so it is possible to find very large disparities with respect to rent¹¹⁹. The parties are also totally free to fix when the rent is due and the way it must be paid (money, payment in kind, both, etc¹²⁰). Index-clauses are admitted and revision possibilities do exist under Belgian Law¹²¹.

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

The landlord has an automatic legal pledge on the furniture situated in the premises to ensure the payment of the rent¹²².

¹¹⁸ C. LOUVOT-RUNAVOT, "Le logement dans l'Union européenne: la propriété prend le pas sur la location", *Economie et Statistique*, n° 343, 2001-3, p.44.

¹¹⁹ G. BENOIT, "Le prix du bail: valeur locative normale, charges locatives et indexation", in *Le bail de résidence principale: cinq ans d'application de la loi du 20 février 1991*, 1996.

¹²⁰ Y. MERCHERS, "Le bail de résidence principale", *o.c.*, p. 146.

¹²¹ De Vlaamse Huurdersbonden, *Het nieuwe Huurboek*, Berchem, EPO, 2002, p. 203.

¹²² Art. 20, 1° of the loi hypothécaire

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/or criminal law (e.g. on profiteering)? By whom are these rules enforced? (public ministry or national or local administrative agency etc)

Article 7 of the 1991 Statute on Tenancy¹²³ explains the conditions that are to be respected in order to modify or index the rent of long-term contracts (nine years)¹²⁴. Parties may agree on a rent increase (or decrease) between the sixth and the ninth month preceding the end of each set of three years. When no agreement can be reached, the judge may admit a rent modification only if new circumstances provoked a rise (or a decrease) of the normal rent value above 20 percent of the rent due at the moment of the claim. He may also accept a rent modification if the landlord has done work in order to improve the premises that increase the normal rent value by 10%. There are two main steps in this procedure: first, the judge must assess the existence of new circumstances and then he must establish the normal rent value. "New circumstances" have been defined by the Belgian Court of Cassation as "*circumstances that didn't exist at the time of conclusion and couldn't be foreseen at that time*"¹²⁵. Nevertheless, there is no consensus on what new circumstances really are. Nowadays, some commentators suggest that the facts that constitute the new circumstances have to be unforeseeable¹²⁶. As an example of cases of application of the notion, we may quote the creation of new means of access or the elaboration of new real estate projects in the neighbourhood¹²⁷. Concerning the definition of the normal rent value, there is no controversy: The normal rent value is the rent paid in the district for a premise with similar standing and facilities¹²⁸.

Ordinary inflation may be met by the index-clause. The adaptation of the price for new circumstances may only meet an extraordinary increase of the average rent in the part of the city the premise is situated in or other similar criteria.

At a procedural level, certain conditions must be respected by the landlord, e.g. the right to seek a judicial review of the rent. The claim may be made between the sixth and the ninth month preceding the end of three years¹²⁹. The party asking for an increase (or decrease) must prove two different facts¹³⁰: firstly, it must be proved that there are sufficient reasons to justify the claim¹³¹ and secondly, that the modification asked corresponds to the real modification of the normal rent value¹³². The judge must make his decision based on equity¹³³.

This means that the judge may take his decision examining the particular facts of each case separately and is not bound by the corresponding increase of the normal rent value. Once the legal conditions are fulfilled to accept the modification, the judge is competent to

¹²³ Act of 20 February 1991.

¹²⁴ Y. MERCHIEERS, *Le bail de résidence principale*, o.c., p. 153.

¹²⁵ Cass., February 12 1972, *Pas.*, 1972, I, p. 542.

¹²⁶ G. BENOIT, o.c., p. 231.

¹²⁷ J.P. Anvers, June 16 1992, *J.J.P.*, 1993, p. 50.

¹²⁸ G. ROMMEL, "Le bail de résidence principale", *J.J.P.*, 1992, p. 300.

¹²⁹ Article 7, §1, 5th, of the 1991 Statute on Tenancy.

¹³⁰ J.P. Ixelles, 11.10.1991, *Echos Log.*, 1992, p. 46.

¹³¹ G. ROMMEL, o.c., p. 300.

¹³² J.P. Borgenhout, 2.6.1993, *R.W.*, 1993/94, p. 576.

¹³³ Article 7, §1, 4th, Statute on Tenancy.

appreciate and to fix the extent of the increase *in specie*¹³⁴. The tenant will be required to pay the rent increase (if accepted) from the first day of the new set of three years¹³⁵.

The right to increase the rent is an imperative right, so the parties are not allowed to exclude it. However two exceptions do exist. First of all, the parties may conclude a restoration contract (*contrat de rénovation*): in this case the tenant commits himself to carrying out repairs falling to the landlord who accepts to give up temporarily his right to increase the rent¹³⁶. The second exception is the life long tenancy, where there exists the possibility to surrender the right to modify the rent¹³⁷.

Question 14: “Index-clause” and Progressive Rent

a) Is it possible to contractually link the annual increase of the rent with the annual average increase of the cost of living (or a similar index) as established by official statistics?

Article 6 of the 1991 Statute provides that if the contract is in written form the rent will automatically be adapted once a year in accordance with the cost of living. However, the parties may contractually renounce this adaptation.

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

Article 1728*bis* of the Civil Code outlines the conditions that must be respected in order to increase the rent. The increased rent may not exceed the amount of the: original rent multiplied by the new coefficient of the cost of living divided by the former one. The contractual terms using greater coefficients shall be reduced to the legal calculation. Although the text of the Tenancy Statute establishes a real right to adaptation, the implementation of this right is not automatic: a written request from the landlord is required¹³⁸. The request may have a retroactive effect limited to 3 months¹³⁹. So the request may be made months after the date but the index-clause will only produce effects for the last three months. The right to ask for adaptation is fixed to 1 year¹⁴⁰.

Question 15: Rent Increase by Contractual Amendment

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?

¹³⁴ G. BENOIT, *o.c.*, p. 233.

¹³⁵ Article 7, §1, 6th, of the 1991 Statute on Tenancy.

¹³⁶ Article 8, 3rd, of the 1991 Statute on Tenancy.

¹³⁷ Y. MERCHIERS, *o.c.*, p. 153.

¹³⁸ Article 6, 2nd of the 1991 Statute on Tenancy.

¹³⁹ Y. MERCHIERS, *Le bail de résidence principale, op. cit.*, p. 151.

¹⁴⁰ Civil Code, article 2277, 3rd.

As previously noted, two kinds of circumstances may give rise to a rent increase: the index-clause and the triennial modification of the rent. If the increase is due to the application of the index-clause and is higher than the result of the official formula provided by article 1728bis¹⁴¹, the judge may reduce the increase to the level obtained by application of this formula¹⁴². Concerning the triennial revision of the rent, one can consider the payment of an unlawful rent increase by the tenant as an acceptance. In this case the increase will be considered valid.

Concerning reimbursement, the judge may choose the execution mode of his judgement. Nevertheless, the statute stipulates that all sums paid above and beyond what is owed in application of the contract or the statute may give rise to reimbursement if it is sought by registered post addressed to the landlord. The limitation period is one year and reimbursement covers only sums paid within the last five years¹⁴³.

Question 16: Deposits

What are the basic rules on deposits?

There is no legal obligation to provide the landlord with a deposit; however, it is a frequent practice of the landlord to request the payment of a deposit. The freedom of the parties is critical: the parties may agree the amount of the deposit, its nature and the identity of the debtor (a third person may provide the deposit)¹⁴⁴. However, if the deposit is an amount of money, this latter may not exceed the equivalent of three months rent¹⁴⁵. This deposit is to be placed in a bank account in the name of the tenant. The interests are saved and the landlord receives a surety. This surety may be useful in the event of contractual breach made by the tenant¹⁴⁶. This surety covers all the tenant's possible contractual debts: payment of rents, utilities, damages to the premise, etc.¹⁴⁷ A contractual agreement may envisage the possibility to increase the amount of the deposit in the course of the contract in so far as this does not exceed three month's rent¹⁴⁸. For example, the deposit may be indexed, just as the rent is commonly indexed¹⁴⁹.

With regard to the return of the deposit, there exist only two possibilities: either there is an agreement between both the parties or a decision of the court allows for the return. In theory, a copy of the decision is sufficient to unfreeze the bank account¹⁵⁰.

¹⁴¹ See *supra*, "index-clause".

¹⁴² Article 1728bis, 2nd of the Civil Code.

¹⁴³ Article 1728quater of the Civil Code.

¹⁴⁴ Y. MERCHERS, *o.c.*, p. 168.

¹⁴⁵ Article 10, of the 1991 Statute on Tenancy.

¹⁴⁶ Article 10, 2nd in fine of the 1991 Statute on Tenancy.

¹⁴⁷ Y. MERCHERS, *o.c.*, p. 170.

¹⁴⁸ F. GRANDHENRY, "La garantie locative", in *Le bail de résidence principale - 5 ans d'application de la loi du 20 février 1991*, Bruges, La Chartre, 1996, p. 265.

¹⁴⁹ Y. MERCHERS, *o.c.*, p. 170.

¹⁵⁰ F. GRANDHENRY, "La garantie locative", in *Le bail de résidence principale - 5 ans d'application de la loi du 20 février 1991*, *o.c.*, p. 271.

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?

The basic rules on utilities are quite similar to those regulating rents. The parties are entirely free to decide who will make payment for the utilities and to what extent¹⁵¹. However, the Civil Code stipulates that when the utilities falling to the tenant are inclusive, they must correspond to real expenses¹⁵². There is no possibility to contractually bypass this obligation. The utilities must also be paid from a separate bank account and the landlord must provide convincing documentary evidence¹⁵³. At any moment the tenant may ask the judge to modify the inclusive utilities ("charges forfaitaires") or to change them into real utilities ("charges réelles")¹⁵⁴.

Although there is no legal repartition of the utilities, in general the contract distributes the utilities in the following way: utilities concerning property right (tax, maintenance, manager earning,) are to be met by the landlord whereas the utilities concerning the use of the premise are to be paid by the tenant (consumption of water, gas, electricity, heating)¹⁵⁵.

Article 7 of the Tenancy statute lays down the procedure to increase or decrease the utilities amount falling to one party. This system is identical to that previously outlined for rent increases¹⁵⁶.

SET 4: OBLIGATIONS OF THE PARTIES IN THE PERFORMANCE OF THE CONTRACT AND STANDARD TERMS

Under the expression "*standardised terms*" one understands contractual clauses written by a party and generally prior to any negotiation¹⁵⁷. This practice is scarcely used in the field of private tenancies, except when the landlord is himself a professional¹⁵⁸, in which case the cost of legal advice can be considerable. On the contrary, incomplete and often unlawful agreements are still commonplace between two private individuals (this is frequently the result of ignorance of the Law of February 21st 1991 and the protection that it has laid down in favour of the tenant).

What are the legal protections afforded to parties under Belgian law?

¹⁵¹ G. BENOIT, *o.c.*, p. 234.

¹⁵² Article 1728^{ter} of the Civil Code.

¹⁵³ G. BENOIT, *o.c.*, p. 234.

¹⁵⁴ Article 7 § 2, Statute on Tenancy (1991).

¹⁵⁵ *Ibidem*.

¹⁵⁶ See *supra*, "rent increase".

¹⁵⁷ J. VAN RYN et HEENEN, *Principes de droit commercial*, Tome III, 3^{ème} édition, n°16.

¹⁵⁸ One must set aside a relatively frequent situation in which the lessor uses a "model" of contract issued by the "Office des propriétaires", real estate agency specialised in advising landlords: see <http://www.op.be>.

This question arises in the case of a dispute between parties. With regard to contractual clauses, the first level of protection, which is also the most broad is the result of jurisprudence and the implementation of the general principles of law of obligations¹⁵⁹. On the other hand, the legislator has intervened with a view to sanctioning the use of certain contractual clauses by adding new dispositions into the Civil Code (f.i. "penalty clauses") or into specific laws (e.g. Tenancy Statute).

The core of the legal protection against abusive clauses lies in particular within the general law of July 14th 1991¹⁶⁰ on trade practices, the protection and information provided to the consumer. This law was modified by the law of December 7th 1998 which enabled the transposition of directive 93/13^{161.162}. The law of July 14th 1991, however, has a narrow field of application as it does not protect parties acting as "sellers"¹⁶³ (or "professionals"), or two "consumers".

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? (presupposing that the national implementation legislation of the Unfair Terms Directive applies to commercial landlords)

Regarding "standardised" clauses in particular, it is important to note that the first control exerted by jurisprudence will be to ensure that a clause may be invoked, i.e. the reality of the consent of the person who has not written them¹⁶⁴. It is only if the consent was given, and given "freely", that the intrinsic validity of the clause will be upheld. In the absence of such validity, the clause will be considered as "non-existent".

What are the limitations placed on the validity of the standardised clauses by the legislator or by the courts?

Firstly, one must note that, as the rules which govern contractual liability are not rules of public order, the clauses which organize the modalities of the contract's performance or non-performance are, in principle, valid.

¹⁵⁹ Several principles are important on this point. They relate to the validity of the clauses (respect of public order and the "morality", prohibition of the abuse of right, compliance with the imperative rules, etc), the reality of assent, or their interpretation (interpretation "contra proferentem", respect of the "declared" will, absence of interpretation in case of no doubt exists). For more details, see *infra*, the development about the clauses in particular.

¹⁶⁰ Law of July 14th 1991, *Mon.b.*, 20.08.1991. This law has been modified twice, first on October 30th 1998 regarding the Euro (*Mon.b.*, 10.11.1998) and then on December 7th 1998 (*Mon.b.*, 23.12.1998).

See P. WOLFCARIUS, "La protection du consommateur en matière contractuelle : la réglementation des clauses abusives dans la nouvelle loi du 14 juillet 1991 sur les pratiques du commerce et l'information et la protection du consommateur", in *Les pratiques du commerce et la protection et l'information du consommateur depuis la loi du 14 juillet 1991*, Ed. Jeune Barreau de Bruxelles, 1991, p.312.

¹⁶¹ *Mon.b.*, December 23 1998.

¹⁶² A first law had already amended the law of 1991 in order to adapt its provisions to the introduction of the euro. Law of October 30, 1998, *Mon.b.*, November 10, 1998. It introduced into the "black list" of the "abusive clauses", a clause number 22 devoting the abusive character of the contractual clause allowing the resolution of the contract or its modification in the only fact of the introduction of the euro.

¹⁶³ The law of July 14, 1991 does not take again the term of "professional", but well that of "salesman".

However, it does not give to this concept the contents that it gives it traditionally. The "salesman" is any person indeed here - physics or morals - which acts within the framework of its occupation. This definition, very broad, refers thus more to a operation in general that with the sale in a strict sense of the term. As J.L. FAGNART raised it so well, "the salesman is not only that which sells. It is also that which rents, which finances, which ensures, which transports or swift an unspecified service", and to conclude "why describe as 'salesman' that which does not sell anything?" (*R.D.C.*, 1991, p.263, n°7). The choice of the term is very criticizable.

¹⁶⁴ General terms are "opposable" only if they:

- were brought to the knowledge of the party against whom one intends to oppose them;
- were accepted by him/her (explicit or tacit consent - Cass., December 11th 1970, *Pas.*, 1971, I, 347).

Belgian jurisprudence asserts the interests of the "*weaker party*" to the contract. Via the general principles of the law of obligations (respect of public order and morality, infringement of rights, bona fide, interpretation of agreements), the courts carry out a real internal control on the contract. However, judicial control is very much inclined to respect private autonomy and the principle of the "convention-loi" (art. 1134 of the Civil Code). Therefore, only "blatant" abuses will be punished.

With regards exclusion clauses, in particular, caselaw generally admits their validity under three conditions:

- the clause cannot take away all the substance from the contract¹⁶⁵, i.e. it cannot make the contract lose all its "utility" by excluding from a contract that which is considered "essential";
- the clause cannot exonerate one party from one's "fraud" (*dol*)^{166 167} ("*Fraus omnia corrumpit*"¹⁶⁸);
- the clause cannot lead to a breach of public order rules;

Sometimes, the *legislator* has pre-empted the work of the courts. For instance, in 1998, the dispositions of the Civil Code regarding penalty clauses¹⁶⁹ were modified¹⁷⁰. The Belgian judge can now *reduce*, even *ex officio*, an amount that he considers as "*blatantly excessive*" in comparison with the damage that was "foreseeable" for the parties at the conclusion of the agreement¹⁷¹ (Article 1231 of the Civil Code¹⁷²).

The provisions on tenancy (Articles 1714 et seq. of the Civil Code) also contain interesting dispositions:

- they simply and solely forbid the clause *resolutoire* (article 1762*bis* of the Civil Code);

¹⁶⁵ B. DUBUISSON, "Les clauses limitatives et exonératoires de responsabilité ou de garantie en droit belge", in *Les clauses applicables en cas d'inexécution des obligations contractuelles*, FUNDP – AJN, 2001, pp. 63 and f., n° 45 and f..

¹⁶⁶ S.STUJNS, P. WERY et D. VAN GERVEN, "Chronique de jurisprudence - Les obligations, Les sources", *J.T.*, 1996, pp. 733, n°127; B. DUBUISSON, "Les clauses limitatives et exonératoires de responsabilité ou de garantie en droit belge", in *Les clauses applicables en cas d'inexécution des obligations contractuelles*, FUNDP – AJN, 2001, pp. 57 and f.

¹⁶⁷ In accordance with B. DUBUISSON, the fraud is definite as "(...) a voluntary and calculated failure of the debtor to his contractual obligations" (B. DUBUISSON, "Les clauses limitatives et exonératoires de responsabilité ou de garantie en droit belge", in *Les clauses applicables en cas d'inexécution des obligations contractuelles*, FUNDP – AJN, 2001, p.57, n°39).

The "faute lourde" ("gross misconduct") is different from the "dol" (fraud) (Cass., 25 septembre 1959, *R.C.J.B.*, 1960, p. 5 and note). See Cass., April 25 1958, *Pas.*, 1958, I, 944 (adage '*culpa lata dolo aequiparatur*'); Cass., March 7 1988, *Pas.*, 1988, I, 812).

¹⁶⁸ B. DUBUISSON, "Les clauses limitatives et exonératoires de responsabilité ou de garantie en droit belge", in *Les clauses applicables en cas d'inexécution des obligations contractuelles*, FUNDP – AJN, 2001, p.57, n°39.

¹⁶⁹ In Belgian law, the penalty clause is definite a "a convention, accessory with a principal contract, which fixes in a contractual way the damages to which the debtor in case non-performance or of delay in performance will be held".

¹⁷⁰ See DELFORGE C., "Entre prudence et audace ... Réflexions sur la récente modification législative des dispositions du Code civil relatives aux clauses pénales et aux intérêts moratoires", *R.N.B.*, novembre 1999, pp. 594-624; WERY P., "La loi du 23 novembre 1998 modifiant le code civil en ce qui concerne la clause pénale et les intérêts moratoires : fin de la crise de la clause pénale ou début de nouvelles incertitudes ?", *R.G.D.C.*, 1999/4, pp. 222-238; WERY P., "Les pouvoirs du juge dans la nouvelle loi relative aux clauses pénales", *J.T.*, 2000, pp. 615 and f.; WERY P., "L'article 32.15 de la loi du 14 juillet 1991 sur les pratiques du commerce et sur la protection et l'information du consommateur : l'exigence de réciprocité des clauses pénales", note sous Civ. Charleroi, 15 septembre 2000, *J.L.M.B.*, 2001, n°29, p. 1246; E.MONTERO, "Les conventions relatives à la réparation du dommage", in *Responsabilités, Traité théorique et pratique*, Titre VI, Dossier 62, Story Scientia, 1999.

¹⁷¹ See the same principle adopted by case law before the Statute of 1998 : Cass. 17 avril 1970, *J.T.*, 1970, p.545; Cass., 28 November 1991, *Pas.*, 1992, I, 240; J. VAN RYN, "Nature et fonction de la clause pénale selon le Code civil", *J.T.*, 1980, p.556; I. MOREAU-MARGREVE, "Une institution en crise : la clause pénale", note sous Cass., 17 avril 1970, *R.C.J.B.*, 1972, 454; I. MOREAU-MARGREVE, "Pour un pouvoir de révision des clauses pénales", *J.T.*, 1976, p.642; D. VAN GERVEN, "Matiging van verhogingsbedingen", *R.W.*, 1976-1977, col.1379 (cancellation).

¹⁷² Art. 1231 of the Civil Code : "the judge can, of his own initiative or at the request of the debtor, to reduce the penalty clause which consists in the payment of a given sum when this sum obviously exceeds the amount which parties could fix to repair the damage resulting from the non-performance of the contract (...) in the event of revision, the judge cannot condemn the debtor to pay a sum lower than that which would have been due in case of absence of a penalty clause". See as well article 1153 of the Civil Code.

- they forbid certain clauses which depart from the protective rules of the law (clauses called "de rigueur"):
 - clauses that forbid the transfer of the lease by the tenant or the subtenant (Article 1717),
 - clauses that contain a rent indexation formula that enables the landlord to obtain more than that which was provided for in article 1728bis¹⁷³,
 - clauses by which the lessor can claim "all-in" expenses and burdens exceeding the real costs (article 1728ter¹⁷⁴),
 - clauses excluding or limiting the possibility for the tenant to obtain restitution for sums paid beyond what would be owed (Article 1728quater),
 - clauses containing rules departing from article 1730 of the Civil Code regarding an inventory of fixtures detailed when entering premises,
 - clauses departing from article 1744 of the Civil Code providing the granting of damages in favour of the tenant when the lease admits his/her eviction by a new buyer,

Question 19: Frequent Standard Terms

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 authorised by a judge.***
- b) The cost of small reparations, up to 100E per annum, has to be met by the tenant.***
- c) At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.***
- d) If the tenant becomes a member of a tenants' association, the landlord has the right to give notice.***

a) The right to off-set or withhold payment can be limited by contract. As such, the term would be lawful. To withhold rent is a self-help remedy that can be rejected by the judge. Theoretically, a failure to pay the rent and other charges constitutes a breach of contract. It can be upheld, however, in the case of a serious breach of contract by the landlord. In such cases the tenant is entitled to withhold the rent if he has given notice of the breach of contract.

b) Such a term would be lawful.

c) Such a term would be lawful.

¹⁷³ According to the article 1728bis of the Civil code, if the lease envisages an indexing of the rent, this one can intervene only according to the formula which it specifies : "basic" rent (initial rent, except the expenses and loads) multiplied by the new price's index and divided by the index in force the month which preceded the conclusion of the contract.

¹⁷⁴ In theory, the parties are free to envisage who will support the "expenses" (water, electricity, gas, maintenance, lighting and heating of the common parts, overhead of the building...) and the "loads" (taxes to be paid at the various local and federal entities). The law envisages two possibilities: the payment of a "fixed price" or the payment of the real expenses. Except contrary convention, the expenses and loads relating to the property are supported by the lessor and the tenant supports the expenses and loads related to the pleasure of the rented good. See Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, p. 153, n°115-116 ; Y. MERCHERS, *Les baux, Le bail de résidence principale*, Larcier, 1998, pp. 163 ad ff., n° 250 and ff. According with article 1728ter of the Civil code, the expenses and loads due by the tenant have to correspond in theory to the real expenses, unless the lease doesn't envisage a "fixed price". These expenses and loads must always be the subject of a distinct account. Any contrary clause is void (§ 2).

d) If parties can, in principle, limit their contractual rights, it seems more difficult to admit that they might, by doing so, renounce a right that is considered as “ fundamental ” by the Belgian Constitution, i.e. the right to associate oneself with someone (article 27)¹⁷⁵. Therefore we think that a judge could annul this clause.

Note: The directive 98/27 of May 19th 1998 was transposed into the Belgian law under the law of May 26th 2002¹⁷⁶ on the intra-community "*actions en cessation*" regarding the protection of the consumers' interests.

The "*entities qualified*" within the meaning of the article 1 of this Law are those which are "*made up in accordance with the right of a Member State of the European Union, having a legitimate interest to bring proceedings in suspension of an infringement in order to protect the collective interests from the consumers, under the terms of the criteria fixed by the law of this Member State*".

According to the Law, in the event of infringement¹⁷⁷ which has its origin in Belgium and which produces effects in another Member State of the European Union, *any* qualified entity of this other Member State can bring proceedings in suspension in front of the President of the commercial Court of Brussels in order to put an end to or to prohibit the infringement (article 4). Two conditions must however be met:

- the interests protected by this qualified entity must be injured by the infringement;
- the entity must be registered on the list of the qualified entities drawn up by the European Commission and published in the Official Journal of the European Communities.

The qualified entities of Belgium are associations having as their aim the defence of the collective interests of consumers, who enjoy civil personality and who are represented in the Consumers Council or are approved by the Minister (article 5).

The president of the commercial Court of Brussels, ruling according to a procedure "*as in summary procedure*" ("emergency" procedure) (article 9) can also order the publication of its judgement - or summary - via the press, post or any other manner, and this at the expense of the party at fault.

¹⁷⁵ Article 23 of the Constitution : "*the Belgians have the right to join; this right can not be subjected to preventive measure*".

¹⁷⁶ *Mon.b.*, 10.07.2002.

¹⁷⁷ The law specifies the provisions whose are protected. Among those, one finds:

- the law of July 14, 1991 on the practices of the trade and the information and the consumer protection, and its decrees of execution,
- the law of June 12, 1991 relating to the consumer credit and its decrees of execution,
- the law of 16 February 1994 governing the contract of organization of travels and the contract of intermediary of travel, and its decrees of execution,
- the law of April 11, 1999 relating to time share contracts and its decrees of execution,
- the law of March 11, 2003 on certain legal aspects of the services of the society of information, like its decrees of execution.

The laws governing the lease are not registered in this list. The consumers's Associations should not thus be able to act as justice in order to make respect the law. It would be different, however, if the lessor is a professional and that the clause can be declared "abusive" within the meaning of the law of 14 July 1991 having transposed directive 93/13 (Black List).

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.

1. General rules

The provisions on tenancy impose upon the tenant two particular obligations in this matter: to respect the property and to use of it as a "*bon père de famille*" (*bonus pater familias*)¹⁷⁸¹⁷⁹ (article 1728 of the Civil code). The landlord must similarly allow for a "*peaceful enjoyment*" of the property (article 1719, 3° of the civil code)¹⁸⁰.

Note : According to legal principles, the tenant must use the rented property in accordance with the purposes agreed between the parties or, failing this, according to the purposes "presumed in the circumstances". Any modification of the purpose(s) is prohibited, even if this causes no damage to the landlord¹⁸¹. This obligation also requires the tenant not to change the "shape" or structure of the rented property¹⁸².

2. Answer to the question

If, by virtue of the contract, any alteration of the premises requires the prior consent of the landlord, the tenant cannot do anything but submit to this term. If he were to disregard the landlord's refusal, his behaviour may allow for the rescission of the agreement.

Where there is a clause against making alterations to the property, it is best to suggest that this only applies to 'alterations which would affect the form or structure of the premises'.

It would be possible for the landlord to complain of a breach of contract (contractual liability).

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?

This variant would not change the answer.

The landlord may lawfully oppose the request of the tenant, the more so as he does not appear to be violating a fundamental right. [cannot be regarded as an "abuse of right" under article 1134 of the civil code].

¹⁷⁸ See Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, pp. 209 and ff, n°261 and ff.

¹⁷⁹ The tenant is a "guard" of the rented good : he must maintain it and to preserve it. He cannot modify his substance.

¹⁸⁰ See Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, pp. 179 and ff., n° 184 and ff.

¹⁸¹ Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, p.206, n°254. See too Civ. Liège, March 23th 1951, *Pas.*, 1951, III, p. 97.

¹⁸² Y. MERCHERS, *Les baux, Le bail en général*, Larcier, 1997, p^208, n°257/

In the event of conflict between the parties, the judge will decide. He will appreciate and balance the rights of each party.

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?

It appears that the tenant, insofar as he has the right to freely enjoy the rented premises, cannot be forbidden by the landlord to place such a poster on the balcony, unless it is forbidden by the internal rules of the building (and provided the tenant has accepted them when entering the premises), in which case the only resort is to report this behaviour to the communal authorities. They will appreciate if this constitutes a "*nuisance against public order*" - in which case they can forbid it - however whilst respecting freedom of speech.

Question 21. The Landlord's 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?

In principle, the landlord grants to the tenant the full and entire use of the rented places. He has therefore to give to the tenant all the keys in his possession and he cannot enter the rented property without the prior consent of the tenant – and, in principle, in his presence. If the landlord fails to respect this obligation and enters the rented property without the tenant's consent, he commits a *criminal offence* (forcible entry in a private home¹⁸³¹⁸⁴).

Note : The landlord is required to guarantee the "peaceful enjoyment" of the rented premises and may not, by his behaviour, cause harm to the tenant. But the landlord has the right to visit the rented places in order to control the state of the building. He can also enter the property in order to allow a prospective purchaser or tenant to view the premises. However, the landlord may not disturb the tenant's enjoyment (e.g. by too many visits)¹⁸⁵. If the landlord is at fault in the exercise of these duties, the tenant may seek a judicial decision in his favour to put an end to this behaviour (performance "*in natura*" of the obligation of guarantee). The judge may also set the number and duration of the visits, etc. If performance "*in natura*" is no longer possible, the tenant may obtain damages, or, in the event of "serious disorder", the contract may be set aside¹⁸⁶.

¹⁸³ Article 439 of the criminal code provides for a term of "*imprisonment of fifteen days to two years and a fine of twenty-six BEF to three hundred BEF, for those who, without order of authority and outside of the cases where the law allows a person to enter into the residence of another against their will, will have entered a house/an apartment in violation of that persons rights ...*". The penalty is harsher if the offence occurs during the night. According to article 441, the offence is punishable with imprisonment of a month to a year and of a fine of fifty BEF to three hundred BEF.

According to the Court of cassation, a person is guilty of a "*residence violation*" by using "*false keys*" when he/she enters into the apartment or the house against the will of its occupants by using - in an illicit way - the key in his/her possession : Cass., October 15 1986, *Pas.*, 1987, I, 173.

The term "*house*", in the sense of article 439, refers to the premises in which the person lives. See Cass., October 21 1992, *Pas.*, 1992, I, 1180.

According to the Court of Appeal of Brussels, it is necessary for another party to be residing in the premises when the intrusion occurs: Brussel, February 6 1992, *J.L.M.B.*, 1993, p.3.

¹⁸⁴ See article 15 of the Belgian constitution (1994) : "*The residence is inviolable; house visits can take place only in the cases foreseen by the law and in the form that it prescribes*".

¹⁸⁵ J.P. Saint-Gilles, december 8th, 1980, *J.J.P.*, 1982, p. 162 and Y. MERCHERS, *Les baux, Le bail en général*, Larcier 1997, p. 180, n°185.

¹⁸⁶ Y. MERCHERS, *Les baux, Le bail en général*, Larcier 1997, p. 184, n°196.

Question 22: The Landlord's Liability for Personal Injury

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 under which legal basis?

It is firstly important to note that, in contrast to the situation in France, Belgian case law does not establish the notion of "*contrat de sécurité*" as such. Belgian jurisprudence and legal theory distinguishes only between obligations of "*means*", obligations of "*result*" and obligations of "*guarantee*" (again depending on intensity).

The landlord is not therefore subjected to a "security obligation" in favour of his tenants. This principle does not mean that such a concept exercises no influence on the assessment of the *fault* when the damage was foreseeable.

It is necessary to establish *fault* and a *causal link* with the damage. Should the landlord substitute another person to perform his obligations (cleaning services for example). Fault can also be attributed to these persons. The first requirement for the tenant is thus to prove that the landlord had a contractual duty to maintain the common space in a suitable condition.

It should be stressed that the landlord can always be held responsible on *two* levels – besides eventual criminal responsibility - :

- on the *contractual* level when he violates an obligation resulting from the contract (articles 1147 and f. of the civil code);
- on the *extra-contractual* level when he violates the "*general duty of prudence and diligence*" (*bonus pater familias*) (articles 1382 and 1383 of the civil code)

If contractual fault can be proved, the next question is whether there has been a "*combination of responsibilities*" ("*cumul des responsabilités*")¹⁸⁷. It is a question of knowing if a contracting party can be held jointly responsible on the extra-contractual level¹⁸⁸. According to the Court of Cassation, the victim of contractual fault can act on the basis of articles 1382 and f. of the civil code only if she/he proves two conditions:

- that the fault is not "purely" contractual and is an infringement of the general obligation to act with prudence and diligence;
- his/her damage is not "purely" contractual and is different from the consequence of the non-performance of the contract¹⁸⁹;

Nevertheless, we must qualify this statement. The Court of Cassation considers that these two conditions are always met in the case of a criminal offence¹⁹⁰. Equally according to the case law, this is satisfied when the damage entails harm to the person (as is the case here)¹⁹¹. Therefore, in principle the victim will have a choice between the two actions.

¹⁸⁷ The term "combination" is in reality inadequate because the victim will never be able to *combine* the two actions. The idea is in fact only to permit that he/she has the *choice* between these two levels of responsibility.

¹⁸⁸ The victim will sometimes have an interest in making this choice, notably in the case where the contract foresees a limitation clause – this is nevertheless rare in a lease contract – or the victim wishes to invoke articles 1384 to 1386 of the civil code.

¹⁸⁹ "Purely contractual" damage will not be repaired on the basis of the extra-contractual responsibility. Damage is "purely" contractual when it corresponds to the loss of profit derived from the contract.

¹⁹⁰ Cass., October 25 1990, *R.C.J.B.*, 1992, p. 493.

¹⁹¹ Bruxelles, 1st June 1988, *R.W.*, 1989-1990, p. 1401.

SET 5 : BREACH OF CONTRACT

Under the term "breach of contract", one can understand two main situations: breach of contract due to a failure in the performance of contractual obligations (including delay and bad performance) and breach as a result of a loss of the premises or the impossibility of performance.

A breach of contract further results where the tenant uses the premises for a purpose not agreed in the contract¹⁹². A tenant may similarly be evicted if he fails to furnish the property with sufficient furniture (unless he gives sureties to guarantee the payment of the rent)¹⁹³. The judge's role is to determine a sanction proportionate to the gravity of the breach, taking into consideration all the surrounding circumstances as well as all legal rules and contractual agreements¹⁹⁴.

A contractual clause that stipulates expressly cases of automatic breach is prohibited under Belgian tenancy law¹⁹⁵. As such litigation may result where one party unilaterally terminates a contract without prior judicial approval¹⁹⁶. Breach of contract is not the only sanction a judge may decide: in fact it is considered somewhat severe. Consequently the judge tries generally to solve contractual difficulties without terminating the contract: he may grant the party in breach a delay in order to fulfil his obligations at a later date, or award damages, etc¹⁹⁷.

Question 23: Destruction of the House

- a) 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.***
- b) Does it make a difference if the apartment is destroyed after transfer of possession to the tenant?***
- c) Does it make a difference if the apartment has already been destroyed at the time of the conclusion of the contract without the parties' knowledge?***

a) If the rented property is no longer available or is destroyed, the contract is terminated. An essential element of the contract is missing and so there is no longer a contract; the landlord has no obligation to rebuild the property or to ensure the continuation of the tenancy¹⁹⁸. The Civil Code stipulates that when the house is totally destroyed during the duration of the contract, without fault on the part of either party, the contract is void. When the premises are only partially destroyed, the tenant may ask for a rent decrease. However neither party will owe damages¹⁹⁹.

¹⁹² Article 1729 of the Civil Code.

¹⁹³ Article 1752 of the Civil Code.

¹⁹⁴ B. LOUVEAUX, "Expiration du bail avant terme", in J. VANKERKHOVE (sous la dir. de), *Le louage de choses, vol. I, Les baux en général, Les Nouvelles*, Bruxelles, Larcier, 2000, p. 232.

¹⁹⁵ Article 1762bis of the Civil Code.

¹⁹⁶ B. LOUVEAUX, *o.c.*, p. 235.

¹⁹⁷ *Ibidem*, p. 236.

¹⁹⁸ Cass., 4.2.60, *Pas.*, I, 1960, p. 631.

¹⁹⁹ Article 1722 of the Civil Code.

b) There is no difference regardless of whether the destruction occurs before or after the transfer of possession. If the loss is due to one party's fault, the situation may be different. In the case of total destruction, the tenancy contract disappears automatically and the responsible party will have to compensate²⁰⁰.

c) In the case that the rented thing has disappeared before the contract is concluded, the contract has no object and cannot exist. There exists a degree of controversy on this point as to whether the nullity affecting such a contract is absolute or relative.

Note about the anticipatory termination of contracts.

In principle, unforeseen circumstances - as well exceptional unforeseen circumstances - does not suffice alone in Belgium to justify the termination of a contract. In particular, the Court of Cassation rejects the theory of "*imprevision*"²⁰¹.

Nevertheless, Tenancy Law foresees some special rules on this point.

According to article 3 of the Tenancy Law, a lease of nine years – or concluded for a period in excess of nine years - concludes at the expiration of a period of nine years – or more - if a request to leave is given at least six months before the term.

When the lease is concluded for a period less than or equal to three years, the law foresees no earlier rupture. In all such cases, no immediate rupture is possible without sufficient notice (which is always foreseen by the law as necessary, and the parties must respect it. If not, the termination risks being held invalid and will produce no legal effects).

Nevertheless, none of the parties may commit un *abus de droit* in imposing the continuation of the contract in unforeseen circumstances - that the judge will appreciate - which make performance particularly onerous for one or other party. It is therefore possible in "exceptional" cases for the judge to authorise the immediate termination of the contract.

It is necessary to distinguish these situations from a "*force majeure*" case, as the one foreseen in article 1722 of the Civil Code (destruction of the rented property) or 1724 (when it is not possible to reside in the rented property).

These cases distinguish themselves from situations where breach is caused through the *fault* of the other party.

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

²⁰⁰ Article 1741 of the Civil Code.

²⁰¹ Cass., 30 novembre 1989, *Pas.*, 1990, I, 392; Cass., 7 avril 1994, *Pas.*, I, 150. In these cases the Court of Cassation refused to modify or terminate the contract on the grounds of "*equity*" or "*good faith*". See for more detail S. STIENS, P. WERY and D. VAN GERVEN, *o.c.*, 1996, p. 728 and f.

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?

This scenario involves a controversy as to which tenant has a superior right to the property - the tenant whose contract has a prior claim or the tenant who first took possession of the premises? Legal doctrine and the courts generally afford preference to the tenant who took first possession of the premise²⁰².

One of the obligations of the landlord is to guarantee the tenant enjoys the property unmolested. This is a scenario where this guarantee has not been respected, so the contractual liability of the landlord is involved²⁰³.

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?

If L fails to deliver the keys to the premises in time, T must decide whether or not to make a claim for breach of contract and damages²⁰⁴. Such delays are usually caused by confusion regarding the moment of delivery or are due to a previous tenant's failure to return the keys/property. In the case of a trial, the judge may decide that in bringing the case T has been overly excessive. L may have a claim against N if it appears that N was at fault in bringing the claim (on the basis of article 1382 of the Civil code) or abused L's right to protest against such a permit. Nevertheless, such cases are rare.

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

L rents an apartment to T. T wants to diminish the rent because

a) 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 T 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?

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?

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

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

²⁰² B. LOUVEAUX, *Le droit du bail - Régime général*, Bruxelles, De Boeck, 1993, p. 68.

²⁰³ Y. MERCHERS, *Le bail en général*, Rép. Not., p. 183.

²⁰⁴ B. LOUVEAUX, *Le droit du bail - Régime général*, Bruxelles, De Boeck, 1993, p.94.

To the extent the landlord is held liable under a)- c): Could his liability have been lawfully excluded by a disclaimer clause contained in the contract?

a) stains of mildew have been found in some corners.

- The state of the thing

There are two different legal obligations concerning the state and characteristics of the house. First of all, there is the issue of minimum standards of safety, health and the suitability of the property as accommodation²⁰⁵. There similarly exists an obligation²⁰⁶ on the landlord to protect the tenant from defects²⁰⁶. This obligation is not written in the Statute on tenancy housing but in the Civil code:

- The conditions of the tenancy statute are much less severe than the Civil code which imposes a need to make property available that is not in need of repair and that can be used normally.
- The provision in the Civil code does not apply where a clause of the tenancy contract excludes its application or when the tenant "accepts" the defects by contracting for the property in its current state²⁰⁷. On the other hand article 2 of the tenancy statute is imperative so the tenant may ask for its application even when a contractual clause restricts this obligation. The tenant may invoke the invalidity of such a clause (excepting in the case of the 'restoration contract'²⁰⁸)

a) Minimum standards of safety, healthiness and liveability

The tenancy statute merely stipulates that such standards are to be respected. A Royal Decree fixes the scope of this legal requirement²⁰⁹. Moreover the Regions are competent to take measures concerning housing and public health²¹⁰. Consequently, they have fixed minimum health standards, which are different for each Region. The federal provisions outline five different kinds of standard that are to be respected, and which concern the "qualification, composition and dimension" of the housing²¹¹, the absence of defects dangerous to health or safety²¹², natural lighting and the possibility of external airing²¹³, minimal facilities²¹⁴ and accessibility²¹⁵.

These obligations must be satisfied when the property is delivered. No clause to the contrary may be admitted but the tenant may give up the possibility to invoke a lack of health or safety standards once he is in possession of the rented housing²¹⁶. A degree of controversy exists as to whether renunciation may be tacit or not. Renunciation must be certain so the

²⁰⁵ Article 2 of the 1991 Statute on Tenancy.

²⁰⁶ Article 1721 of the Civil Code.

²⁰⁷ Y. MERCHERS, *o.c.*, p. 72.

²⁰⁸ Cf *supra* and *infra*.

²⁰⁹ Royal Decree of July 8 1997.

²¹⁰ Cf. *supra*. See Special Statute of August 8 1980, article 1, § 3 and 6, § 1, IV.

²¹¹ Royal Decree of July 8 1997, articles 1 and 2.

²¹² Royal Decree of July 8 1997, articles 3 and 4.

²¹³ Royal Decree of July 8 1997, article 5.

²¹⁴ Royal Decree of July 8 1997, article 6.

²¹⁵ Royal Decree of July 8 1997, article 7.

²¹⁶ M. VANWIJCK-ALEXANDRE, in *Le bail de résidence principale - 5 ans d'application de la loi du 20 février 1991*, pp. 170-172.

judge will have to appreciate the circumstances to decide if there is tacit renunciation or not. The elements to be considered are those such as, the time which has elapsed since the delivery of the property, the relationships between the parties and so on²¹⁷.

The sanctions imposed for a failure to respect this obligation may be: a forced execution of the work or a termination of the contract. The tenant must choose between both of these possibilities. If the tenant chooses to allow for the carrying out of repair work²¹⁸, the landlord will be liable for all expenses. If required, the expenses may be deducted from the rent²¹⁹.

If the landlord cannot finance the work, he may conclude a restoration contract with the tenant. The tenant commits himself to perform the work. In compensation, the landlord temporarily renounces his right to terminate the contract, to ask for application of an index-clause, to review the rent or to demand the payment of rent²²⁰.

Should the tenant prefer to terminate the contract he will receive damages²²¹.

b) Protection from defects

One of the legal obligations imposed upon the landlord consists in providing property that is free from defects²²². The defect must render the housing unfit for its purpose²²³. The most frequent examples are the dampness of walls, excessive noise entering the housing²²⁴, permanent disgusting odours, for example; less serious but inconvenient problems may not give rise to a claim for damages. Although article 1721 is silent on this point, defects that the tenant could have noted prior to agreeing the contract will not give rise to a claim for breach. The judge appreciates the fact that the defect was apparent in the circumstances²²⁵.

In the case of mildew stains it would seem most likely that this will not constitute sufficient grounds to breach health and safety standards. Such a defect is similarly apparent and as such the judge will have to decide whether this is a case that would require the landlord to repair the defect. Importantly, the parties may decide that this type of defect can instead be repaired by the tenant. Moreover, such defects may in reality be caused by negligence on the part of the tenant, in which case T will be held liable.

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

The landlord owes the tenant a guarantee for legal difficulties (*trouble de droit*) caused by third parties²²⁶. Concerning the relationships between the parties, the public authority must be equated to a third party²²⁷. As such, the landlord will not be held responsible for the troubles caused by administrative authorities, unless the trouble is due to a legal or contractual

²¹⁷ Y. MERCHERS, *o.c.*, p. 79.

²¹⁸ This is an application of article 1144 of the civil code.

²¹⁹ P. DESMEDT, "De staat van de huurwoning en de renovatiehuurovereenkomst na de wet van 13 april 1997", in *Het gewijzigde woninghuurrecht*, Diegem, Kluwer rechtswetenschappen, 1997, p. 48.

²²⁰ Article 8, of the 1991 Statute on Tenancy.

²²¹ Y. MERCHERS, *o.c.*, p. 82.

²²² Article 1721 of the civil code.

²²³ P. COECKELBERGHS, "Obligations et droits du bailleur", in *Le louage de choses, o.c.*, p. 472.

²²⁴ *Ibidem*, p. 474.

²²⁵ *Ibidem*.

²²⁶ Articles 1725 - 1727 of the Civil Code.

²²⁷ Y. MERCHERS, *Le bail en général, o.c.*, p. 186.

right of the administration over the rented property that predates the contractual right of the tenant. The landlord will not be held responsible for any trouble caused by the administration, even if illegal. In this case the public authority will engage its extra-contractual responsibility towards the tenant²²⁸.

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

The neighbour is a third party towards the contract. The landlord consequently has to guarantee the 'legal troubles' caused by them, and not the 'factual troubles'. The loud nightly parties organised by the tenants of the neighbouring apartment constitute a 'factual trouble', and so the landlord cannot be held responsible. Even when the neighbouring tenants are tenants of the same landlord, he cannot be held responsible²²⁹.

Note: Are there any public law mechanisms to which the tenant may resort when trying to ensure an adequate quality of the rented premises?

The quality of the rented premises may be considered as a contractual obligation of the landlord. To ensure this obligation is fulfilled, the tenant may under certain conditions perform necessary works at the expense of the landlord ("faculté de remplacement") or suspend rent payments until certain repair work is performed ("exception d'inexécution"). These examples are included within the Civil code, from which the courts have derived a general principle. Certain conditions must however be satisfied. The landlord must have been at fault and must be notified of a lack of quality by the tenant.

Question 27: House to be used for Specific Purpose

L rents a big apartment to T under the assumption shared by both parties but not explicitly stipulated in the contract 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?

Note: Please mention whether there are special rules applying to such a mixed "private-professional" tenancy?

Two alternative solutions may be envisaged, even though it would appear that neither would allow the tenant to succeed in this case:

1) One may firstly argue that the contract was concluded under a "*suspensive condition*"²³⁰²³¹ – and the obligation is therefore dependent upon a "*future*" and/or

²²⁸ *Ibidem*, p. 187.

²²⁹ *Ibidem*, pp. 186-187.

²³⁰ The "*suspensive condition*" is defined as "*a future and dubious event which suspends the execution of the obligation and not its birth*" (S. STIJNS, P. WÉRY et D. VAN GERVEN, "Chronique de jurisprudence, Les obligations : les sources (1986-1995)", *J.T.*, 1999, p.823, n°6).

²³¹ Civ. Liège, June 13 1994, *R.G.E.N.*, 1996, p. 198 (sale under the condition of obtaining a mortgage loan) ; Liège, 17 décembre 1991, *J.T.*, 1992, 369 (sale under the condition of obtaining a credit). See also the references quoted by S. STIJNS, P. WÉRY et D. VAN GERVEN, "Chronique de jurisprudence, Les obligations : les sources (1986-1995)", *J.T.*, 1999, p.823, n°6).

"uncertain" condition²³² (articles 1168 and f. of the Civil Code) - i.e. the need for authorization in order to lease the property for commercial use.

It is firstly important to note that the protection foreseen by the Law of 20st February 1991 is applied solely where the tenant uses the property as his principal residence (see article 1 § 1). This solution is nevertheless difficult as the contract does not precisely express this to be the case. That will give rise to a problem of proof. The first thing to be verified is whether the tenant can prove this is the case (need to consider the previous allocation of the rented premises, the nature of the property, advertisement of the landlord,²³³ etc).

2) An alternative method is to verify whether the tenant can obtain the cancellation of the contract on the basis of his "error" on a substantial issue relating to the rented property (see article 1108 and f. of the civil code²³⁴). This solution would however be possible only if the landlord should have known that this assignment would never be permitted by the administrative authority²³⁵.

It is also important to recall that, to constitute a cause of cancellation, the error must be "common" and a matter for contract law²³⁶. The proof of this element would appear to be problematic in this case²³⁷.

Note : In theory, when the rented property, or a part thereof, is assigned for a professional use, the parties must mention this purpose in the contract as this situation will give rise to important taxation issues. When property is let for a professional purpose, the landlord is required to declare with his personal income tax the *real* amount of the rent which he receives (article 8 of the Code of Income Tax of 1992), whereas in the absence of such an assignment, he should declare only the (hypothetical) rent, laid down in the register, of the building which he rents, which implies less tax. For this reason, it is rare that when a property is leased for a professional use, the share corresponding to this use is not mentioned in the lease.

²³² To distinguish from the "resolutive condition" (condition résolutoire). Article 1183, subparagraph 1st of the Civil Code said that the "condition résolutoire" is that which, when it is achieved, operates the revocation of the obligation, and which gives the things to the same state as if the obligation had not existed. See Cass., 19 janvier 1995, *Pas.*, 1995, p.47.

See S. STIJNS, P. WÉRY et D. VAN GERVEN, "Chronique de jurisprudence, Les obligations : les sources (1986-1995), *J.T.*, 1999, pp. 821 and f., n° 2 and f.

²³³ See the principles concerning the possibility for the parties of choosing the destination of the places. Y. MERCHERS, *Le bail, Le bail en général*, Larcier, 1997, p. 206, n°254. This question is especially important in a situation distinct from the put question, namely when, in the course of lease, the tenant intends to modify the destination of the places, modification which is prohibited without the agreement of the lessor.

²³⁴ See in particular article 1110 of the Civil Code according to which the "vice of consent" is the cause of nullity only if it relates to the substance of the thing. The doctrines extend this notion to the error relating to a quality "substantial" (or "determinant") of the good. See S. STIJNS, P. WÉRY et D. VAN GERVEN, "Chronique de jurisprudence, Les obligations : les sources (1986-1995)", *J.T.*, 1996, pp. 709 et suivants, n° 52 and f. It is important to note that the error on the "reasons" doesn't constitute a cause of nullity.

²³⁵ Case law gives us examples close to the situation noted here, although distinct : for example, the sale of a ground to be built could be cancelled on the basis of error on the substance of the thing called upon by the purchaser because a licence to build, which had been granted by error by the administration, had been then withdrawn (Anvers, 22 février 1989, *T. not.*, 1990, 27).

²³⁶ It will be the case if this element were presented at the other party as being determinant for his/her consent.

²³⁷ We find an example rather similar in case law : the Court of Appeal of Brussels indeed refused to cancel a sale requested by the purchaser of a good which had realized, at the time to pass the notarial act, that there were particular conditions prohibiting certain trades. The Court considered that the purchaser did not bring to sufficiency the proof that the "substantial" character of the possibility of intending the good bought for a trade aimed by prohibition had been made available for the salesman : Bruxelles, March 29 1988, *R.N.B.*, 1988, 379.

SET 6: THE RELATIONSHIP BETWEEN THE TENANT AND THIRD PERSONS

Short General Introduction

As previously outlined, the tenant has only an obligatory right to the rented thing²³⁸. As such, he cannot oppose to the other parties a property right on the rented premise. But the tenancy contract confers to the tenant the use of the housing²³⁹. The precedent set of the questionnaire showed us that the landlord can only be held responsible for juridical troubles caused by third parties but it doesn't mean that no compensation may be owed for factual troubles. However, this compensation won't be asked on basis of the contract but on an extra-contractual basis : the common system of extra-contractual responsibility (article 1382 of the Civil code)²⁴⁰ and the theory of the neighbouring troubles (based on article 544 of the Civil code). The civil responsibility may apply when the three legal conditions are fulfilled: a fault, a damage and a causal link between the fault and the damage. If the tenant suffers a damage related to the use of the premise (bad smells, noise, ...) caused by a fault of a third person, this person will have to fully repair the damage he caused. An other possibility of the tenant is to ask for compensation on basis of the theory of the neighbouring troubles²⁴¹ : when loads that excess the normal loads of neighbouring are imposed so as to break the balance between the neighbours, this excess must be compensated by the neighbour it's due to. This regulation is specific and is not part neither of the tort law nor the unjust enrichment law. There is no idea of fault and the sanction is different from the one applied by application of the civil responsibility. The point is here to compensate and not to fully repair. The sanction of the neighbouring theory cannot consist in the forbidding of the comportment that caused the damage without being defective²⁴².

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?

The tenant may choose among the two possibilities. He may ask for compensation on the basis of the civil liability (article 1382 of the Civil Code) or on the basis of theories regarding neighbour relationships.²⁴³ If all the necessary conditions are satisfied, the neighbour will have to repair or compensate the other (maybe by soundproofing the walls when the damage consists in too much noise, for example). There is no difference regardless of whether T and N are tenants; are tenants of the same landlord or not, etc.

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, which causes repair costs of

²³⁸ See *Short General Introduction*.

²³⁹ N. VERHEYDEN-JEANMART and C. MOSTIN, *o.c.*, p. 93.

²⁴⁰ Article 1382 and following ones of the Civil Code.

²⁴¹ This theory is based on the article 544 of the Civil Code.

²⁴² For more details on this theory, see C. MOSTIN, *Les troubles de voisinage*, Diegem, Kluwer, 1998, 163 p.

²⁴³ B. LOUVEAUX, *o.c.*, p. 176.

10000 € and entails T being unable to use two rooms for 2 weeks. The lorry has been driven by E, an employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?

Notes:

- the principal problem is whether T may request damages despite the fact that he is not the owner of the house; possibly, he may request compensation for the fact that his full possession and use of the house was disturbed by the accident; if this is the case what is the legal basis?;

It is necessary to prove that the damage caused is as a result of the lorry driver's negligence under article 1382 of the Civil code. As the damage prevents the tenant from enjoying full access to the property he may bring a claim in damages to off-set this reduction. If this is accepted, the tenant may force the driver to indemnify the damage he has caused.

- another problem is whether the building company and/or the neighbour are liable under tort law for the fault of the lorry driver (employee of the building company)?

Damage caused by third parties who are not neighbours may be compensated (articles 1382-1383 et seq.). However, when damage is caused to a property by a person acting in the course of his business there is no possibility to invoke this rule. Instead, a claim for damages must be brought before the neighbour who has commissioned the construction work²⁴⁴). The only means to obtain compensation from the lorry driver is to base a claim on article 1382 et seq. The building company may also be held liable for the fault of its employee on the basis of article 1384 of the Belgian Civil code. So both the lorry driver and the building company may be held liable in this scenario.

The neighbour may be held liable on the basis of articles 1382 and 544, but in the case of 1382 there is a need to prove fault on the part of the neighbour.

Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

When T has left his rented apartment for holidays, neighbour N notices a strong gas-like smell coming out of T's door. Assuming that the gas pipe in T's apartment has a leak and that a danger of explosion may be imminent, N breaks open the apartment door, thereby destroying his chisel worth 10 € and causing a damage of 200 € at the apartment door. After entering the apartment, N discovers, however, that the gas-like smell stems from the garbage bin which T had forgotten to empty before leaving. Has N a claim against T or vice-versa?

The Belgian civil code views this case as a "management of another's affairs" (*gestion d'affaire*). The "management of another's affairs" arises where one party (*gérant*) involves himself in the affairs of another person (*géré*) without having been asked to do so. When one party voluntarily decides to manage the affairs of another, this person is required to act with all the care of a good *paterfamilias*²⁴⁵. Certain conditions must be observed as Article 1375 of the Civil code establishes in particular that the affairs of the *géré* must be well managed, usefully managed, and managed in the case of an emergency.

²⁴⁴ Brussels, April 19 1991, *Entr. et dr.*, 1991, p. 350.

²⁴⁵ Articles 1372 and f. of the civil code.

In the aforementioned scenario, it appears that these conditions are not met, to the extent that the intervention of the *gérant* was not useful. Nevertheless, the Belgian Civil code outlines the circumstances which motivated the *gérant* to involve himself in the affairs of the *géré* and which can lead the judge to moderate the damages which would result from the fault or negligence of the *gérant*²⁴⁶. The neighbour will be held responsible for any damage caused to the premises²⁴⁷, however, the damages may be reduced as a result of his good intentions.

²⁴⁶ Article 1375, al. 2 of the civil code.
²⁴⁷ Articles 1382 and f. of the civil code.

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